

Stellar Corporate Services LLC

ALERT!

Changes to Business Entity Publication Requirements

On February 3, 2006, New York Governor George Pataki signed into law Senate Bill No. 85-A. The new law amends the current limited liability company law and partnership law, among others, relating to publication requirements for certain business entities.

When does the law take effect?

- The new law becomes effective on June 1, 2006 ("Effective Date")

Who does the law effect?

- All limited liability companies
- All foreign limited liability companies
(e.g: LLC formed in Delaware and qualified to do business in New York)
- All professional service limited liability companies
- All foreign professional service limited liability companies
- All limited partnerships
- All foreign limited partnerships
(e.g: LP formed in Delaware and qualified to do business in New York)
- All limited liability partnerships
- All foreign limited liability partnerships

What are the new publication requirements?

- Within one hundred twenty (120) days after establishment of a business entity, the entity will be required to publish once each week for four successive weeks, in two newspapers of the county in which the office of the limited liability company is intended to be located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk. The existing statute requires entities to publish once in each week for six successive weeks and did not require that one newspaper is printed weekly and one newspaper is printed daily.
- The notice of publication must now include the names of the ten persons (or fewer persons) who are actively engaged in the business and affairs of the entity and have the most valuable membership interests. Excluded from this disclosure* is an entity which is: (i) an investment adviser as defined in the Investment Advisers Act of 1940 or a commodity pool operator or commodity trading advisor as defined in the Commodity Exchange Act, or (ii) a collective investment vehicle or any direct or indirect subsidiary and affiliates thereof sponsored, advised or managed by an investment adviser, commodity pool operator or commodity trading advisor as set forth in item (i) of this sentence. The existing statute did not require this information in the notice of publication.
- A business entity must now prepare and complete a certificate of publication, executed under penalties of perjury and file the certificate of publication with the Department of State along with the affidavits of publication from the newspapers. The certificate of publication must include the information that the newspapers described in the affidavits of publication satisfy the requirements set forth by law and the designation made by the county clerk. The existing statute did not have a certification requirement by the entity.

**This exclusion applies to domestic and foreign limited liability companies, domestic and foreign professional service limited liability companies, and domestic and foreign limited partnerships but not domestic and foreign limited liability partnerships.*

What happens if a business entity fails to follow the publication requirements?

- For business entities formed after the Effective Date, if no proof of publication is filed with department of state within one hundred twenty (120) days after establishment of the entity, the entity's authority to carry on, conduct or transact business in New York State shall be suspended, effective as of the expiration of such one hundred twenty (120) day period. If, at any time following the suspension of an entity's authority to carry on, conduct or transact business, if such entity's complies with the new publication requirements (other than the one hundred twenty day (120) period), such suspension shall be annulled. The existing statute provided that failure to publish would prohibit the entity from maintaining any action or special proceeding in New York State.
- For business entities formed prior to the Effective Date, which did not comply with the publication and filing requirements when formed, and such entity does not comply with the new publication requirements within eighteen (18) months from the Effective Date, it will be suspended, effective as of the expiration of such eighteen (18) month period. If, at any time following the suspension of an entity's authority to carry on, conduct or transact business, if such entity complies with the new publication requirements, such suspension shall be annulled.

How does this effect business entities formed prior to June 1, 2006?

- Business entities formed prior to the Effective Date, which complied with the publication and filing requirements in effect prior to the Effective Date, shall not be required to make any additional publication or re-publication under the new law.
- Business entities formed prior to the Effective Date, which did not comply with the publication and filing requirements, have eighteen (18) months from the Effective Date to publish under the requirements of the new law.
- Business entities formed between January 1, 1999 and the Effective Date are in compliance if the business entity filed at least one affidavit of the printer or publisher of a newspaper with the department of state at any time prior to the Effective Date.
- Business entities formed prior to January 1, 1999 are deemed in compliance without regard to whether the entity did or did not file any affidavit of the printer or publisher of a newspaper with the Secretary of State.

Effects of the proposed amendment to the new law:

There is a proposed amendment to the new law. The relevant proposed changes to the new law contained in the amendment are as follows:

- Business entities will be required to publish once in each week for six successive weeks, not for four successive weeks as required by the new law.
- Business entities will not be required to include the names of the ten persons (or such fewer persons) who are actively engaged in the business and affairs of the entity and have the most valuable membership interests in the notice of publication.
- Business entities formed prior to the Effective Date, which did not comply with the publication and filing requirements, will have one hundred twenty (120) days, not eighteen (18) months, from the Effective Date to publish under the requirements of the new law.
- If a business entity formed after the Effective Date fails to comply with the new publication and filing requirements within one hundred twenty (120) days after establishment of the entity or if a business entity formed prior to the Effective Date, which did not comply with the publication and filing requirements, fails to comply with the new publication and filing requirements within one hundred twenty (120) days from the Effective Date, each member of a domestic or foreign limited liability company or a professional service limited liability company, or each limited partner of a domestic or foreign limited partnership or each partner of a domestic or foreign limited liability partnership, shall be personally and fully liable, jointly and severally with such entity and with each other member, limited partner, or partner if any, of such entity, for all debts,

obligations and liabilities of such entity incurred or arising at any time before or after such failure and the entity will not be suspended. However, if an entity subsequently complies with the publication and filing requirements (other than the requirement that such publication and filing be completed within the one hundred twenty (120) day period), the above mentioned liability shall not apply to such entity or to the members, limited partners, or partners of such entity for failure to publish.

Conclusion

- The most relevant changes imposed by the new law are that the notice of publication must now include the names of the ten persons, or such lesser number, who are actively engaged in the business and affairs of the entity and have the most valuable membership interests and if an entity fails to publish, the entity's authority to carry on, conduct or transact business in New York State will be suspended. We do not know what the practical effect of "suspension" will be and there is no case law on this issue. The pending amendment, if enacted, will delete the name requirement from the notice of publication and the suspension language but adds personal liability for the members, limited partners or partners of an entity for failure to publish.
- Therefore, we recommend that you discuss with your clients who have already formed an entity but have not complied with the publication requirements now in effect, that they publish their entity before the Effective Date to avoid the consequences arising from the uncertainty of the new law and proposed amendment, including potential personal liability.

Contact Information

If you have any questions concerning this Alert, please contact:

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