

April 10, 2006

Memorandum to Our Clients and Friends

Amended New York Publication Requirement

Introduction. On February 3, 2006, Governor Pataki signed into law Chapter 767 of the Laws of 2006 (the “New Law”) which amended the publication requirement for limited liability companies and limited partnerships formed or qualified to do business in New York (“Entities”). The New Law takes effect on June 1, 2006.

Ramifications for Entities Failing to Publish. Under the New Law, if an Entity fails to comply with the publication requirement within 120 days of its formation or qualification, *the Entity’s authority to conduct business in the State of New York will be suspended*, which, we understand, means that the Department of State will not issue a Good Standing Certificate to anyone seeking a status report regarding the Entity’s authority to conduct business in the State. Note that a Good Standing Certificate or a representation that an Entity is in good standing is often requested by: banks and other counterparties; clients in managed accounts or under investment advisory agreements; and investors conducting due diligence on the Entity. The New Law, however, states further that the validity of any contracts entered into by the Entity will not be impaired or limited by such suspension. (If at any time following the suspension of an Entity’s authority to conduct business, such Entity shall cause proof of publication to be filed with the Department of State, such suspension shall be annulled.) It also appears that, as in the past, the suspended Entity will be unable to maintain an action or special proceeding in the State courts. **Finally, a chapter amendment to the New Law has recently been proposed which would reinstate many of the publication requirements that were in effect prior to the New Law and would result in the removal from a non-complying Entity of its limited liability protection and the imposition of joint and several liability on its partners/members, until the Entity comes into full compliance (although the ramifications of such temporary loss of limited liability protection remain unclear).**

Publication Requirements. The New Law amends the publication requirements as follows¹:

- A notice must be published once a week for four weeks.
- The current requirement that a notice be published in two newspapers designated by the appropriate county clerk is further clarified to require publication in one newspaper of weekly circulation and one of daily circulation.
- The current content requirements of the notice have been significantly expanded to require the full street address of the entity, *as well as disclosure of the names of the ten persons (or fewer) who are actively engaged in the business affairs of the Entity and who*

¹ Entities formed on or after January 1, 1999 and prior to June 1, 2006 that are not currently in compliance will have until December 1, 2007 to publish as required under the current law and to file a certificate of publication as required under the New Law.

are members or partners (as applicable) of the Entity having the most valuable membership or partnership interests (as applicable), as well as a statement regarding the personal liability of such persons. The New Law, however, does provide a broad exemption from the ten person requirement for: (i) an investment adviser as defined in the Investment Advisers Act of 1940²; (ii) a commodity pool operator or commodity trading advisor as defined in the Commodity Exchange Act; and (iii) 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 defined above.

- The current cost of publication for an Entity located in New York County is approximately \$1,350. In other counties, costs are lower. Costs under the New Law may be slightly higher due to filing the Certificate of Publication at the Department of State.

We encourage you to contact an attorney or paralegal at Seward & Kissel to discuss the entities for which publication may be required and to determine your current publication status. If you are unsure of the name of the paralegal responsible for your entities, please contact Diane Schmierer, Andrew Rowan or Sue Schneider and they will direct you to the appropriate paralegal.

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² An “investment adviser” under the Investment Advisers Act essentially means any person, who, for compensation, engages in the business of advising others, either directly or through publications and writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. *Note that the investment adviser is not required to be federally or state registered in order to take advantage of this exemption, but rather simply must meet the above definition.*