

**The Association of the Bar of the City of New York  
42 West 44<sup>th</sup> Street  
New York, New York 10036**

**Committee on Corporation Law**

June 29, 2005

The Honorable George E. Pataki  
Governor  
Executive Chamber  
State Capitol  
Albany, New York 12224

Re: S.00085-A and A.7383 – Opposition to Certain Amendments to  
the Limited Liability Company Law and the Partnership Law  
Relating to Publication of Notices

Dear Governor Pataki:

The Committee on Corporation Law of the Association of the Bar of the City of New York (the “Committee”) is composed of lawyers in governmental agencies, academia, public and private companies and private practice whose interests and practice involve corporations, limited partnerships, limited liability companies and other business enterprises.

The Committee opposes S.00085 and A.7383, which would amend the publication requirements applicable to foreign and domestic limited liability companies, limited partnerships and limited liability partnerships. Among other things, these bills would (i) require the publication of the names of the ten persons having the most valuable membership or partnership interests in the limited liability companies or limited partnerships, as the case may be, and (ii) suspend a subject entity’s authority to carry on, conduct or transact any business in the State of New York if the entity fails to timely file its affidavit of publication. These bills would also impose the suspension penalty on existing entities which have failed to publish and have not cured such failure through publication within a cure period.

These amendments would have significant and serious consequences for individuals, professionals and businesses conducting business, or otherwise utilizing such entities, in the State of New York. Moreover, the Committee believes that the increased publication requirements of these bills are highly unlikely, as a practical matter, to provide increased protection for consumers. In fact, for reasons discussed in more detail below, the Committee suggests that the only true benefactors of the bills are the newspapers in

which the formation notices will be published. Indeed, for instance, even though the sponsors of the bills would point to the reduction of the publication period from six weeks to four weeks, for reasons explained below the aggregate cost of publication under the new bills is likely to increase due to the requirement that additional information be published.

### **The Bills Are Unlikely To Enhance Consumer Protection**

The Introducer's Memorandum in Support of Senate bill S.00085-A claims that disclosure of the ten persons who are actively engaged in the business and affairs of the entity "will now provide consumers with the information they need to protect themselves from unscrupulous business people who conduct their affairs with immunity from personal liability under the guise of a business name that imparts no information as to the true identity of the persons behind such name."

The Introducer's claim does not withstand scrutiny. The legal entities that would be subject to the publication requirements of the proposed legislation would be formed long before any consumer will have any commercial dealings with the entity. It strains credulity to suggest that consumers will read "notices or advertisements" regarding new entities at the time of their formation, long before the consumer would have any reason to know of (or have reason to be concerned about) the existence of such an entity. Moreover, publication is required in various newspapers whose selection is determined by the county clerks of the county involved. There are 62 counties in the state of New York. Publication could possibly be made in newspapers in any of these 62 counties. The bills apparently contemplate that concerned consumers would read the classified advertising, on a daily basis, in all newspapers that might be selected by the appropriate county clerk to learn about entities that the consumer might foreseeably deal with in the near or distant future. That seems highly unlikely.

Not only that, but the so-called "disclosure" required by the bills belies the professed consumer protection purpose of the proposed legislation. The bills require disclosure of "the names of the ten persons (or fewer) who are actively engaged in the business and affairs of the limited liability company and who are members of the limited liability company having the most valuable membership interests, as defined."

Furthermore, the Introducer's Memorandum refers to disclosure of the "real name of the ten persons", "the true identity of the persons. . .", "the name and address of persons", "requiring up to 10 individuals. . .to disclose their name. . ." However, the following should be noted:

1. None of the above-quoted phrases find support in the bills.
2. A "Person" is defined in LLC Law Section 202 to mean any "association, corporation. . .limited liability company. . .limited partnership, natural

person. . . or any other individual or entity in its own or any representative capacity.”

3. The new legislation makes clear that after the completion of the first weekly publication if there is a change in any of the information in the notice (e.g., the persons with the most valuable interests), no further or amended publication would be required.

Thus, far from ensuring any meaningful disclosure, the bills provide a number of loopholes that would allow sophisticated business persons desiring to avoid disclosure to establish holding companies, shelf companies, or “straws” before actually engaging in business in New York, or companies could be initially formed with “dummy” members who would be replaced by “real” members after the initial publication, thus , in each case, avoiding any realistic disclosure.

### **The Bills Are Likely To Result In Increased And Unnecessary Costs To Do Business In The State Of New York**

Supporters of the bill have also claimed that the reduction in the number of weeks from six to four will reduce the expense of publication. While the number of weeks may be reduced, the actual cost of publication is likely to be increased. The bills will require additional information, which will increase the cost of publication each week: namely, the names of the ten persons (or fewer) who have the most valuable interests, the number and street address of the new entity, and a statement, several lines long, regarding personal liability:

“The inclusion of the name of a person in this notice does not necessarily indicate that such person is personally liable for the debts, obligations or liabilities of the limited liability company and such person’s liability, if any, under applicable law is neither increased nor decreased by reason of this notice.”

The cost of publication, including the payments to the newspapers, filing of affidavit of publication, and fees to the service company or companies involved can be significant, in fact, prohibitive to small businesses. These costs presently range from \$1,300 to \$2,300 depending on the newspaper selected by the county clerk and the length of the notice. This is six to ten times the amount that is paid to the Department of State for organizing the entity! Many small businesses (and in some instances even large enterprises) have, in the past, deferred publication by reason of these exorbitant costs, perhaps intending to publish if necessary in order to maintain an action or proceeding in the state. This is a cost that is not imposed by any other state and it serves as a material deterrent to new businesses that might otherwise organize or do business in New York.

Also, the new legislation would work a particular hardship on microentrepreneurs who often support themselves with other jobs while developing their small businesses. Many

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of these people operate in low-income neighborhoods. For them, the limited liability company framework would normally be the ideal form to adopt. However, the cost of the publication requirement may preclude many microentrepreneurs from using the limited liability form and availing themselves of the benefits and protections limited liability status would provide.

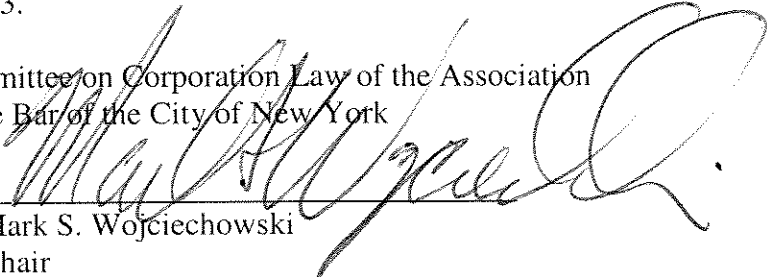
**The Bills Are Likely To Result In Increased And Uncompetitive Risks And Liabilities For Existing Entities Doing Business In New York**

Furthermore, the bills would severely increase the proposed penalty for non-publication, both for new entities and for entities that had failed to publish before the effective date of these bills, and cure such failure, by suspending the entity's authority to carry on, conduct or transact any business in the state of New York. This suspension would be automatic, without notice. The consequences of such suspension are unclear; however, lawyers familiar with partnership law have expressed concern that persons who thought they were conducting business as members of a limited liability company or as limited partners in a limited partnership or partners in a limited liability partnership would lose the protection of the limited liability entity and become "an association of two or more persons to carry on, as co-owners, a business for profit." This is the classic definition of a partnership without limited partners. As a result, such persons would have unlimited joint and several liability. This horrendous consequence should not be risked in order to increase revenues to the State's newspapers. This trap for the unwary is more likely to affect small businesses, or professional firms, forming an entity in New York, not using counsel, or using counsel who might be unaware of the revised publication requirement, or the consequences of failing to strictly comply. While subsequent publication might annul the suspension, the risk of unlimited liability for acts, omissions, or transactions that take place during the period of suspension, might not be cured.

The Committee's preference would be revocation of the publication requirement which, in the view of the Committee, serves no useful purpose. At the very minimum the existing publishing requirements should not be expanded in terms of scope and penalties for failure to publish. The only beneficiaries of the publication requirement and of the proposed legislation are the newspapers in which the required notices are published. The proposed legislation would impose unfair and unjustifiable burdens and possible financial exposure on partners and members of limited partnerships and limited liability companies publication requirements.

We urge you to veto S.00085-A and A.7383.

Committee on Corporation Law of the Association  
of the Bar of the City of New York

By:   
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Chair