

**NEW YORK FURTHER AMENDS NOTICE PUBLICATION LAWS
FOR LIMITED LIABILITY ENTITIES AUTHORIZED TO
CONDUCT BUSINESS WITHIN THE STATE**

On May 31, 2006, New York State enacted new legislation further amending its laws governing notice publications (the “New Legislation”) for certain limited liability business entities, including foreign limited liability entities that are considered to be doing business within New York State.¹ The New Legislation supersedes an earlier amendment to the publication requirements that was signed into law on February 3, 2005 and was to become effective on June 1, 2006 (the “Original Amendment”), and will similarly become effective June 1, 2006 (the “Effective Date”). In contrast with the Original Amendment, the New Legislation will not require disclosure of the identities of owners and clarifies that the limited liability protection of individual members, managers, partners or agents will not be affected by a failure to publish. As in the Original Amendment, the New Legislation will increase the consequences for entities formed on or after the Effective Date that do not properly file proof of notice publication.

I. The New Standard

Beginning on the Effective Date, limited liability entities will have 120 days after their articles of organization are deemed effective or, for foreign entities doing business in New York State, 120 days after they have filed their application for authority with the New York Department of State, to publish the substance of such articles or application for authority and to file proof of such publication. Publication is to occur once per week for six consecutive weeks in two newspapers (one weekly newspaper and one daily newspaper) in the county in which the office of the entity is located. This increases the four-week publication requirement that was contemplated by the Original Amendment and reinstates the six-week requirement of the law previously in effect. After publication is complete, proof of publication must be filed with the New York Department of State.² Such proof is to consist of affidavits from each publisher affixed to a completed form of “certificate of publication.”

¹ The New Legislation pertains to limited liability companies (including foreign limited liability companies, professional service limited liability companies and foreign professional service limited liability companies), limited partnerships (including foreign limited partnerships) and limited liability partnerships (including foreign limited liability partnerships and registered limited liability partnerships).

² The forms of the certificate and affidavit of publication vary slightly depending on the type of entity and are contained within the New Legislation. These more specific forms of certificate and affidavit replace the previous requirement that affidavits of the printers or publishers of the newspapers be filed with a copy of the publication affixed thereto.

By eliminating the Original Amendment's requirement that limited liability entities publish membership information, the New Legislation's principal change to the law in effect prior to the Effective Date (without giving recognition to the Original Amendment) is that entities failing to comply with the New Legislation requirements within a statutory "grace period" will have their authority to carry on, conduct or transact business within New York State suspended (each such occurrence, a "Suspension").

A. Information to Be Included in Post-Effective Date Publications

The New Legislation maintains the current information requirements for notice publications.³ It adds a new requirement that the street address of the principal place of business, if any, must be included. Unlike under the Original Amendment, however, entities will no longer be required to disclose the names of up to ten persons holding the most valuable membership or partnership interests in the entity.

B. The Effect of Failure to Publish or File Notice

Under the law in effect prior to the Effective Date, the failure to file proof of publication resulted in a prohibition against the noncompliant entity's availing itself of the New York State courts to maintain an action or special proceeding prior to complying. However, under the New Legislation, such entity faces Suspension. Suspension will occur automatically upon the conclusion of the 120-day postformation window for all entities formed on or after the Effective Date. This Suspension will not impair or limit the validity of existing contracts or acts of the entity, or limit the rights of other parties to seek remedies against the noncomplying party. Suspension will also not impair or limit the right of such entity to defend in any action or special proceeding brought against it in New York State. It is not clear at this time what effects Suspension may have on individual entities.

³ Information currently required to be disclosed for domestic entities includes (i) the name of the entity; (ii) the date of filing the articles of organization or the date of formation of the entity; (iii) the county where the office of the entity is to be located; (iv) a statement that the secretary of state has been designated as the entity's agent upon whom process may be served and the post office address to which the secretary of state shall mail a copy of any process served against the entity; (v) the name and address of any registered agent of the company upon whom process may be served; (vi) any specific date of dissolution; and (vii) the character or business of such entity. Foreign entities publishing will additionally have to include (i) the date of filing the application for authority and the jurisdiction of organization; (ii) a statement that the secretary of state has been designated as the agent of the entity upon whom process may be served and the post office address to which the secretary of state shall mail a copy of any process served against the entity; (iii) the name and address of any registered agent within New York State and a statement that the registered agent is the agent against whom process may be served; (iv) the address of the office required to be maintained in its home jurisdiction, or, if none is required, the principal office; and (v) the name and address of the authorized officer in its home jurisdiction where a copy of its certificate of organization is filed, or, if no such public filing is required, a statement that the entity shall provide a copy of such documents upon request along with a copy of all amendments thereto.

The New Legislation does not contain the provision included in a previously proposed amendment that would make members or limited partners personally and fully liable, jointly and severally, with the entity and with each other member or limited partner for the debts, obligations and liabilities of the entity arising after the Effective Date in the event of a failure to comply with the publication requirements.

II. Grandfathered and Exempted Entities

Limited liability entities that were formed prior to the Effective Date and that have complied with the requirements in effect at the time of their formation need not make additional filings and will not be subject to Suspension. For noncompliant entities formed prior to the Effective Date, a “grace period” of 12 months will apply within which noncompliant entities formed prior to the Effective Date will further avoid Suspension. This 12-month period is shorter than the 18-month period contemplated by the Original Amendment but still allows for adequate time to comply with the new requirements. Within this time period, the entities may publish the required information in the manner required (other than the requirement that publication occur within 120 days) in compliance with the laws in effect prior to the Effective Date and file proof of such publication. In other words, by publishing within the grace period, companies will avoid any change in publication requirements imposed by either the Original Amendment or the New Legislation. Failure to take these steps during such “grace period” will result in Suspension immediately upon conclusion of the 12-month period.

The New Legislation grants further relief for entities formed prior to the Effective Date but not in technical compliance with the statute. Limited liability entities formed prior to January 1, 1999 will be deemed to have complied with the notice and publication requirements without regard to whether any affidavit of the printer or publisher was filed. For entities formed between January 1, 1999 and the Effective Date, compliance will be deemed to have occurred if at least one printer's or publisher's affidavit was filed prior to the Effective Date.

III. Further Curative Provisions

In the event that an entity organized after the Effective Date does have its authority to do business suspended upon conclusion of the 120-day filing period, this Suspension will be annulled upon that entity's filing of proof that publication has occurred in compliance with all provisions of the New Legislation other than the timing of the publication. The same will be true for entities currently in existence that fail to come into compliance prior to the end of the 12-month post-Effective Date grace period, although after the expiration of the grace period these entities will have to comply with the New Legislation requirements.

After the initial publication has occurred, companies will be under no obligation to amend the contents of publication if the information contained therein has changed. There is similarly no requirement that companies correct information that has changed after the conclusion of publication and filing of proof.

IV. Commentary

The New Legislation substantially scales back the greater publication content burden that was to have been imposed by the Original Amendment. The New Legislation, however, does provide for potentially harsher consequences than the law in effect prior to the Effective Date in the event that a limited liability entity fails to comply with publication requirements. While the ultimate consequences of a Suspension are unclear, due to the potentially harsher penalties that would be imposed it is important that all entities that are or will be organized in New York or that conduct or intend to conduct business within New York take the necessary steps to publish notice of their organization and file subsequent proof of such publication within the applicable time periods.

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If you have any questions about the new publication requirements, please contact Daniel Schloendorn (212-728-8265, dschloendorn@willkie.com), Robert Blaustein (212-728-8797, rblaustein@willkie.com), or the attorney with whom you regularly work.

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