

## Changes to New York State Publication Requirements for Non-Corporate Entities

July 20, 2006

On June 1, 2006, a number of changes in the publication requirements under New York State law applicable to several different kinds of non-corporate entities became effective.<sup>1</sup> This memorandum briefly summarizes the new requirements and discusses the applicability of the new requirements to various entities organized in the State of New York (domestic entities) as well as various non-corporate entities organized in states other than New York or outside of the United States (foreign entities). The changes to the publication requirements are significant as the consequences of non-compliance will now include suspension of the business entity's ability to "carry on, conduct, or transact any business" in the State of New York.

### AFFECTED ENTITIES

The revised publication requirements affect the following domestic and foreign entities that are doing business in the State of New York:

- limited liability companies (LLCs);
- limited partnerships (LPs);
- limited liability partnerships (LLPs); and
- professional service limited liability companies (PLLCs).

### SUMMARY OF PUBLICATION REQUIREMENTS

Newly formed domestic entities and foreign entities which file an application for authority to do business in the State of New York must comply with the following requirements within 120 days of their formation or application for authority, as the case may be:

---

<sup>1</sup> N.Y. LTD. LIAB. CO. LAW §§ 206, 802(b), 1203(c)(2), and 1306(d); N.Y. P'SHIP LAW §§ 121-201(c), -902(d), -1500(a)(II), and -1502(f)(II).

- Publish a weekly notice of formation or application for authority in one daily and one weekly newspaper designated by the county clerk of the county where the office of the entity is located for a period of six successive weeks.<sup>2</sup> The notice must include the following information:
  - Ø Name of the entity;
  - Ø Date of formation (usually the date when the relevant formation documentation was filed with the Department of State) or the date of filing of the application for authority with the Department of State;
  - Ø County in New York State where the entity is located (including street address of principal business location);
  - Ø Statement confirming that the Secretary of State has been designated as the agent for service of process of the entity and the address therefor;
  - Ø Name and address of registered agent within the state of New York (if there is one);
  - Ø Information regarding the jurisdiction of organization (foreign entities only);
  - Ø Statement verifying the availability of names and addresses of general partners (limited partnerships only); and
  - Ø Character or purpose of the business.
- File a proof of the publication with the New York Department of State, consisting of the following information:
  - Ø Certificate of publication; and
  - Ø Affidavits of publication by the printer or publisher of the two newspapers described above.<sup>3</sup>

#### PENALTY FOR NONCOMPLIANCE

Failure to submit the proof of publication to the Department of State within the 120 day period described above will result in the suspension of the entity's ability to "carry on, conduct, or transact

---

<sup>2</sup> The statutes generally provide that if any of the information contained in the required notices changes at any time after the first notice is published, the notifying entity need not update the information.

<sup>3</sup> See N.Y. LTD. LIAB. CO. LAW §102(a-1); N.Y. P'SHIP LAW §121-101(a-1) for format of the affidavits.

any business” in the State of New York.<sup>4</sup> The suspension becomes effective at the end of the 120 day period. The suspension, however, does not (i) result in any of the entity’s members, managers, limited partners or agents, as the case may be, becoming liable for the entity’s contractual obligations or other liabilities or (ii) invalidate any contract or act of such entity or any rights and remedies attached thereto. Once the entity files the proof of publication, the statutes provide for the suspension to be lifted.

#### RETROACTIVITY OF THE NEW RULES

The changes in publication requirements do not impact all entities equally:

- The new rules are fully applicable to domestic and foreign LLCs, PLLCs, LPs, and LLPs which are formed on or after June 1, 2006.
- The new rules are deemed to have been satisfied by all subject entities formed prior to January 1, 1999 regardless of whether the entity had actually published notice of formation or filed proof of publication with the Department of State.
- Domestic and foreign LLCs, PLLCs, LPs, and LLPs formed on or after January 1, 1999, but prior to June 1, 2006 are deemed to have satisfied the new publication requirements if the entity filed at least one affidavit of the printer or publisher of the newspaper with the Department of State before June 1, 2006. If the subject entity failed to make such submission, then it has twelve months to publish a notice according to the rules prior to June 1, 2006 and to submit the proof of publication, consisting of the certificate of publication and the affidavits of publication. If the subject entity fails to submit the proof of publication within twelve months after June 1, 2006, it shall be suspended from carrying on, conducting, or transacting business in the State of New York.

#### APPLICABILITY OF THE NEW RULES TO FOREIGN ENTITIES

The new publication requirements apply to foreign entities that are qualified in the State of New York.<sup>5</sup> All foreign entities that plan on “doing business” in the State of New York must obtain

---

<sup>4</sup> The suspension of an entity’s authority to carry on, conduct or transact business is one of the most significant changes from the old regime although the full impact of this development is not certain at this time. Prior to June 1, 2006, failure to satisfy the publication requirements resulted only in the prohibition of maintaining any legal action or proceeding in the State of New York. We believe that this prohibition will continue to apply to entities that fail to comply with applicable publication requirements.

<sup>5</sup> N.Y. LTD. LIAB. CO. LAW §§ 802(b) and 1306(d); N.Y. P’SHIP LAW §§ 121-902(d) and - 1502(f)(II).

authority to do business in New York by filing an application for authority with the Department of State.<sup>6</sup>

While there is no statutory definition of what constitutes “doing business” in New York, whether a particular activity constitutes “doing business” has been considered on a case by case basis by New York courts.<sup>7</sup> Summarizing case law, the New York Department of State Counsel’s Office has stated that in order for an activity to be considered as “doing business,” the activity generally must be permanent, continuous, regular, vital, and essential to the organization’s business.<sup>8</sup>

In addition, Section 803 of the New York limited liability company law<sup>9</sup> provides additional guidance as to what activities do not amount to “doing business.” A nonexclusive list of four such activities includes:

- maintaining or defending any judicial, administrative, or arbitral action or proceeding, or effecting settlement of claims or disputes;
- holding meetings of its members or managers;
- maintaining bank accounts; or
- maintaining offices or agencies only for transfer, exchange and registration of its membership interests or appointing and maintaining depositories with relation to its membership interests.<sup>10</sup>

It appears that the new publication rules will not affect the legal status of those foreign entities whose activities in the State of New York are limited to maintaining a paying agent, registrar or similar agent in connection with securities issued by such foreign entities in the State of New York.

Commentators have suggested that “[a] foreign corporation may issue and sell its shares, bonds, or other securities in New York without being authorized to do business in the state.”<sup>11</sup> While no court

---

<sup>6</sup> N.Y. LTD. LIAB. CO. LAW §§ 802(a) and 1306(a)-(b); N.Y. P’SHP LAW §§ 121-902(a) and -1502(a).

<sup>7</sup> New York Department of State Counsel’s Office, “Doing Business” in New York: An Introduction to Qualification, available at [http://www.dos.state.ny.us/cnsl/do\\_bus.html](http://www.dos.state.ny.us/cnsl/do_bus.html).

<sup>8</sup> Id.

<sup>9</sup> See also N.Y. P’SHP LAW § 121-902(b).

<sup>10</sup> The fourth activity is not listed as not “doing business” for foreign limited liability partnerships. N.Y. P’SHP LAW § 121-1502(b).

<sup>11</sup> See WHITE, NEW YORK BUSINESS ENTITIES § B1301.03(2) (2005).

has ruled on whether maintaining a paying agent, a registrar or a similar agent amounts to “doing business” in New York (which would subject such entity to qualification and publication requirements), the Supreme Court of New York held that such activities alone are not sufficient to subject a foreign entity to jurisdiction of New York courts.<sup>12</sup> The New York Department of State Counsel’s Office has stated that in order to require a foreign entity to obtain authority to do business in New York State, a higher level of contact is necessary than that required to subject a foreign entity to jurisdiction of New York courts or taxation in the State of New York.<sup>13</sup>

Accordingly, if maintaining a paying agent or registrar is not sufficient to provide jurisdiction over a foreign entity and if obtaining authority to do business has a higher contact requirement than being subject to jurisdiction, it can be inferred that such activities should not amount to “doing business” in New York State and should not result in the foreign entity becoming subject to the new publication requirements.

This memorandum is for general information purposes only and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate developments, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).

---

<sup>12</sup> See *Grossman v. Sapphire Petroleums Ltd.*, 195 N.Y.S. 2d 851 (1959) (“The courts of this state do not have jurisdiction over a foreign corporation which is not qualified to do business within the state where the only connection with the state is the maintenance of a fiscal agent under an indenture to act as a paying agent of interest on its debentures, or as a registrar, transfer agent, or conversion agent for its debentures”).

<sup>13</sup> New York Department of State Counsel’s Office, “Doing Business” in New York: An Introduction to Qualification, available at [mailto:http://www.dos.state.ny.us/cnsl/do\\_bus.html](mailto:http://www.dos.state.ny.us/cnsl/do_bus.html).