

Client Alert

New York Amends Newspaper Publication Requirements Applicable to Limited Liability Companies and Other Entities

Under current provisions of New York law, certain business entities formed or authorized to do business in New York, including limited liability companies, limited partnerships and registered limited liability partnerships, must publish a notice for six consecutive weeks within 120 days of formation. The State of New York has recently enacted Chapter 767, new legislation that amends these publication rules in several important respects. Failure to comply with the new publication rules, which become effective June 1, 2006, will result in the suspension of the entity's authority to transact business in New York.

One of the most significant changes to the form of notice required to be published is the inclusion of the names of the 10 persons (a) who are actively engaged in the business and affairs of the business entity, and (b) who have the most valuable ownership interests (however, the statute does not define the terms "actively engaged" or "most valuable"). This new disclosure requirement does not, however, apply to investment advisors. It should also be noted that once the first of four weekly notices has been published, subsequent changes to any of the information covered in the notice will not require an additional publication.

Under the new rules, the number of weeks that the notice must be published has been reduced from six to four. Proof of compliance with the new notice provisions must be filed with the Department of State within 120 days after formation or the filing of an application for authority to do business in New York. Under the new rules, proof of publication will consist of a certificate of publication provided by the entity and an affidavit of publication provided by the applicable newspapers.

Under the new rules, failure to file such proof of publication with the Department of State within 120 days will now result in suspension of the entity's authority to conduct business within New York. However, a suspension would not limit the validity of any contract or act of the business entity and it would remain subject to suit, although it would not be allowed to bring a claim on its own behalf (the inability to bring a claim is the penalty for noncompliance under the existing rules). Upon compliance with the publication requirement, such suspension will be annulled.

Impact on Limited Liability

There is concern that if an entity's authority to conduct business has been suspended, the continued conduct of business might be viewed as performed by an association of persons, rather than the entity. Such an interpretation may consequently expose such persons to personal liability for the entity's debts and liabilities.

On March 22, 2006, a bill that would amend Chapter 767 was referred to the Committee on Corporations, Authorities and Commissions of the New York State Assembly. The amendment provides that failure to comply with the publication requirements would expose each member or partner to personal liability, jointly and severally with the business entity and each other member or

partner for all debts, obligations and liabilities of the entity incurred or arising at any time before or after the failure to fully comply with the law, with such exposure continuing until such time as the publication requirement is fully satisfied. While this proposal has not yet been adopted by the state legislature, the severity of the penalties associated with a failure to comply with Chapter 767 seems out of proportion with the failure to satisfy the publication requirement.

Existing Entities

Entities that were, or will be, formed prior to June 1, 2006 remain subject to the rules in existence prior to such effective date. However, an entity that has not previously complied with the publication requirement in existence at the time of its formation, subject to certain exceptions, must file such proof of publication with the Department of State by December 1, 2007. Failure to file will result in the suspension of such entity's authority to conduct business.

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For Additional Information

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