

THE ASSOCIATION OF THE BAR  
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August 25, 2004

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

Re: S.5902 and A.11205 – 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 Private Investment Funds of The Association of the Bar of The City of New York (the “*Committee*”) is composed of lawyers with diverse perspectives on investment advisory issues, including members of law firms and counsel to private advisory and financial services firms. The Committee focuses on, among other things, the issues, trends and regulations relating to a wide variety of private investment funds, including buyout funds, venture capital funds, mezzanine funds, distressed funds, hedge funds and funds of funds. (*A list of our current members is attached.*)

In most cases, private investment funds sponsored in the United States are organized as limited liability companies or limited partnerships under the laws of the State of Delaware and, in some instances, qualify to do business in the State of New York. The general partners or managers who operate or advise these private investment funds are themselves typically organized as limited liability companies or limited partnerships under the laws of the State of New York or under the laws of the State of Delaware and, if necessary or appropriate, qualify to do business in the State of New York.

The Committee opposes S.5902 and A.11205, which would amend the publication requirements applicable to limited liability companies and limited partnerships organized under the laws of the State of New York or qualifying to do business in the State of New York. Among other things, these amendments would require the publication of the names of the ten individuals who are members, managers, authorized persons, or general or limited partners, as applicable, who have the most valuable type of aggregate rights in the limited liability companies or limited partnerships, as the case may be. A failure to timely file an affidavit of publication would result in the suspension of the vehicle’s authority to carry on, conduct, or transact any business in the State of New York. The issues raised by S.5902 and A.11205 have significant and serious consequences for the community of private investment funds and

their general partners or managers that engage in business in the State of New York. Accordingly, we respectfully ask you to consider the following arguments against the bill.

*Consumer Protection.* The Committee believes that the enhanced publication requirement contemplated by S.5902 and A.11205 serves no legitimate consumer protection purpose. First, these amendments do not match the practical realities of the private investment funds marketplace. In fact, publication could actually serve as a source of misinformation if, subsequent to the publication, the information contained therein ceases to be accurate. Under S.5902 and A.11205, if there is a change at any time after completion of the first weekly publication, no amendment to such published information seems to be required. Most “committed” private investments funds (such as buyout funds and venture capital funds) hold multiple closings over a period of 9 to 12 months where investors are admitted to the fund. As a result, the most valuable individual investors are often not known for a significant period of time after the technical formation of the fund. Moreover, due to the existence of a secondary market, interests in these private investments funds change hands on a more frequent basis after their final closings. Similarly, in the case of hedge funds, the composition of the investors changes frequently, as investors are routinely admitted to the fund and allowed to redeem their interests on a regular basis. Because of the changes in the composition of investors of private investment funds after formation, the proposed enhanced publication requirement would serve no useful purpose and certainly not provide any protection to consumers.

Second, the actual consumers of the investment advisory services of the individual professionals who lead general partners or managers of private investment funds have access to the names of the investment professionals and other information about their business. The identity and past experiences of the individuals who lead the general partners or managers of private investment funds is typically required by the investors in private investment funds. Moreover, much of this information may also be available from other sources. For example, an investment adviser registered under the Investment Advisers Act of 1940 is required to identify its direct owners and executive officers in its Form ADV filed with the Securities and Exchange Commission.

Finally, other than general partners of limited partnerships, none of the individuals who may be identified in the publications has any personal liability (other than in limited statutory exceptions) for the debts or obligations of the applicable entities. Accordingly, S.5902 and A.11205 provide that the following will be added to the publication after listing the individuals: “the inclusion of the names of the individuals in this notice shall not be deemed to make such individuals personally liable for any of the debts, obligations or liability” of the limited liability company or the limited partnership, as the case may be. Therefore, assuming for the moment that the published information was accurate and not already available to the consumers of the advisory services interested in it, such information will not inform anyone as to who may be responsible for an entity’s obligations.

*Confidentiality.* The confidential nature of the participation in a private investment fund is a cornerstone requirement of the marketplace by most investors

(whether U.S., non-U.S., institutional or individual). In many cases, the operative agreements of private investment funds include confidentiality undertakings by the general partner or manager to prohibit or limit the disclosure of the identity of any investor in these funds. Based on our extensive collective experience in this field, we believe that many of the marketplace's leading individual investors will likely refuse to invest in a private investment fund which would publicly disclose their participation in it.

*Competitive Position.* Once news of S.5902 and A.11205 reaches the broader marketplace, the concern about disclosure will likely force private investment funds to consider organizing or qualifying in other jurisdictions. Similarly, the general partners or managers of private investment funds may decide to establish investment management businesses or offices in jurisdictions other than the State of New York. Any such disclosure will place general partners or managers who conduct business in the State of New York at a competitive disadvantage, as investors may decide to make investments with general partners or managers who are located in jurisdictions where they have assurances that their identities and participations will be kept confidential. The Committee believes that the enhanced publication contemplated by the amendments could have an adverse impact on the large and thriving industry of private investment funds and their managers who are organized or engage in business in the State of New York.

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The expansion of the publication requirement contemplated by S.5902 and A.11205 represents a significant retreat to outdated laws in the State of New York. In many other states, the modern trend has been against publication (and certainly against any expansion along the lines set forth in amendments). We very much hope that these comments and observations will persuade you to veto S.5902 and A.11205.

Please note that we endorse (i) the Memorandum of the New York State Bar Association Section of Business Law Committee on Corporations and Other Business Entities, dated June 14, 2004, and (ii) the letter of the New York Private Investment Fund Forum, dated August 16, 2004.

The comments and observations set forth in this letter by the Committee do not necessarily represent the views of the firms or companies with whom the Committee members are associated or the clients that they represent.

Very truly yours,



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Marco V. Masotti, Chair  
Committee on Private Investment Funds

cc: Richard Platkin, Counsel to the Governor  
Jeffrey Lovell, Senior Policy Advisor to the Governor  
John Haggerty, State Government and Legislative Affairs Executive Director

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