Proposed Affiliation Polytechnic University and New York University

Senator Kenneth P. LaValle, Chairman
New York State Senate Committee on Higher Education
May 2008

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May 2008

INTRODUCTION

New York University (hereinafter referred to as NYU) is a private, nonsectarian, coeducational research university in New York City. NYU was founded in 1831 and it is the largest private, nonprofit institution of higher education in the United States.

Polytechnic University (hereinafter referred to as Polytech) is the second oldest private technological university in the United States. Polytech was founded in 1855 and is located in the Borough of Brooklyn in New York City.

In the early 1970's, NYU was experiencing financial difficulties which necessitated the sale of their School of Engineering. In 1972, legislation was passed (Chapter 463 of the Laws of 1972) which provided for negotiations between NYU and Polytech, leading to the merger of NYU's School of Engineering and Science into Polytech.

As of November of 1972, negotiations between NYU and Polytech had not resulted in a concrete merger plan. In an effort to effectuate the mandate of Chapter 463 of the Law of 1972, then Commissioner of Education, Ewald B. Nyquist, intervened to reestablish negotiations between the two institutions. These negotiations resulted in an Agreement of Merger of Programs and Faculty which was signed on April 23, 1973.

In or about February of 2007, Polytech and NYU began discussions about the possible merger of these two institutions. On August 3, 2007, the Executive Committee of the Polytech Board of Trustees met to authorize the President of Polytech to begin negotiating a non-binding Memorandum of Understanding (hereinafter referred to as MOU) that would lead to an affiliation with NYU, as opposed to a merger.

On October 10, 2007, the MOU was approved by a supermajority of voting members of the Polytech Board of Trustees (hereinafter referred to as Board). This MOU served as a framework for developing a definitive affiliation agreement that originally was scheduled for a vote by the Board on or about February 8, 2008.

On February 4, 2008, members of the Polytech Alumni Association contacted this Committee regarding allegations of impropriety as related to the conduct of the Board as pertained to the negotiations of their proposed affiliation with NYU. These allegations centered on the following areas: 1.) that Chapter 463 of the Laws of 1972 served as a prohibition to NYU reentering the engineering field, 2.) that the Board had not upheld their duty of loyalty and care owed to Polytech, and 3.) that the Board's decisions were in contravention of the Business Judgment Rule.

As a result of these allegations, on February 6, 2008, this office requested that the Board postpone their vote to approve the proposed affiliation until a more comprehensive review was conducted. Before this office had a chance to complete the review, Polytech voted to approve the affiliation.

DOES CHAPTER 463 OF THE LAW OF 1972 SERVE AS A BARRIER TO NYU MERGING WITH POLYTECH

In 1972, the legislature found that the continued viability of New York State's system of higher education was threatened by the fiscal crisis facing NYU. As a result of this fiscal crisis, legislation was passed requiring NYU's school of engineering and science to merge with Polytech. Specifically, Chapter 463 of the Laws of 1972 states the following:

"In recognition of the importance of New York University's School of Engineering and Science as a part of New York State's system of higher education, New York University and Polytechnic Institute of Brooklyn shall immediately undertake negotiations and shall not later than July first nineteen hundred seventy-three, merge the appropriate educational and research programs and such faculty of New York University's School of Engineering and Science as may be necessary into the Polytechnic Institute of Brooklyn."

"Not later than October first, nineteen hundred seventy-two, New York University shall adopt and submit to the regents of the State of New York a financial plan which meets with the approval of the regents and the governor for the five-year period beginning with the nineteen seventy-two/seventy-three academic year showing how by retrenchment and stringent financial control and by increasing revenues from expanded enrollment and other means it will be able to balance its budget by the academic year nineteen hundred seventy-four/seventy-five, without special extraordinary state subsidies."

"Not later than October first, nineteen hundred seventy-two Polytechnic Institute of Brooklyn shall adopt and submit to the regents of the State of New York a financial plan which meets with the approval of the regents and the governor for the five-year period beginning with the nineteen hundred seventy-two/seventy-three academic year showing how by stringent financial control and by increasing revenues from expanded enrollment and other means it will be able to balance its budget by the academic year nineteen hundred seventy-five/seventy-six, without special extraordinary state subsidy."

"If any section, clause or provision of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective, it shall be valid or effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective."

While the Polytech Alumni Association claims that the above mentioned legislation serves as a bar to NYU ever reentering the field of engineering, as set forth above, there is nothing contained in Chapter 463 of the Laws of 1972, either expressed or implied, to support this conclusion.

In further support of their position, that NYU is barred from ever reentering the field of engineering, the Polytech Alumni Association points to numerous correspondence between the two institutions and the New York State Education Department between 1972 to 1981 which express an understanding that NYU would not reestablish an engineering department in New York City. However, as previously stated, there is nothing contained in any of these correspondence which points to any legal prohibition to NYU reentering the field of engineering.

Also noteworthy is the fact that the April 23, 1973 Agreement of Merger of Programs and Faculty, which is approximately forty (40) pages in length and contains ten (10) separate articles setting forth the terms of the merger, fails to set forth any expressed barrier to NYU reentering the field of engineering.

DID THE POLYTECH BOARD OF TRUSTEES BREACH THEIR FIDUCIARY DUTY OWED TO THE INSTITUTION PURSUANT TO SECTION 717 OF THE NOT-FOR-PROFIT LAW

A. Applicable Law

The law provides that officers and directors of a corporation stand in a fiduciary relationship to the corporation which they serve and they also owe their undivided and unqualified loyalty to the corporation. *See,*

generally, Howard v. Carr, 222 A.D.2d 843, 845 (Third Dept., 1995). Section 717 of the Not-For-Profit Law sets forth the standard of care to which individuals operating a not-for-profit corporation must subscribe. Section 717 states that directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In other words, the duty of care concerns the director's competence in performing their directorial functions. *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms, 23 J. Corp. L. 631.*

In addition to the duty of care owed by directors, officers and board members to a not-for-profit corporation, as fiduciaries, these individuals also bear a duty of loyalty which prohibits them from improperly profiting at the expense of their corporation. *See, Scheuer Family Foundation v. 61 Associates et al.,* 179 A.D.2d 65, 70 (First Dept., 1992). The duty of loyalty requires the director's faithful pursuit of the interests of the organization he serves rather than the financial or other interests of the director or of another person or organization. *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms, 23 J. Corp. L. 631.*

B. <u>Duty of Loyalty</u>

The Polytech Alumni Association has alleged numerous facts which suggest that the Board did not uphold their fiduciary duty to the corporation by violating the duty of loyalty that they owed to the institution. Specifically, the Alumni Association alleges that the Board had, *inter alia*, numerous conflicts of interest during the negotiation of Polytech's affiliation with NYU and that the affiliation negotiations were motivated more by the Board's self interest than what was in the institution's best interest. The Alumni Association's allegations are as follows:

1. That one of the Polytech Trustees, Michael O'Brien, Esq., has a conflict of interest because he is a partner with WilmerHale, the law firm representing Polytech in the negotiation of its affiliation with NYU;

2. That Polytech's use of Grant Thorton, LLP, an accounting firm utilized by the Board to evaluate the financial condition of NYU as part of the affiliation negotiations, was inappropriate because Grant Thorton, LLP had allegedly provided tax services to NYU;

3. That Polytech President, Jerry Hutlin, was participating in NYU's development of the Abu Dhabi campus in the middle east while simultaneously participating in negotiations on behalf of Polytech to become affiliated with NYU;

4. That Polytech President, Jerry Hutlin, was promised a position with NYU during the course of the affiliation discussions with Polytech and NYU;

5. That Polytech president, Jerry Hutlin, served as a consultant to NYU's Academic Cabinet during the course of the affiliation discussions between Polytech and NYU;

6. That Craig Matthews, Chairman of the Board of Trustees of Polytech, was promised membership to the NYU Board of Trustees if the affiliation were to proceed;

7. That while Polytech president, Jerry Hutlin, claimed that discussions between Polytech and NYU began in February, 2007, in reality, these discussions began approximately six (6) months prior without informing the rest of the board about these discussions;

8. That the Polytech Board of Trustees did not seek a vote from the faculty approving the affiliation because they suspected that the faculty would vote against the transaction;

9. That Polytech Trustees who did not support the affiliation were excluded from various committees that were set up to discuss issues pertaining to the affiliation;

10. That Polytech was somehow connected to the disappearance of a number of documents pertaining to the 1973 sale by NYU of their Washington Heights campus.

The Polytech Board of Trustees' response to these concerns is as follows:

1. In response to the alleged conflict of interest as pertains to Polytech Trustee, Michael O'Brien, Esq., Polytech states that they obtained a legal opinion from the law firm of Cullen & Dykman, LLP and that the legal opinion concluded that Mr. O'Brien did not have a conflict of interest. Polytech further claims that Mr. O'Brien did not vote on the selection of his law firm to handle the merger and that they followed the procedures in their bylaws and under the New York State Not-For-Profit law in addressing the potential conflict of interest. Polytech did not specify what procedures they followed in their bylaws to address the conflict of interest or in what ways they followed them. Nevertheless, the obtaining of the legal opinion was appropriate and in keeping with the Board's duty to exercise good faith and diligence regarding this potential conflict of interest. Furthermore, the fact that Mr. O'Brien did not participate in the vote regarding the selection of his law firm to handle the affiliation was consistent with the duty of loyalty that the Board owed to the institution.

2. In response to the alleged conflict of interest regarding Polytech's use of Grant Thorton, LLP, the accounting firm that Polytech retained to evaluate the financial condition of NYU and who had also previously done work for NYU, Polytech responded to this allegation as follows:

> "Four firms were solicited by Polytechnic and two submitted proposals and were interviewed by a committee that included one board member and two senior administrators. Grant Thorton was retained to prepare the Due Diligence Report for Polytechnic. One of the 7-person Grant Thorton teams periodically provides tax service to NYU; it was considered not to be a conflict of interest."

In their response, Polytech neglects to set forth the names of the other firms interviewed or offer an explanation as to why these other firms were not selected. Upon information and belief, Polytech has retained the accounting firm of KPMG in the past to perform their auditing work. However, they offer no explanation as to why KPMG was not retained to prepare a Due Diligence Report despite the obvious lack of any conflicts of interest pertaining to that accounting firm. Polytech also fails to offer any detailed explanation as to how they arrived at the conclusion that their retention of Grant Thorton, LLP would not constitute a conflict of interest despite their admission that Grant Thorton, LLP had previously done work for NYU.

Notwithstanding Polytech's failure to articulate a rationale for selecting Grant Thorton, LLP to prepare the Due Diligence Report, it is conceivable that they selected this firm because of their familiarity with the financial condition of NYU. While it would have been more sensible for Polytech to avoid the appearance of impropriety by selecting another firm with no connection to NYU, there is insufficient evidence to conclude that the selection of Grant Thorton, LLP constituted a breach of the Board's fiduciary duty.

3. In response to the allegation that Polytech President, Jerry Hultin, was participating in NYU's development of an engineering program for their proposed Abu Dhabi campus in the middle east while simultaneously participating in negotiations on behalf of Polytech to become affiliated with NYU, Polytech claims that it was not only President Hultin that was involved, but other members of the Polytech community including the Provost of Polytechnic, senior administrators and faculty members of Polytechnic. Polytech further claims that NYU invited President Hultin and other Polytech administrators and faculty to participate in planning sessions regarding

Polytech's role in providing the technology and engineering portion of the NYU-Abu Dhabi program. They also state that this involvement began in the Fall of 2007, many months after affiliation discussions had commenced between these two institutions. While Polytech claims that they repeatedly disclosed the opportunity related to Abu Dhabi to the Polytech community and continue to do so, they fail to state whether or not a vote was ever taken on this issue by the Board or whether any other steps were taken to ascertain whether this involvement, which at a minimum also constitutes the appearance of impropriety, was appropriate given their ongoing negotiations with NYU at the time. Also of concern is the fact that while members of the Polytech administration were devoting considerable amounts of time and resources to the development of an engineering program in Abu Dhabi for NYU's benefit, a vote had not yet been held as to whether Polytech and NYU would indeed become affiliated. There is also no remuneration in the Definitive Agreement, the document which outlines the affiliation of these two institutions, for Polytech's role in developing the Abu Dhabi campus.

In evaluating the appropriateness of President Hultin's involvement with the Abu Dhabi project, there is no evidence to suggest that this involvement was anything more than an attempt by Polytech to evaluate their potential role in the Abu Dhabi campus as Polytech claims. The NYU Abu Dhabi campus will be a full scale liberal arts college with select graduate programs driven by advanced research. Clearly, Polytech would want to review this proposed program to see how they could be involved in the event that they became affiliated with NYU. Without concrete evidence to the contrary, there is no basis to assume that Polytech's involvement with the Abu Dhabi project is anything more than what they claim.

4. In response to the allegation that Polytech President, Jerry Hutlin, was promised a position with NYU during the course of the affiliation discussions with Polytech and NYU, the Polytech denies this allegation without elaboration.

However, Polytech's response to this allegation is inconsistent with the recollection of Advisory Trustee Thomas A. Mauro, who claims that NYU President, John Sexton, stated at a Board meeting on October 9, 2007, that he would "be pleased to have Jerry Hultin run NYU's new engineering school." Additionally, Mr. Mauro also recalls President Hultin and Polytech Provost Erich Hunhardt stating at multiple public meetings that President Hultin would be appointed to head the "new Poly." Mr. Mauro also claims that during a December 6, 2007 telephone conference of the Board, President Hultin made the following statement, "John Sexton told Craig [Mathews] that he is favorable to renew my contract but the contract is between the Polytechnic Board and me."

It is worth noting that on page forty three (43) of the Definitive Agreement, it states, "The incumbent President of Polytechnic, Mr. Jerry Hultin, shall continue to serve as President until the expiration of his term of office, his resignation or other termination of his service in such capacity in accordance with the term of his employment."

Once again, even assuming that the Polytech Alumni Association's allegations are true, there is no evidence of a concrete promise or guarantee on the part of NYU to give President Hultin a position at NYU. Obviously, President Hultin would be on the list of potential candidates given his current role with the institution, but this fact alone does not justify a conclusion that there was misconduct by Polytech.

5. In response to the allegation that Polytech President, Jerry Hultin, served as a consultant to NYU's Academic Cabinet during the course of the affiliation discussions between Polytech and NYU, Polytech denies the fact that President Hultin ever served as a consultant. They do acknowledge the fact that President Hultin, along with other administrators, faculty members and staff of Polytech, have been invited to attend some of NYU's administrative and staff meetings as a means of preparing for the prospective merger. No details were offered by Polytech regarding the number or nature of these meetings.

Once again, there is no evidence to suggest that Polytech's involvement with the NYU Academic Cabinet was anything more than what they claim; an attempt by Polytech to familiarize themselves with the inner workings of NYU prior to the affiliation.

6. In response to the allegation that Mr. Craig Matthews, Chairman of the Board of Trustees of Polytech, was promised membership to the NYU Board of Trustees if the affiliation were to proceed, Polytech simply denies this allegation without any elaboration. However, it is important to point out that the terms of the Definitive Agreement provide for two (2) Polytech Board members to be named to the NYU Board of Trustees, one of whom must be a Polytech Alumnus. Once again, there is no evidence to suggest that Mr. Craig Matthews was promised membership to the NYU Board of Trustees.

7. In response to the allegation that discussions between NYU and Polytech began earlier than Polytech claims, Polytech responds by saying that discussions about a potential merger began approximately three (3) years ago. However, they claim that the most recent affiliation discussions began in February of 2007 and details about these discussions were immediately relayed to the Chairman of the Board of Trustees of Polytech, Craig Matthews. It is not know what steps Chairman Matthews took, if any, to relay this information to the rest of the board or how quickly this was done. However, Polytech did provide dates for numerous meetings that they held in 2007 and 2008. These meetings include the following:

- **Board Meetings** on October 10, 2007, January 15, 2008 and February 7, 2008;

- **Board Teleconferences** on August 23, 2007, September 11, 2007, September 25, 2007, October 4, 2007, November 19, 2007, December 6, 2007, December 21, 2007 and February 1, 2008;

- **Meetings of the Executive Committee** on August 3, 2007, August 21, 2007, September 12, 2007 (teleconference), September 18, 2007 (teleconference), September 28, 2007 and November 15, 2007;

- **Merger Committee Meetings** on October 9, 2007, November 8, 2007, November 14, 2007, November 30, 2007, December 4, 2007, December 10, 2007, January 25, 2008 and February 25, 2008;

- **Merger Oversight Committee** on September 12, 2007 (teleconference), September 18, 2007 (teleconference), September 28, 2007 (teleconference) and October 4, 2007 (teleconference);

- **Town Hall Meetings** on August 3, 2007 (community), August 8, 2007 (community), September 17, 2007 (faculty and staff), September 19, 2007 (alumni), September 26, 2007 (student council), October 3, 2007 (faculty and senate), November 5, 2007 (alumni), November 28, 2007 (students), December 5, 2007 (faculty and staff), January 30, 2008 (faculty and staff) and February 7, 2008 (community).

As set forth above, approximately forty (40) meetings were held to address the affiliation. The Polytech Alumni Association contends that many of these meetings were just for show and concerns regarding the welfare of Polytech as relates to the affiliation were ignored. Both sides have dramatically different accounts about how these meetings were conducted.

This issue is troubling because even if one were to take Polytech's version of events at face value, they were careless in terms of the dissemination of information to the rest of the Board. This issue, as it relates to their fiduciary duty, will be discussed more fully below in this document.

8. In response to the allegation that Polytech inappropriately discouraged a faculty vote, Polytech responds by saying that they had forgone a vote in favor of "discussions" with the faculty which were designed to elicit "more specific knowledge than could be gained by a simple yes/no vote." Polytech also stated that they provided many avenues for in depth discussions with the faculty including the following:

- There were four faculty members, including two department heads and two members of the faculty executive committee, on the Merger Advisory Council. According to Polytech, this Council met eleven (11) times;

- Direct meetings with members of the faculty and the board;

- There were four (4) town hall meetings;

- Senior administrators attended a number of faculty meetings to give updates, receive suggestions and answer questions;

- That the President and the Negotiating Team met on multiple occasions with the Faculty Executive Committee (FEC);

- That the Speaker and Speaker-elect and an attorney for the Faculty personally reviewed the entire Definitive Agreement and were provided with a summary to share with the rest of the Faculty.

Polytech also claims that the Faculty Bylaws provide a process for faculty to vote on issues which it must or chooses to consider, such as the instant affiliation, and that the faculty declined to do so. They also point out that the Faculty, through its leadership, has conveyed to the Board support for the affiliation in a letter signed by ten of the eleven department heads representing more than 90% of the faculty. Additionally, Polytech claims that nineteen (19) members of the faculty leadership met with the Board on February 7, 2008 and all but one endorsed the affiliation.

While Polytech sets forth a number of instances where they included the faculty in discussions, one Polytech faculty member, who insisted upon remaining anonymous, contacted this office and presented a very different picture. The anonymous faculty member claimed that members of the Board consistently characterized the affiliation as something of a "done deal." He further stated that when asked for specific information about the affiliation, members of the Board routinely responded by saying that their inquiry "had been taken care of" or that certain terms were "a matter of trust" between Polytech and NYU and thus, did not need to be addressed in the Definitive Agreement. The anonymous faculty member also states, and Polytech admits, that they were only permitted to review the Definitive Agreement in the presence of a Polytech administrator. He further claims that neither he nor the faculty attorney were allowed to make copies of the document or take notes. Polytech has maintained that their refusal to disseminate copies of the Definitive Agreement was at the request of NYU. However, they have offered no legal justification for NYU's request if this is in fact the case. This office did request a copy of the Definitive Agreement and was provided with same despite resistance by Polytech. Regardless, given the fact that there were mechanisms in place for the faculty to hold a vote on this issue, and given the fact that the declined to do so, as well as the fact that there was overwhelming support by the faculty for this affiliation, it does not appear as though Polytech breached their fiduciary duty by not holding a faculty vote.

9. In response to the allegation that Board members who were not supportive of the affiliation were excluded and/or marginalized from the process, Polytech states that five (5) committees were set up during the course of the affiliation negotiations and that each committee was comprised of various Board members. These committees included the Executive Committee of the Board, the Merger Oversight Committee, the Negotiating Team, the Merger Advisory Council and the Merger Committee. However, Polytech acknowledges that Board

members were excluded from the Negotiating Team and the Merger Advisory Council. Polytech does not explain why Board members were excluded from these two committees.

In their response, Polytech explains that the Negotiating Team's function was to negotiate and draft the Definitive Agreement and Memorandum of Understanding. They further state that The Merger Advisory Council's role was to organize conversations among the various constituents, provide community wide level of input, and provide follow through on the issues at hand during merger discussions. It is difficult to understand why Board members would be excluded from the Negotiating Committee which addressed the legal terms of the affiliation between these two institutions. It is equally difficult to understand why Board members would be excluded from the Merger Advisory Council which controlled the flow of information about the affiliation to the public.

The Alumni Association claims that Polytech's response is "incomplete" and "evasive" because it does not address whether any of the Trustees who voted against the transaction had any meaningful input in the work of the committees. Advisory Trustee Thomas A. Mauro states that none of the Trustees who voted against the Memorandum of Understanding on October 10, 2007 or the subsequent straw polls were included on any of the Committees which were set up during the course of the merger discussions. He further claims that of the five (5) subcommittees which were comprised of approximately twenty-five (25) trustees, all of those who voted in opposition to, or abstained from, the vote on the Memorandum of Understanding were excluded from these subcommittees. Mr. Mauro further claims that when Chairman of the Board, Craig Mathews, was asked why this was the case, he stated that he only wanted "constructive" people on these committees.

Among the Trustees that were excluded from the working committees include Steven Rittvo, Deborah Devedjian, Herman Viets and Randy Frey. While Polytech points out that Trustee Steven Rittvo and Deborah Devedjian were members of the Executive Committee of the Board, this committee was not set up to specifically address the affiliation, rather it is, by Polytech's own admission, a permanent committee of the Board. While Trustee Deborah Devedjian was a member of the Merger Oversight Committee, by Ms. Devedjian's own admission, she was removed from said Committee after she voted against the Memorandum of Understanding on October 10, 2007 because she asked due diligence questions. It is worth noting that Ms. Devedjian is not an alumnus of Polytech and has no apparent bias in favor of the Alumni Association's position.

It is also worth pointing out that Trustee Herman Viets, who as set forth above was also excluded from committees pertaining specifically to the affiliation, resigned on or about April 9, 2008 from the Board of Trustees of Polytech. In a letter to his fellow Trustees, Mr. Viets states the following:

"My affection for Brooklyn Polytechnic started in 1961 and has grown over the years. I never thought I would write this letter. However, it is time for me to resign from the Board and to wish Polytechnic the very best as it is absorbed into NYU.

As you know, it is my opinion that this "merger" is a financial boon to NYU. In a fairly short period of time, all real vestiges of Polytechnic will disappear. Some parts of Polytechnic will not last long enough even to become part of NYU.

I have no animosity toward NYU, only great respect. They captured Poly under the terms they dictated and, true to NYU's reputation, will build a good school of engineering. While I admire their successes, I have no emotional attachment to NYU and no desire to be a part of it.

Likewise, I have no animosity toward my fellow trustees. I believe this decision to be a mistake, on many levels, but the majority rules. Attempting to avoid the NYU takeover by legalistic methods or seeking to improve the result by negotiating better terms were, to me, fatally flawed. The real issue was much less complicated."

I thank you for your fellowship. I mourn what Poly could have regained as an independent institution."

In addition to the facts set forth above, the Alumni Association also alleges that Advisory Trustees George Likourezos and Thomas Mauro were excluded from a February 7, 2008 meeting of the Board of Trustees and reprimanded because they spoke to this office. This fact is disputed by Polytech.

The fact that none of the dissenting Trustees were placed on any of the five (5) working committees set up to address the affiliation is one of the more serious allegations brought by the Polytech Alumni Association, particularly when considered in combination with the allegations made by Mr. Herman Viets and Ms. Deborah Devedjian. A more detailed discussion about Polytech's breach of the fiduciary duty as relates to this issue is set forth more fully below in this document.

10. The Polytech Alumni Association alleges that they requested a number of documents from the New York State Education Department relative to the 1973 sale by NYU of their Brooklyn Heights campus and that those documents cannot be located. The Alumni Association suggests that Polytech is somehow responsible for these documents having gone missing. They even state that they hired an investigator at a cost of $1,000 to search the New York State Archives for documents and the investigator reported that a vast amount of correspondence from July of 1972 to December of 1973 could not be located.

The Alumni Association has not offered any evidence sufficient to substantiate the allegation that Polytech was in any way responsible for these missing documents. Furthermore, this office contacted the State Education Department to inquire about the issue of these missing documents. We were told that all records of the Board of Regents and the Commissioner of Education are sent to the State Archives to be evaluated for historical significance before they are destroyed. Since the documents in question date from 1971 to 1977, and the State Archives was only established by Statute in 1971, it is unknown when some of the documents in question were transferred to the control of the State Archives. Nevertheless, the State Education Department explains that after a diligent search of the archives, all but one of the documents requested by the Polytech Alumni Association have been located.

C. <u>Duty of Care</u>

The Polytech Alumni Association has alleged facts which suggest that the Board did not uphold their fiduciary duty to the corporation by violating the duty of care that they owed to Polytech. Specifically, the Alumni Association alleges that the Board did not exercise adequate due diligence or make competent business decisions as relate to the prospective affiliation with NYU. Specifically, the Alumni Association's allegations are as follows:

1. That Polytech breached the duty of care owed to the institution by not obtaining an independent legal opinion to ascertain whether Chapter 463 of the Laws of New York (1972) and/or the March, 1973 Merger Agreement served as a barrier to NYU reentering the field of engineering;

2. That Polytech breached the duty of care owed to the institution by failing to obtain an updated appraisal of Polytech's real property during the course of the affiliation negotiations with NYU;

3. That Polytech breached the duty of care owed to the institution by not adequately safe guarding the institution's air rights in the Definitive Agreement;

4. That the terms of the Definitive Agreement negotiated by Polytech provide no legal consideration from NYU to Polytech, while at the same time giving NYU near total control over Polytech as an institution with no way for Polytech to terminate this arrangement;

5. That the terms of the Definitive Agreement negotiated by Polytech do not adequately protect the Polytech name, Polytech's location in Brooklyn, NY, the Polytech students, the Polytech faculty or the Polytech Alumni;

6. That the manner in which the affiliation has been structured is an attempt by Polytech to avoid antitrust scrutiny under the Laws of the State of New York.

The Polytech Board's response to these concerns is as follows:

1. In response to the allegation that Polytech did not take adequate steps to ascertain whether or not the March, 1973 Merger Agreement and/or Chapter 463 of the Laws of New York (1972) served as a barrier to NYU reentering the engineering field, Polytech claims that they did in fact take adequate steps. While they acknowledge that independent legal counsel was not retained to evaluate this issue, they did have an attorney on the Polytechnic staff evaluate whether such a barrier did exist. Polytech states that an attorney on the Polytech staff, George Smith, researched this issue in 2005 by, *inter alia*, reviewing state documents, reviewing documents in Polytech's archives and having discussions with the staff of the New York State Education Department in order to determined whether such a legal barrier existed. In support of their position, Polytech also points out that Richard Thorsen, the current Vice President for Academic Affairs at Polytech, was a party to the merger negotiations in 1973. While Polytech does not set forth what Mr. Thorsen's position was in 1973, on page thirty-five (35) of the 1973 Merger Agreement, Mr. Thorsen's signature appears under the title "Faculty of New York University School of Engineering and Science."

The Polytech Alumni Association maintains that the 2005 legal evaluation conducted by George Smith was inadequate because, while Mr. Smith does have a law degree, he is not employed by Polytech as a staff attorney(according to the Alumni Association he was a member of the Development Staff at Polytech), is not a practicing attorney and is not, despite Polytech's claims to the contrary, admitted to the New York State Bar.

The Polytech Alumni Association also claims that several Trustees implored the Board to obtain an updated and independent legal opinion regarding this issue but were ignored. Upon information and belief, one Trustee, Mr. Stephen Rittvo, even offered to pay for the legal opinion but was told by Chairman Craig Matthews that this offer was "untimely." Upon information and belief, Trustee Michael O'Brien, who's law firm is representing Polytech in the affiliation negotiations, encouraged the Board not to seek an independent legal opinion because it would be viewed by NYU as "bad faith" and that consequently, nothing more should be done.

While the alleged statement by Mr. O'Brien is troubling considering the fact that the Polytech Board's only concern should have been the welfare of Polytech, the nature of this issue is such that the failure of the Board to obtain a legal opinion was not sufficient to indicate that there had been a breach of their fiduciary duty. As is set forth more fully above, any attorney reading the March, 1973 Merger Agreement and/or Chapter 463 of the Laws of New York (1972) could conclude that neither of these documents served as a barrier to NYU reentering the field of engineering. It is also worth pointing out that no one has submitted a legal opinion to support the Polytech Alumni Association's position.

2. In response to the allegation that Polytech did not exercise adequate business judgment by failing to obtain an updated appraisal of Polytech's real property, Polytech states that they relied on an appraisal which was completed by KTR Newmark in January of 2005 which valued the property at $213 million dollars. They further claim that Polytech has substantial outstanding debt of $103 million dollars and deferred maintenance of close to $25 million dollars. Polytech acknowledges the fact that they did not update this appraisal and consequently, they were unaware of the value of this property as of 2007-2008.

The Polytech Alumni Association further alleges facts which suggest that the Board has been disingenuous regarding the value of their real property and the extent of their debt. Specifically, they contend that the Board stated at an October 10, 2007 meeting that the liability of the school for "Deferred Maintenance/Renovation" was $150 million dollars resulting in a value of negative $33 million dollars. The Alumni Association further claims that the Board has consistently promoted the affiliation with NYU by claiming that Polytech is not financially viable on their own due to the negative value. However, according to the Alumni Association, the Board made a different representation to the New York State Supreme Court, Kings County, in a petition that they filed in May 31, 2007 to refinance various bonds that they had. Upon information and belief, in that petition, the Board claimed in a sworn statement that Polytech's net assets were valued at $154.6 million dollars. In light of Polytech's failure to obtain an updated appraisal, it is impossible to ascertain the true value of this institution's real property at this time. The implications of the Board's failure to obtain an updated appraisal of the real property as relates to their fiduciary duty will be discussed more fully below in this document.

3. In response to the allegation that Polytech did not adequately safeguard the institutions air rights when negotiating the terms of the Definitive Agreement, Polytech claims that their 943,000 square feet of air rights were valued by the firm of Grubb & Ellis and the proceeds from any sale of these air rights will remain with Polytech pursuant to the terms of the Definitive Agreement. Polytech does not set forth the value of these 943,000 square feet of air rights. However, the Alumni Association contends that the there are additional air rights that were not valued or disclosed by Polytech. Aside from the 943,000 square feet of air rights, they claim that there is also an additional 277,000 square feet of air rights associated with the Rogers/Jacobs academic building, 97,643 square feet of air rights associated with the Dibner Library building, 13,000 square feet of air rights associated with the Wunsch Hall and a bonus of 39,430 square feet of air rights associated with the Othmer Dormitory which, presumably, have substantial value.

While Polytech claims that pursuant to the terms of the Definitive Agreement they retain their air/development rights, this is not without qualification. There are provisions in the Definitive Agreement which restrict Polytech's ability to borrow money from sources other than NYU without first obtaining NYU's consent. There is also a provision in this agreement allowing Polytech to borrow up to $50 million dollars from NYU directly over a five year period so long as any amount borrowed by Polytech from NYU is secured by Polytech's air/development rights. Nevertheless, pursuant to the terms of the Definitive Agreement, in the absence of a loan by NYU, Polytech retains the proceeds from the sale of the air rights even if there is an affiliation or consolidation.

4. The Polytech Alumni Association complains that with the exception of the right to obtain loans from NYU, Polytech as an institution receives nothing else of value from NYU pursuant to the terms of the Definitive Agreement. There is a section in the Definitive Agreement which allows Polytech to borrow up to $50 million dollars from NYU over a period of five (5) years. Any loans made by NYU to Polytech are conditioned upon, *inter alia*, Polytech securing such loans by its air/development rights and any other security that may be reasonably required. With the exception of this provision, Polytech receives no additional sums from NYU. In fact, there is a provision in the Definitive Agreement, which expressly states that "NYU shall not be obligated to divert any funds from its tuition or existing donor base or its endowment to Polytech."

The Polytech Alumni Association maintains that terms such as the aforementioned are inequitable considering the other terms of the Definitive Agreement which restrict Polytech's autonomy as an institution and gives NYU a tremendous amount of control over Polytech. There are provisions in the Agreement which restrict Polytech's ability to change the character of its business in any way, provisions which bar Polytech from making changes to their curriculum, admissions standards and financial aid policies, provisions which give NYU "oversight" over Polytech's operations including, but not limited to, budget, hiring plans, fundraising and use of facilities, provisions which allow NYU the ultimate right to elect the entire Board of Trustees of Polytech, and

provisions which bar Polytech from selling or buying any real estate or merging or encumbering any of its assets. It is worth noting that NYU is not bound by any of these conditions.

The Polytech Alumni Association also complains that there is no mechanism in the Definitive Agreement for Polytech to voluntarily terminate their affiliation with NYU after the Closing Date, which is defined by the Definitive Agreement as the date that Polytech's Charter is amended by the Board of Regents. Polytech has consistently claimed that the parties are entering into an affiliation opposed to a consolidation so that they can see if both institutions are a "good fit." If there is no mechanism in the Definitive Agreement for Polytech to terminate their affiliation with NYU and regain their independence as an institution, it would appear as though the affiliation does not accomplish Polytech's stated goals and rather locks Polytech into an eventual consolidation.

While terms such as the aforementioned seem unfair to Polytech, as will be disclosed more fully below, it takes more than unfavorable terms and questionable decisions by the Board to conclude that there was a breach of the fiduciary duty.

5. The Polytech Alumni Association contends that the Definitive Agreement negotiated by Polytech does not adequately protect (A) the Polytech name, (B) the Polytech location in Brooklyn, NY, (C) the Polytech students, (D) the Polytech faculty and administration, or (E) the Polytech Alumni or Alumni Association. The Definitive Agreement addresses each of these issues as follows:

A. The Polytech Name. The Definitive Agreement addresses this issue by saying that Polytech's name shall be changed to "Polytechnic Institute of New York University." The word "Polytechnic" in the name of the new school shall be used until the tenth anniversary from the Effective Date unless it is otherwise agreed to by NYU and the Polytech Board of Trustees based on the acceptance of a significant gift which shall be conditioned on the renaming of the institution.

B. The Polytech Location. The Definitive Agreement states that Polytech will continue to operate its main campus at its existing Brooklyn, NY location and will operate at such other locations where Polytech programs may be delivered from time to time.

C. The Polytech Students. The Definitive Agreement states that Polytech shall be an institution of higher education separate and apart from NYU for purposes of regulation by the New York State Education Department, Middle States Commission on Higher Education, ABET, DOE, and other Educational Agencies.

D. The Polytech Faculty. The Definitive Agreement states that the tenured faculty at Polytech as of the date of the Closing Date shall remain tenured faculty at Polytech, subject to Polytech's policies and procedures as in effect from time to time. The Agreement further provides that tenured faculty who are employed at Polytech at the time of Consolidation shall remain tenured faculty with NYU at the new school of technology and engineering at NYU and that Polytech's policies and procedures shall be made to be consistent with the appointments and tenure policies of NYU.

E. The Polytech Alumni or Alumni Association. There are no provisions in the Definitive Agreement to address the Alumni or the Alumni Association after the affiliation is complete. There is however a provision in the Agreement which provides for an Advisory Board. The Definitive Agreement states that upon consolidation, NYU will create an advisory board to the new school of technology and engineering. At least twenty percent (20%) of the members of the advisory board shall be comprised of individuals from the Polytech community.

In regards to the Alumni Association's concerns as set forth above, the Definitive Agreement provides for the Polytech name to be part of the NYU name, for Polytech to continue to operate in Brooklyn, NY, for the two institutions to be separate entities for regulatory purposes and for the tenured faculty and tenure tracked faculty at Polytech to retain this status once affiliated with NYU. While there is language in the Definitive Agreement that allows for flexibility regarding these issues, it is unreasonable to criticize Polytech for drafting an Agreement which does not allow them to accommodate unanticipated changes in circumstances. It is equally unfair to criticize Polytech for drafting an Agreement which requires them to bring many of their procedures into conformity with NYU. After all, the point of this affiliation is for NYU to become a member of Polytech. While there are no provisions for the continuation of the Alumni Association once Polytech becomes affiliated with NYU, as previously stated, there are provisions for members of the Polytech community to be members of the advisory council. Regardless, these facts in and of themselves are not enough to indicate that Polytech has breached the duty of loyalty and care owed to the institution.

6. The Polytech Alumni Association also alleges that the affiliation is structured in such a way as to constitute an illegal price fixing and market allocation which is impermissible under General Business Law Section 340, better known as the Donnelly Antitrust Act. This statute/act prohibits the making of contracts or agreements which result in the fixing of prices or any anticompetitive activities. *Lennon v. Philip Morris Companies,* 189 Misc. 2d 577, 579 (October, 2001). Specifically, the Donnelly Act declares as void against public policy, any contract, agreement, arrangement or combination that restrains competition or the free exercise of an activity pertaining to any business or the furnishing of any service in the State.

The suggestion that the affiliation between Polytech and NYU violates antitrust law is unpersuasive. First, in support of their position, the Polytech Alumni Association cites a number of cases which are readily distinguishable from the instant transaction between NYU and Polytech. The Alumni association cites the case of *Lennon v. Philip Morris Companies,* 189 Misc. 2d 577, 579 (October, 2001) where the Court held that the price fixing engaged in by the largest firms in the cigarette industry violated Section 340 of the General Business Law. However, this case involved a situation where nearly all of the largest cigarette manufacturers in the country repeatedly increased their prices at the same time. This is very different from the situation where two institutions of higher education, only one of which is presently offering an engineering program, have entered into a contract which requires them to bring their, inter alia, curriculum, admissions standards and financial aid policies into conformity with each other over a period of time.

The second case that the Alumni Association cites is the case of *Purofied Down Products Corp. V. National Association of Bedding Manufacturers,* 201 Misc. 149 (New York County, 1951). This case, which was decided approximately sixty (60) years ago, involves a situation where a former member of a trade association who manufactured pillows, sued the association alleging impermissible price fixing by the same. As was the case in *Lennon v. Philip Morris Companies,* the complaint in *Purofied Down Products Corp*. alleged that nearly all of the companies that manufactured pillows joined together to control prices. Again, this is completely different from the NYU/Polytech affiliation which deals only with two institutions of higher education entering into an agreement. The Alumni Association does not acknowledge the fact that there are other institutions in the New York City area which also offer engineering programs including, but not limited to, Columbia University, City University of New York and The Cooper Union. Since these institutions are not party to the instant transaction, the Definitive Agreement does not violate General Business Law Section 340.

However, one troubling aspect of the Alumni Association's argument as pertains to Polytech's attempts to avoid antitrust scrutiny concerns a reference in the Definitive Agreement to the "HSR Act." Upon information and belief, the Agreement is referring to the Hart-Scott-Rodino Act, a federal statute that requires notification when two entities decide to consolidate. What is concerning about this reference is the fact that Polytech has consistently maintained that their affiliation with NYU is being done to determine whether the two institutions are suitable for pursuing any type of a consolidation. However, the brief reference to the Hart-Scott-Rodino Act could cause

one to question what Polytech's real intentions are regarding this affiliation. Pursuant to the Definitive Agreement, NYU is required to file a petition in accordance with the Hart-Scott-Rodino Act prior to the affiliation. On the one hand Polytech is representing to interested parties in the State of New York that this transaction is just an affiliation, yet in the Definitive Agreement NYU is required to take steps to initiate a consolidation. Regardless, if and when Polytech and NYU decide to consolidate, they will be required to seek the approval of various governmental entities in the State of New York before that happens. Hopefully, those same entities will now be on notice of this issue if and when that occurs.

ARE THE DECISIONS MADE BY THE POLYTECH BOARD OF TRUSTEES RELATIVE TO THE AFFILIATION NEGOTIATIONS AND TERMS OF THE DEFINITIVE AGREEMENT PROTECTED BY THE BUSINESS JUDGMENT RULE

A. Applicable Law. The Business Judgment Rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purpose." *Auerbach v. Bennett,* 47 N.Y.2d 619, 629 (July 9, 1979). Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to the corporation and these decisions may not be questioned even though the results may show that they were unwise. *Id.*

The Court in *Auerbach* further went on to state the following:

> "It appears to us that the business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by courts or otherwise." *Id. at 630*

However, the Business Judgment Rule will govern only where such decision making, although perhaps misguided, has been honest and disinterested, and the doctrine will not be enforced when the good faith or oppressive conduct of the officers and directors is at issue. *S.H. and Helen R. Scheuer Family Foundation, Inc., v. 61 Associates et al.,* 179 A.D.2d 65, 69 (March 26, 1992)(quoting the Court in *Koral v. Savory, Inc.,* 276 NY 215). Thus, absent evidence of bad faith or fraud, the courts must and properly should respect the determinations of a corporation. *Auerbach* at 631.

With the exception of three (3) areas of concern raised by the Polytech Alumni Association, the vast majority of the allegations do not amount to a breach of the fiduciary duty because they are protected by the Business Judgment Rule. Those allegations that are not protected by the Business Judgment Rule are the allegations that (1) the affiliation negotiations between Polytech and NYU were being conducted by President Hultin months before they were announced to the rest of the Board, (2) Board members who were not supportive of the affiliation were excluded or marginalized from the working committees set up address the affiliation and (3) an updated appraisal of Polytech's real property was never obtained. While some of the remaining allegations suggest a significant lack of diligence or good faith on the part of Polytech, they are not substantiated by evidence which definitively says that the Board did not uphold the duty of loyalty and care owed to the institution. As was set forth in the case of *Kimeldorf v. First Union Real Estate Equity and Mortgage Investments, et al.,* 309 A.D.2d 151, 156 (First Dept., 2003), a breach of the fiduciary duty requires more than "innuendo." Thus, given the lack of clear cut evidence of bad faith or fraud (see, *Auerbach v. Bennett* at 631) there is no basis to question the decisions made by the board, other than those previously mentioned, despite the fact that many of their decisions appear to be questionable and to have been made in bad faith.

The allegations that do not appear to be protected by the Business Judgment Rule will be addressed as follows:

(1) The affiliation negotiations between Polytech and NYU were being conducted by President Hultin months before they were announced to the rest of the Board. By Polytech's own admission, the affiliation negotiations commenced approximately six (6) months before they were disclosed to the rest of the Board. This lack of disclosure is inconsistent with the upholding of the duty of loyalty and care required by a fiduciary. In the matter of *Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc.2d 126 (December 3, 1999), the Court found that misconduct had occurred when the president of the Board of Manhattan Eye, Ear & Throat Hospital attempted to withhold certain information from other members of the hospital community during the course of negotiating the sale of certain parcels of hospital real estate. In the instant situation regarding Polytech, affiliation negotiations supposedly began in February, 2007. However, meetings of the Board were not held until August of 2007. There is no legitimate excuse for not holding these meetings sooner particularly when, by Polytech's own admission, preliminary discussions began some three years prior. Therefore, it appears that detailed negotiations began in February of 2007 and those discussions should have included the entire Board.

(2) That Board members who were not supportive of the affiliation were excluded or marginalized from the working committees set up address the affiliation. Polytech provided this office with a list of the committees set up to address issues relative to the affiliation as well as the names of those individuals on those committees. Indeed, none of the members who were not supportive of the affiliation were included on those committees. Additionally, the statements made by Deborah L. Devedjian, a Polytech Trustee who is not an alumnus of Polytech and has no obvious bias in favor of the Polytech Alumni Association, says that she was removed from one of the working committees for "asking too many question" and encouraging "due diligence." These two facts coupled with the resignation of Trustee Herman Viets, along with the reasons set forth in his April 9, 2008 resignation letter, lead to the conclusion that those on the Board in favor of the affiliation were attempting to marginalize the participation of those individuals who opposed the affiliation. In fact, the actions of the Board suggest that the majority had decided that the affiliation with NYU was the proper course of action for Polytech and this decision drove subsequent events. This type of activity is not consistent with the duty of loyalty that a board owes to an institution. *Id.* at 156.

(3) That an updated appraisal of Polytech's real property was never obtained by the Board. As previously stated, the Polytech Alumni Association has stated that the Polytech Board has in part promoted the affiliation with NYU by claiming that Polytech is not financially solvent enough to operate as an independent institution indefinitely. While Polytech has claims that they are in debt by approximately $33 million dollars, by their own admission, they relied upon a 2005 appraisal of their real estate. Their failure to obtain an updated appraisal, regardless of the cost involved, is inconsistent with the duty of care that the Board owed to Polytech. As set forth above, the duty of care requires directors and officers to discharge the duties of their respective positions in good faith and with the degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. *Not-For-Profit Law Section 717*. Given the fact that the Polytech Board is comprised of individuals who are, *inter alia*, attorneys and leaders of large corporations, it is inconceivable that they would not have thought it prudent to obtain an updated appraisal of Polytech's real property. Their failure to do so could lead to the conclusion that they did not act with the degree of diligence, care and skill that was required of them and it substantiates the Alumni Associations position that the Board was attempting to portray Polytech as being in financial straits in order to garner support for the affiliation with NYU.

CONCLUSION

The role of this office in evaluating the proposed affiliation between NYU and Polytech has been to review the process in order to determine whether or not the existing law sufficiently allows the interested parties access and the ability to participate in affiliation/consolidation decisions. Based upon the information that has been submitted, the following questions have been raised regarding affiliations/consolidations:

- Whether procedures should be put in place requiring an institution, before they enter into affiliation/consolidation discussions, to inform students, faculty, administration and alumni about its plans and allow these individuals a reasonable period of time to communicate their feelings on the proposed affiliation/consolidation.

- When and to what extent an institution's Board of Trustees and other members of the institution (including faculty, administration, students and alumni) should be involved in affiliation/consolidation negotiations while they are occurring.

- Whether procedures should be put in place to ensure that faculty, administration, students and alumni are aware of potential conflicts of interest as pertain to the affiliations/consolidations and the steps taken by the institution to resolve those conflicts of interest.

- Whether procedures should be put in place, before a final vote is held to approve an affiliation/consolidation, to inform interested parties of the terms of the transaction and to obtain their input.

APPLICABLE STATUTORY LAW
PERTAINING TO AFFILIATIONS/CONSOLIDATIONS

Education Law § 216. Charters. Under such name, with such number of trustees or other managers, and with such powers, privileges and duties, and subject to such limitations and restrictions in all respects as the regents may prescribe in conformity to law, they may, by an instrument under their seal and recorded in their office, incorporate any university, college, academy, library, museum, or other institution or association for the promotion of science, literature, art, history or other department of knowledge, or of education in any way, associations of teachers, students, graduates of educational institutions, and other associations whose approved purposes are, in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement by the university. No institution or association which might be incorporated by the regents under this chapter shall, without their consent, be incorporated under any other general law. An institution or association which might be incorporated by the regents under this chapter may, with the consent of the commissioner of education, be formed under the business corporation law or pursuant to the not-for-profit corporation law if such consent of the commissioner of education is attached to its certificate of incorporation.

Education Law § 216-a. Applicability of not-for-profit corporation law. 1. The term "education corporation" as used in this section means a corporation (a) chartered or incorporated by the regents or otherwise formed under this chapter, or (b) formed by a special act of this state with its principal purpose an education purpose and which is a member of the university of the state of New York, or (c) formed under laws other than the statutes of this state which, if it were to be formed currently under the laws of this state, might be chartered by the regents, and which has been authorized to conduct its activities in this state by the regents or as an authorized foreign education corporation with the consent of the commissioner. A corporation as defined in the business corporation law is not an education corporation under this section.

Education Law § 219. Change of name or charter. 1. The regents may, at any time, for sufficient cause, by an instrument under their seal and recorded in their office, change the name, or alter, suspend or revoke the charter or certificate of incorporation of any domestic corporation which they might incorporate under section two hundred sixteen, or any certificate of authority of a foreign corporation which they have issued or to which the commissioner has consented, (a) if subject to their visitation, or, (b) if authorized, chartered or incorporated by the regents or under a general law; provided that, unless on three-fourths request of the trustees of the corporation, no name shall be changed and no charter or certificate shall be altered, suspended or revoked, nor shall any rights or privileges thereunder be suspended or repealed by the regents, until they have mailed to the usual address of every director or trustee of the corporation concerned at least thirty days' notice of a hearing when any objections to the proposed change will be considered, and until ordered by a vote at a meeting of the regents at which the notices have specified that action is to be taken on the proposed change. A certified copy of such order of the regents, under their seal, to change the name, or alter, suspend or revoke a certificate of incorporation of any domestic corporation filed by the department of state under a general law, or certificate of authority of any foreign corporation filed by the department of state under a general law, shall be delivered by the regents to such department. The order shall become effective upon the filing of such certified copy by the department of state.

Not-For-Profit Corporation Law § 901. Power of merger or consolidation. (a) Two or more domestic corporations may, as provided in this chapter: (1) Merge into a single corporation which shall be one of the constituent corporations; or (2) Consolidate into a single corporation which shall be a new corporation to be formed pursuant to the consolidation. (b) Whenever used in this article: (1) "Merger" means a procedure of the character described in subparagraph (a) (1). (2) "Consolidation" means a procedure of the character described in subparagraph (a) (2). (3) "Constituent corporation" means an existing corporation that is participating in the merger or consolidation with one or more other corporations. (4) "Surviving corporation" means the constituent corporation into which one or more other constituent corporations are merged. (5) "Consolidated corporation" means the new corpora-

tion in which two or more constituent corporations are consolidated.

Not-For-Profit Corporation Law § 902. Plan of merger or consolidation. (a) The board of each corporation proposing to participate in a merger or consolidation under section 901 (Power of merger or consolidation) shall adopt a plan of merger or consolidation, setting forth: (1) The name of each constituent corporation and if the name of any of them has been changed, the name under which it was formed, and the name of the surviving corporation, or the name or the method of determining it, of the consolidated corporation. (2) As to each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification, and voting rights, if any. (3) The terms and conditions of the proposed merger or consolidation, including the manner and basis of converting membership or other interest in each constituent corporation into membership or other interest in the surviving or consolidated corporation, or the cash or other consideration to be paid or delivered in exchange for membership or other interest in each constituent corporation, or a combination thereof. (4) In case of merger, a statement of any amendments or changes in the certificate of incorporation of the surviving corporation to be effected by such merger; in case of consolidation, all statements required to be included in a certificate of incorporation for a corporation formed under this chapter, except statements as to facts not available at the time the plan of consolidation is adopted by the board.

Not-For-Profit Corporation Law § 903. Approval of plan. (a) The board of each constituent corporation, upon approving such plan of merger or consolidation shall submit such plan to a vote of the members in accordance with the following: (1) Notice of meeting shall be given to each member whether or not entitled to vote. A copy of the plan of merger or consolidation or an outline of the material features of the plan shall accompany such notice. (2) The plan of merger or consolidation shall be approved at a meeting of the members by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members). (3) If any merging or consolidating corporation has no members entitled to vote thereon, a plan of merger or consolidation shall be deemed approved by the members of the corporation when it is adopted by the board of such corporation pursuant to section 902 (Plan of merger or consolidation). (b) Notwithstanding authorization as provided herein, at any time prior to the filing of the certificate of merger or consolidation, the plan of merger or consolidation may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of merger or consolidation.

Not-For-Profit Corporation Law § 904. Certificate of merger or consolidation; contents. (a) After approval of the plan of merger or consolidation unless the merger or consolidation is abandoned in accordance with paragraph (b) of section 903 (Approval of plan) a certificate of merger or consolidation, entitled "Certificate of merger (or consolidation) of ..... and ..... into (names of corporations) under section 904 of the Not-for-Profit Corporation Law," shall be signed on behalf of each constituent corporation and delivered to the department of state. It shall set forth: (1) The statements required by subparagraphs (a), (1), (2), and (4) of section 902 (Plan of merger or consolidation). (2) The effective date of the merger or consolidation if other than the date of filing of the certificate of merger or consolidation by the department of state. (3) In the case of consolidation, any statement required to be included in a certificate of incorporation for a corporation formed under this chapter but which was omitted under subparagraph (a) (4) of section 902. (4) The date when the certificate of incorporation of each constituent corporation was filed by the department of state or, in the case of constituent corporations created by special law, the chapter number and year of passage of such law. (5) The manner in which the merger or consolidation was authorized with respect to each constituent corporation. (b) The surviving or consolidated 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.

Not-For-Profit Corporation Law § 905. Effect of merger or consolidation. (a) Upon the filing of the certificate of merger and consolidation by the department of state or on such date subsequent thereto, not to exceed thirty

days, as shall be set forth in such certificate, the merger or consolidation shall be effected. (b) When such merger or consolidation has been effected: (1) Such surviving or consolidated corporation shall thereafter, consistently with its certificate of incorporation as altered or established by the merger or consolidation, possess all the rights, privileges, immunities, powers and purposes of each of the constituent corporations. (2) All the property, real and personal, including causes of action and every other asset of each of the constituent corporations, shall vest in such surviving or consolidated corporation without further act or deed, except as otherwise provided in paragraph (b) of section 907 (Approval by the Supreme Court). Except as the court may otherwise direct, as provided in section 8-1.1 of the Estates, Powers and Trusts Law, any disposition made in the will of a person dying domiciled in this state or in any other instrument executed under the laws of this state, taking effect after such merger or consolidation, to or for any of the constituent corporations shall inure to the benefit of the surviving or consolidated corporation. So far as is necessary for that purpose, or for the purpose of a like result with respect to a disposition governed by the law of any other jurisdiction, the existence of each constituent domestic corporation shall be deemed to continue in and through the surviving or consolidated corporation. (3) The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any member, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any member, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or comprised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation. (4) In the case of a merger, the certificate of incorporation of the surviving corporation shall be automatically amended to the extent, if any, that changes in its certificate of incorporation are set forth in the plan of merger; and, in the case of a consolidation, the statements set forth in the certificate of consolidation and which are required or permitted to be set forth in a certificate of incorporation of a corporation formed under this chapter shall be its certificate of incorporation.

Not-For-Profit Corporation Law § 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 as 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 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.