

Clients & Friends Memo

New York Publication Law

March 15, 2006 The New York legislature has passed and the governor has signed a bill (the "Publication Law")¹ that requires limited liability companies ("LLCs"), limited partnerships ("LPs") and limited liability partnerships ("LLPs") that are organized or otherwise conduct certain business activities in New York to publish notices in designated newspapers disclosing certain biographical information about the publishing entities and up to ten of their investors. The Publication Law amends the existing publication requirements for LLCs, LPs and LLPs ("Prior Publication Requirements") with a more costly² procedure analogous to the advertisement or notice of a judicial proceeding ("New Publication Requirements").³ Non-conforming LLCs, LPs and LLPs are subject to having their authorization to conduct business in New York suspended.

Who the Publication Law Applies To

The Publication Law applies to two types of LLCs, LPs and LLPs. First, it applies to LLCs, LPs and LLPs (i) formed in New York or (ii) which begin to "conduct business" in New York, after the Publication Law's effective date ("Post Law LLCs, LPs and LLPs"). Second, the Publication Law applies to LLCs, LPs and LLPs (whether or not organized in New York) formed prior to the Publication Law's effective date that conduct business in New York but have not, as of the Publication Law's effective date, published in accordance with the Prior Publication Requirements ("Pre Law LLCs, LPs and LLPs").⁴ Although neither the Publication Law nor other New York

¹ Chapter 767, New York Laws of 2005.

² Although the new requirements appear to grant relief by reducing the mandated publication period from six weeks to four, publication costs are not likely to be reduced. Rather, the New York State Bar Association Business Law Section ("NYSBA"), the New York County Lawyers' Association ("NYCLA") and the Association of the Bar of the City of New York's Committee on Corporate Law ("City Bar") have argued that publication costs will actually *increase* under the new requirements for two reasons. First, publication costs are a direct function of the length of notices. NYSBA, NYCLA and the City Bar, in separate memorandums to the New York State legislature or Governor Pataki opposing adoption of the Publication Law, have pointed out that the Publication Law mandates disclosure of additional information not required by the Prior Publication Requirements. Specifically, the Publication Law requires disclosure of the names of up to ten investors, the entity's address and a statement several lines long disclaiming personal liability for disclosed investors. These additional disclosures will result in longer, more costly notices. Moreover, NYSBA has observed that the Publication Law classifies the new notices as notices "of judicial proceedings," which may be subject to higher "per line" publication rates than the old-style notices.

³ For a description of what LLCs, LPs and LLPs must disclose under the New Publication Requirements, see Schedule A.

⁴ The Publication Law contains a grandfathering exemption for Pre Law LLCs, LPs and LLPs who have complied with the Prior Publication Requirements by the Publication Law's effective date ("Prior Complying LLCs, LPs and LLPs"). Under the Publication Law, such entities are deemed to have satisfied the New Publication Requirements. However, in order to take advantage of this "prior compliance exemption," Prior Complying LLCs, LPs and LLPs formed between January 1, 1999 and the Publication Law's effective date must have filed at least one affidavit of a printer or publisher of a newspaper with the New York State Department of State by the Publication Law's effective date. Prior Complying LLCs, LPs and LLPs formed

statutes provide a definition of “conducting business” in New York, New York courts have interpreted the phrase relatively narrowly to apply to entities with systematic and regular intrastate, as opposed to interstate, activities.⁵

The only way for LLCs, LPs and LLPs to avoid being subject to the New Publication Requirements is to organize under another state’s law and not conduct business in New York.

Non-Compliance: Sanctions and Cure

The Publication Law provides two grace periods for compliance. Post Law LLCs, LPs and LLPs are required to comply within 120 days of their dates of formation (if formed in New York) or the dates upon which they first conduct business in New York. Pre Law LLCs, LPs, and LLPs (other than those exempt under the prior compliance exemption) are required to comply within 18 months of the Publication Law’s effective date.⁶

After expiration of the grace periods, non-complying LLCs, LPs and LLPs may have their authority to carry on, conduct or transact business in New York suspended, effective as of the expiration of the applicable grace period, until compliance is achieved. The Publication Law does not define “suspension” and it is not clear what effect suspension will have.⁷ However, the Publication Law states that any suspension would not limit or impair the validity of any contract or act of the entity, any right or remedy of any other party under or by virtue of any contract, act or omission of such entity, or the right of the entity to defend any action or special proceeding in New York.⁸

before January 1, 1999 are deemed compliant with the Prior Publication Requirements despite failure to file such an affidavit with the New York State Department of State.

- ⁵ Factors New York courts have considered when determining if an entity is “doing business” in New York for purposes of the New York Business Corporation Law include maintenance of an office, telephone listing or a sales representative within the state, and solicitation of sales and placement of orders that are not merely incidental to the sale and delivery of merchandise into New York.
- ⁶ Under a proposed chapter amendment to the Publication Law, the grace period for Pre Law LLCs, LPs and LLPs would be reduced from eighteen months to 120 days from the Publication Law’s effective date.
- ⁷ The New York State Bar Association’s Business Law Section, in a May 2005 Memorandum to the New York State legislature opposing adoption of the Publication Law, observed that the proposed text of the Publication Law failed to define “suspension” and cautioned that the uncertainty over its meaning would cause practitioners to avoid organizing LLCs, LPs and LLPs in New York. The Association of the Bar of the City of New York’s Committee on Corporation Law, in a June of 2005 letter to Governor Pataki opposing signing of the Publication Law, speculated that “suspension” could be construed to mean that members or limited partners of an LLC, LP or LLP would lose the protection of a limited liability entity and incur unlimited joint and several liability. Perhaps as a response to this critique, a chapter amendment to the Publication Law introduced on February 28, 2006 contains provisions explicitly assigning liability for the debts, obligations and liabilities of non-complying LLCs, LPs and LLPs to members and limited partners of such entities. For further discussion of the chapter amendment, see footnote 11.
- ⁸ Under the Prior Publication Requirements, LLCs, LPs and LLPs which failed to publish the required information were barred from maintaining legal actions or special proceedings in the courts of New York. The Publication Law suggests that the same applies under the new regime by specifically stating that suspended entities may *defend* against actions brought by others (and not stating that suspended entities may bring actions against others). Given that this bar to bringing actions in the State of New York was the only sanction for non-complying LLCs, LPs and LLPs under the Prior Publication Requirements, many Pre Law LLCs, LPs and LLPs may have elected not to follow the Prior Publication Requirements based on advice that they need not do so until they intended to commence an action in the New York courts.

What the Publication Law Requires

The Publication Law requires subject LLCs, LPs and LLPs to publish certain biographical information regarding the entities and certain of their investors for four successive weeks in two newspapers in the county where the office of the subject entity is located. The precise content of the notice varies by entity and depends upon whether the entity is foreign or domestic, and whether the entity is an LLC, LP or LLP. A chart of the required disclosures for each entity by entity type is contained in Schedule A attached hereto.

Perhaps the most controversial element of the Publication Law is that it requires LLCs, LPs and LLPs, with certain exceptions,⁹ to disclose the names of up to ten investors with the "most valuable interests"¹⁰ in the LLC, LP or LLP. This requirement may be removed from the final legislation pursuant to a chapter amendment¹¹ that was agreed upon between the New York state legislature and the Governor and introduced as New York State Senate bill S-6831 on February 28, 2006. We have been told that this amendment will be introduced and signed into law before the effective date of the Publication Law, which currently is scheduled to take effect on June 1, 2006.

If you have any questions regarding the Publication Law, please contact a member of the Capital Markets Department.

⁹ LLCs and LPs (but not LLPs) doing business as, or sponsored, advised or managed by, investment advisers (as defined in the federal Investment Advisers Act of 1940) ("IAs"), commodity pool operators ("CPOs") or commodity trading advisers ("CTAs") (each as defined in the federal Commodity Exchange Act) are exempted from disclosing the names of investors in their publication notices. The New York State Bar Association Business Law Section ("NYSBA") has noted that while this exclusion may be justified on a consumer protection rationale for IAs, CPOs and CTAs which, together with their principals, are registered with the New York Bureau of Securities, the United States Securities and Exchange Commission or the United States Commodity Futures Trading Commission, such justification would not extend to unregistered IAs, CPOs and CTAs. NYSBA has suggested that the New York legislature's decision to exempt IAs, CPOs and CTAs from the name disclosure requirement was not due to any consumer protection rationale, but was rather due to a threat by such advisors and pool operators to cease doing business in New York if subject to the name disclosure requirement while operating through an LLC or LP.

¹⁰ The Publication Law provides that changes in the compositions of the LLC, LP or LLP's owners need not be disclosed after completion of the first weekly publication. The New York County Lawyers' Association ("NYCLA") has observed that this is a critical flaw, given the Publication Law's stated rationale of consumer protection through forced disclosure of the names of "unscrupulous business people who conduct their affairs with immunity from personal liability under the guise of a business name that imparts no information as to the true identity of the person behind the name." NYCLA has argued that investors seeking to avoid disclosure of their names may simply appoint nominees to hold their shares or form entities with unrevealing names to hold their equity interests until after publication of the first weekly notice.

¹¹ The chapter amendment eliminates the requirement that LLCs, LPs and LLPs identify their largest interest holders, but restores the mandated publication period to six weeks (instead of four). Moreover, the chapter amendment replaces the existing sanction for failure to comply (suspension of authority to conduct business in New York) with a new sanction: individual members or limited partners of non-complying LLCs, LPs and LLPs will be subject to joint and several personal liability for the debts, obligations and liabilities of those entities. This new sanction in effect nullifies LLCs, LPs and LLPs' limited liability status. However, the chapter amendment also provides that once compliance is achieved, any personal liability of members or limited partners, whether incurred prior to or during the non-compliance period, is expunged.

Schedule A

Chart of Required Disclosures Under the Publication Law

	Limited Liability Companies	Foreign Limited Liability Companies	Professional Service Limited Liability Companies	Foreign Professional Service Limited Liability Companies	Limited Partnerships	Foreign Limited Partnerships	Registered Limited Liability Partnerships	Foreign Limited Liability Partnerships
Entity Name	Y	Y	Y	Y	Y	Y ¹	Y	Y
Filing Date of Formation Documents	Y	Y	Y	Y	Y	Y	Y	Y
County within New York in which Entity's Office is Located	Y	Y	Y	Y	Y	Y	Y	Y
Street Address of Entity's Office Location (or Statement that Street Address has not yet been Determined) ²	Y	Y	Y	Y	Y	Y	Y	Y
Date of Organization	Y	Y	N	Y	N	Y	N	Y
Jurisdiction of Organization	N	Y	N	Y	N	Y	N	Y
Statement Designating the New York Secretary of State as Process Agent plus Address for Secretary to Mail any Process Served	Y	Y	Y	Y	Y	Y	Y	Y
Name and Address of any Registered Agent	Y	Y	Y	Y	Y	Y	Y	Y

¹ Foreign LPs, in addition to disclosing their names, are also required to divulge any fictitious names under which they have applied for authority to do business in New York.

² Under the proposed chapter amendment to the Publication Law, the requirement to disclose the LLC, LP or LLP's office street address (or to include a statement that the street address has not yet been determined) is replaced with a requirement to disclose the LLC, LP or LLP's principal business location.

	Limited Liability Companies	Foreign Limited Liability Companies	Professional Service Limited Liability Companies	Foreign Professional Service Limited Liability Companies	Limited Partnerships	Foreign Limited Partnerships	Registered Limited Liability Partnerships	Foreign Limited Liability Partnerships
Statement Identifying Agent as Entity's Registered Agent Upon Whom Process may be Served	Y	Y	Y	Y	Y	Y	Y	Y
Names of up to Ten Investors Actively Engaged in the Entity's Business Who Have the Most Valuable Membership Interests	Y	Y	Y	Y	Y	Y	Y	Y
Statement Disclaiming Personal Liability for Disclosed Investors	Y	Y	Y	Y	Y	Y	Y	Y
Latest Specific Date of Planned Dissolution (if any)	Y	N	Y	N	Y	N	Y	N
Statement that the Names and Business or Residence Addresses of all General Partners are Available from the New York Secretary of State	N	N	N	N	Y	Y	N	N
Entity's Character or Purpose	Y	Y	Y	Y	Y	Y	Y	Y
Address of Office in Entity's Home Jurisdiction or Principal Office	N	Y	N	Y	N	Y	N	Y
Name and Address of Authorized Officer in Home Jurisdiction or Statement Regarding Availability of Copies of Formation Documents	N	Y	N	Y	N	Y	N	Y