

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 1300

INTRODUCER: Judiciary Committee and Senator Simmons

SUBJECT: Limited Liability Companies

DATE: April 3, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Shankle	Cibula	JU	Fav/CS
2.			CM	
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/SB 1300 creates the Revised Limited Liability Companies Act. The bill carries over many provisions in existing law to new chapter 605, F.S., but makes some substantial changes to the rules governing Limited Liability Companies. The bill is the result of efforts by representatives of the Business Law Section, the Tax Section, and the Real Property, Probate, and Trust Law Section of The Florida Bar. The bill is substantially based on the Revised Uniform Limited Liability Company Act of 2006 as amended in 2011(RULLCA)<sup>1</sup> with deviations to reflect unique situations present in Florida. The bill:

- Expands the list of nonwaivable default rules that cannot be “trumped” by the operating agreement;
- Modifies rules for the power of members and managers to bind the company;
- Modifies provisions addressing the LLC’s management structure (including the elimination of the term “managing member”);

<sup>1</sup> *Uniform Limited Liability Company act of 2006 as amended in 2011*, National Conference of Commissioners on Uniform State Laws, 2011, available at <http://uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20%28Revised%29>.

- Modifies default management and voting rules;
- Modifies provisions relating to member dissociation and company dissolution;
- Modifies provisions for service of process on LLCs;
- Modifies provisions for derivative actions;
- Adds provisions to permit interest exchanges and in-bound domestications by non-U.S. entities; and
- Modifies appraisal rights provisions, including adding events that trigger appraisal rights, and provides clarifications to the procedural aspects of the appraisal rights provisions, particularly in dealing with organic transactions approved by way of written consent.

The bill does not change the rules regarding charging orders, and therefore the 2011 amendments to s. 608.433, F.S., made as a result of the Olmstead Patch continue unchanged under new s. 605.0503, F.S.

This bill substantially amends the following sections of the Florida Statutes: 607.1109, 607.1113, 607.193, 617.1108, 620.2104, 620.2108, 620.8914, 620.8918, 621.051, 621.07, 621.12, and 621.13.

This bill creates the following sections of the Florida Statutes: 48.062, 605.0101, 605.0102, 605.0103, 605.0104, 605.0105, 605.0106, 605.0107, 605.0108, 605.0109, 605.011, 605.0111, 605.0112, 605.0113, 605.0114, 605.0115, 605.0116, 605.0117, 605.0118, 605.0119, 605.0201, 605.0202, 605.0203, 605.0204, 605.0205, 605.0206, 605.0207, 605.0208, 605.0209, 605.021, 605.0211, 605.0212, 605.0213, 605.0214, 605.0215, 605.0216, 605.0301, 605.0302, 605.0304, 605.0401, 605.0402, 605.0403, 605.0404, 605.0405, 605.0406, 605.0407, 605.0408, 605.0409, 605.041, 605.0411, 605.0501, 605.0502, 605.0503, 605.0504, 605.0601, 605.0602, 605.0603, 605.0701, 605.0702, 605.0703, 605.0704, 605.0705, 605.0706, 605.0707, 605.0708, 605.0709, 605.071, 605.0711, 605.0712, 605.0713, 605.0714, 605.0715, 605.0716, 605.0717, 605.0801, 605.0802, 605.0803, 605.0804, 605.0805, 605.0806, 605.0901, 605.0902, 605.0903, 605.0904, 605.0905, 605.0906, 605.0907, 605.0908, 605.0909, 605.091, 605.0911, 605.0912, 605.0913, 605.1001, 605.1002, 605.1003, 605.1004, 605.1005, 605.1006, 605.1021, 605.1022, 605.1023, 605.1024, 605.1025, 605.1026, 605.1031, 605.1032, 605.1033, 605.1034, 605.1035, 605.1036, 605.1041, 605.1042, 605.1043, 605.1044, 605.1045, 605.1046, 605.1051, 605.1052, 605.1053, 605.1054, 605.1055, 605.1056, 605.1061, 605.1062, 605.1063, 605.1064, 605.1065, 605.1066, 605.1067, 605.1068, 605.1069, 605.107, 605.1071, 605.1072, 605.1101, 605.1102, 605.1103, 605.1104, 605.1105, 605.1106, 605.1107, and 605.1108.

This bill repeals the following sections of the Florida Statutes: 608.401, 608.402, 608.403, 608.404, 608.405, 608.406, 608.407, 608.408, 608.4081, 608.4082, 608.409, 608.4101, 608.411, 608.4115, 608.415, 608.416, 608.4211, 608.422, 608.4225, 608.4226, 608.4227, 608.4228, 608.4229, 608.423, 608.4231, 608.4232, 608.4235, 608.4236, 608.4237, 608.4238, 608.425, 608.426, 608.4261, 608.427, 608.428, 608.431, 608.432, 608.433, 608.434, 608.4351, 608.4352, 608.4353, 608.4354, 608.4355, 608.4356, 608.4357, 608.43575, 608.4358, 608.43585, 608.4359, 608.43595, 608.438, 608.4381, 608.4382, 608.4383, 608.439, 608.4401, 608.4402, 608.4403, 608.4404, 608.441, 608.4411, 608.4421, 608.4431, 608.444, 608.445, 608.446, 608.447, 608.448, 608.4481, 608.4482, 608.4483, 608.449, 608.4491, 608.4492, 608.4493, 608.4511, 608.452, 608.455, 608.461, 608.462, 608.463, 608.471, 608.501, 608.502, 608.503, 608.504,

608.505, 608.506, 608.507, 608.508, 608.509, 608.5101, 608.511, 608.512, 608.513, 608.5135, 608.514, 608.601, 608.701, 608.702, 608.703, 608.704, and 608.705.

## II. Present Situation:

Limited Liability Company (LLC) statutes were created to address the perceived gap in the ideal business organization in certain situations. On the one hand, corporations are often highly complex and require payment of state corporate taxes, making them less than ideal for small businesses. On the other hand, partnerships are simpler but carry the risk of full joint and severable liability for each member. The LLC provides limited liability with the tax and management structure of a partnership.<sup>2</sup>

Florida's existing Limited Liability Company act was codified in ch. 608, F.S., in 1982. The chapter has been subsequently amended multiple times, with the last significant modifications made in 2002. In 2011, in response to the Florida Supreme Court decision, *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010), the Florida legislature adopted amendments to s. 608.433, F.S. (which has come to be known as the "Olmstead Patch"). The Olmstead Patch clarified that a charging order is the sole and exclusive remedy afforded a judgment creditor of a member in a multi-member LLC with respect to seeking recourse against the member's membership interest, but allowed for a judgment creditor of the member in a single member LLC to seek a court supervised foreclosure against the single member's membership interest, but only upon a showing to the court issuing the charging order that the judgment will not be satisfied out of LLC distributions within a "reasonable time."

## III. Effect of Proposed Changes:

The bill creates ch. 605, F.S., which it designates as the Florida Revised Limited Liability Company Act. Until January 1, 2015, LLCs in existence before January 1, 2014, may continue to operate under the provisions of existing law. As of January 1, 2015, all LLCs are subject to the provisions under ch. 605, F.S., and ch. 608, F.S., is repealed.

### Operating Agreement

Current law allows for the members of an LLC to enter into an operating agreement to regulate the affairs of the LLC and govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, ch. 608, F.S., governs relations among the members, managers, and the LLC. However, the operating agreement may not:

- Unreasonably restrict a right to information or access to records required under s. 608.4101, F.S.;
- Eliminate the duty of loyalty under s. 608.4225, F.S.;
- Unreasonably reduce the duty of care under s. 608.4225, F.S.;
- Eliminate the obligation of good faith and fair dealing under s. 608.4225, F.S.;
- Vary the requirement to wind up the limited liability company's business; or

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<sup>2</sup> McGinty, A. Edward, *Olmstead – A Lever from Member's Creditor to Full Multi-member LLC Membership?* 85 FLA. BAR J., 39, 42 (March 2011).

- Restrict rights of a person, other than a manager, member, or transferee of a member's distributional interest, under chapter 608, F.S.<sup>3</sup>

The bill retains many similarities to current law. Like current law, the bill provides a gap-filler provision for when the operating agreement does not provide a specific rule. Additionally, the bill delineates matters that the operating agreement may not alter. This is a far more extensive list than exist under current law. The operating agreement may not:

- Vary a limited liability company's capacity to sue and be sued in its own name;
- Vary the law applicable governing LLCs;
- Vary the procedure pertaining to registered agents or the Department of State;
- Eliminate the duty of loyalty or the duty of care;
- Eliminate the obligation of good faith and fair dealing;
- Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law;
- Unreasonably restrict the duties and rights to records required by the bill;
- Vary the power of a person to dissociate;
- Vary the grounds for dissolution specified;
- Vary the requirement to wind up the company's business;
- Unreasonably restrict the right of a member to maintain an action against another member or manager;
- Vary the provisions relating to the formation of a special litigation committee as a result of a derivative action;
- Vary the required contents of plan of merger, a plan of interest exchange, a plan of conversion, or a plan of domestication;
- Except in certain narrow circumstances, restrict the rights under this chapter of a person other than a member or manager; and
- Provide for indemnification for a member or manager when he or she commits:
  - Conduct involving bad faith, intentional misconduct, or a knowing violation of law;
  - A transaction from which the member or manager derived an improper personal benefit;
  - An improper distribution of funds; or
  - A breach of the duty of loyalty or the duty of care.

### **Registered Agent**

Under current law, each LLC must maintain a registered agent with an office in Florida and must file a statement, including the address of the agent, with the Department of State.<sup>4</sup> The bill limits the duties of a registered agent to forwarding process, forwarding notices or demands served upon him or her to the company, and providing notice of the agent's resignation.

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<sup>3</sup> Section 608.423(2), F.S.

<sup>4</sup> Section 608.415, F.S.

## **Service of Process**

Under Existing Law, service of process must be effected in the same manner as service is made upon a partnership under ch. 49, F.S.<sup>5</sup> This has caused considerable confusion, particularly because of the significant differences between “manager-managed” and “member-managed” LLCs, and how those differences impact the application of the principles of agency and constructive notice.

The bill provides more detail to serve process on an LLC, recognizing different types of LLCs. The bill also provides for a method of delivery and waiver of notice. The bill also creates s. 48.062, F.S., to provide for service of process on an LLC within the chapter of the Florida Statutes relating to Service of Process.

## **Formation**

Under existing law, in order to form an LLC one or more members or authorized representatives of the LLC must file articles of incorporation with the department of state.<sup>6</sup> Consistent with existing law, the bill requires an LLC to have at least one member in order for the formation of the LLC to be effective. “Shelf” LLCs, where there are no members when the LLC is formed, are not authorized. Only a minimal amount of disclosure is necessary in the articles of organization. For example, the bill does not require the articles to state whether the LLC is member-managed or manager-managed. However, the filing party may include this or any other items in the articles so long as they are not inconsistent with the nonwaivable provisions set forth in new s. 605.0105, F.S.

## **Amending the Articles of Organization**

Currently, s. 608.411, F.S., allows an LLC to amend its articles of organization by filing an amendment with the Department of State. The bill is substantively the same as current law. The bill sets forth the differences between an amendment and a restatement, and adds a provision, consistent with existing law, to more specifically outline the process and requirements for simultaneously amending and restating articles of organization. However, contrary to existing law, the bill imposes an obligation directly on the members or managers, as applicable, to correct information in articles of organization that have become inaccurate. A member or manager’s failure to meet the obligation exposes the member or manager, as applicable, to potential liabilities to third parties under new s. 605.0205(1)(b), F.S.

## **Filing of Records**

Currently, a number of records must be filed with the Department of State including articles of organization and any amendments or restatements to the articles as well as an annual report.<sup>7</sup> The bill allows an LLC to file a document with a specification of when it takes effect, though it cannot be retroactive by more than 5 days. The bill allows an LLC to withdraw a statement that has been filed as long as it has not yet taken effect, in which case the record may be corrected

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<sup>5</sup> Section 608.407, F.S.

<sup>6</sup> Section 608.407(1), F.S.

<sup>7</sup> *Id.*

but not withdrawn. The bill allows for a corrected record to relate back to the date of the originally filed record except when a person relied on the uncorrected record and was adversely affected by the correction. The bill requires an annual report, consistent with current law, but explicitly allows an LLC to file multiple annual reports, with subsequent reports being considered amended reports.

The bill addresses liability to third parties for inaccurate information in a filed record and provides that an operating agreement may relieve and shift the liability to third parties from certain specified members to other specified members. Existing law expressly states that the execution of a certificate filed with the Department of State is an affirmation of accuracy under penalties of perjury. Section 605.0205(3), F.S., of the bill clarifies this provision in existing law by clarifying that the affirmation under penalties of perjury applies to any and all records authorized or required to be filed with the Department of State.

### **Authority**

Currently, s. 608.4235, F.S., provides for multiple ways in which a person can bind an LLC to an agreement. The bill retains the traditional Florida rule by providing four ways in which someone has the power to bind the LLC. A person may bind the LLC if he or she:

- Is an agent of the company;
- Has the authority to do something under the articles of organization or operating agreement;
- Has the authority pursuant to a statement of authority; or
- Has the status as an agent under another law.

This is the default rule, but the articles of organization or operating agreement may provide otherwise.

The bill provides that an LLC may file a statement of authority, which is a concept that comes from the RULLCA and is currently unknown to Florida law. This statement provides constructive notice as to who can bind the LLC. Likewise, a person who has been granted authority in a statement of authority may subsequently file a statement of denial to deny the grant of authority.

### **Liability**

Under current law, the members of an LLC are not liable, solely by reason of being a member or serving as a manager or managing member for a debt, obligation, or liability of the limited liability company unless this liability is altered by an LLC's articles of organization or operating agreement.<sup>8</sup>

Similar to existing law, the bill shields members and managers against the debts, obligations, and liabilities of the LLC, but does not provide any shield against a person's own conduct or any contractual obligation he or she expressly assumes.

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<sup>8</sup> Section 608.4227, F.S.

The bill makes no changes to the common law concept of “piercing the veil,” which allows individual liability in certain situations. Therefore, this concept will likely still apply to LLCs.

### **Members**

The bill changes the membership requirements from existing law while retaining some language for consistency. Under existing law, the required consent is a majority in interest of the members for consent to add a new member. However, existing law requires unanimous consent if the new member is a person that has been assigned an interest in the LLC.<sup>9</sup> The bill requires unanimous consent in all cases.

Unlike existing law, the bill allows a person to become a non-economic member without a transferable interest or any obligation to contribute capital. The default rule under the bill requires all of the members to consent to the admission of a new member after the LLC has been formed.

### **Contributions**

Currently, under s. 608.4211, F.S., a contribution to the LLC by a member may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services. The form of contribution required by the bill is similar to current law, except that it adds new permissible contributions in accordance with the RULLCA. A contribution may consist of tangible or intangible property, including services performed and contracts for services to be performed. A promise to contribute is not enforceable unless it is set out in a writing signed by the member. A member is obligated to the agreement, even after death or disability, and that obligation is enforceable by other members and a non-member creditor. Unlike the RULLCA, the bill allows an operating agreement to provide penalties for failure to meet the obligation.

### **Distributions**

Currently, the default rule in Florida for LLCs is that distributions are made in accordance with the value of the members’ capital contributions.<sup>10</sup> The bill changes current law by ignoring the value of any capital contributions that, at the time of the particular distribution, have previously been returned.

The bill clarifies existing law by providing that no member has a right to distributions prior to the LLC’s dissolution unless the LLC decides to make the distribution. A member or transferee that becomes entitled to a distribution has the status and remedies of a creditor with respect to the distribution. The bill changes the default rule under current law in that although it allocates profits and losses based on the value of contributions, consistent with existing law, it does not, in making the calculation, subtract any contributions that have been returned.

Like current law, the bill limits distributions in prohibiting distributions that would render the LLC insolvent. The bill, however, provides the two methods to be used in the determination of

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<sup>9</sup> Sections 608.4232 and 608.433, F.S.

<sup>10</sup> Section 608.426(1), F.S.

insolvency. The bill is consistent with current law, except that the bill eliminates the requirement of identifying distributions that are based on financial statements or a fair valuation of assets. The bill also provides that debts owed by a LLC to a member as a result of a permitted distribution puts the member in parity with other unsecured creditors of the LLC unless expressly subordinated by agreement.

The bill also provides liability for a member or manager that makes improper distributions. The bill provides that in a member-managed LLC, if the operating agreement expressly relieves a member of the authority and duty to consent to distributions and imposes that authority and obligation on another member or members, the relieved member will have no liability. The bill also imposes direct liability to the LLC by a member that receives a distribution that the member knows violates the law.

### **Management**

Currently, Florida law contains the concept of a “managing member,” who is elected from among the existing members.<sup>11</sup> The term “managing member” is fairly unique to Florida and is not used in the RULLCA or LLC statutes in any of the more prominent states. The bill does not follow either the RULLCA or existing law with respect to management. The bill changes existing law by eliminating the concept of a “managing member.” This change was made to eliminate the confusion and disparate interpretations under existing law as to the ramifications that having a managing member has on the nature of the management structure of the LLC. The bill provides that existing LLCs that are managed by a managing member are deemed to be member-managed rather than manager managed. The bill provides that, absent an agreement, a member in a member-managed LLC is not entitled to compensation for its services, except for reasonable compensation for services to wind up the LLC. Additionally, a member that advances funds to an LLC is entitled to reimbursement. Finally, the bill provides that the management provisions of the bill apply in the event of dissolution of the LLC, except that a person that wrongfully causes the dissolution cannot participate in management as either a member or manager.

The bill authorizes an operating agreement to establish an LLC’s status as a manager-managed limited liability company, in addition to the right to so authorize in the articles of organization. This is a carryover from current law, which states that an LLC may (but is not required to) identify whether it is “manager-managed” in its articles of organization. As in current law, a limited liability company that does not effectively designate itself a “manager-managed limited liability company” under the new act will operate, subject to any contrary provisions in its operating agreement, under statutory rules governing a “member-managed limited liability company.”

The voting rights provisions of the bill are based on a combination of existing law and the RULLCA. The bill provides:

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<sup>11</sup> Section 608.422(a), F.S.



- For a member-managed LLC, each member votes in accordance with its then-current percentage of the profits interest of the LLC;<sup>12</sup>
- The general rule that in a member-managed LLC, all decisions, whether in the ordinary course of business or not, require the consent by members holding a majority of the then-current interests in the profits of the LLC;<sup>13</sup>
- A transferring member that transfers all of its transferable interest continues to vote as a member based on the percentage of profits interest that the transferring member would have had but for the transfer;
- A requirement that notice of an action by written consent of the members be sent within 10 days to all members who did not consent;<sup>14</sup> and
- That managers may act by unanimous written consent or by proxy vote. However, the bill eliminates the requirement under current law to provide of any non-unanimous manager written consent actions within 10 days to all managers that did not consent to the action because, under the default rule, managers only can act by unanimous written consent.<sup>15</sup>

Under existing law, no specific provision addresses the amendment to the operating agreement. Therefore, under current law, the general rule applies, requiring the vote or consent by members holding a majority of the then-current interests in the profits of the LLC. The bill adopts the RULLCA approach by providing that in a member-managed LLC, the unanimous vote of the members is required to amend the operating agreement or the articles of organization.

The new act eliminates the following provisions under existing law, none of which is in the RULLCA:

- Section 608.4231(4), F.S., which prohibits amending the articles of organization or the operating agreement to provide for a vote of less than a majority in interest.
- Section 608.4231(5), F.S., which provides that notwithstanding anything to the contrary in the articles of organization or the operating agreement, members have the right to vote on dissolutions and mergers.
- Section 608.4231(7), F.S., which expressly allows the articles of organization or the operating agreement to provide for the mechanics of voting.

## **Records**

The bill provides a list of specific records that are required to be maintained by the LLC. The bill also provides circumstances under which a member may inspect the records, and provides a cause of action for a member that is improperly denied access to the records.

## **Transferable Interests**

The bill provides for a transferrable interest, which is generally defined as a member's right to distributions. This is distinguishable from a member's interest, which is the membership interest.

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<sup>12</sup> This is the same as current law. See s. 608.422(a), F.S. for the current law.

<sup>13</sup> This is the same as current law. See ss. 608.4232 and 608.433, F.S. for the current law.

<sup>14</sup> This is the same as current law. See ss. 608.4231(6), F.S. for the current law.

<sup>15</sup> This is the same as current law. See ss. 608.4231(8), F.S. for the current law.

A member may transfer a transferable interest to another without transferring management rights or access to records. The bill retains the Olmstead patch from current law, as previously discussed.

### **Indemnification**

Under current law, an LLC has discretion to indemnify and hold harmless any person from and against any claims, subject to any restrictions in the articles of organization or operating agreement.<sup>16</sup> Existing law limits the prohibition of indemnification and advancement of expenses to violations of criminal law, a transaction in which the person seeking indemnification received an improper personal benefit and liability in connection with improper distributions.<sup>17</sup>

The bill varies from existing law in that it expands the categories for which indemnification of a current or former member or manager is prohibited by including in such group any violation of ss. 608.4071-608.4074, F.S. and 608.4091, F.S., which relate to the standards of conduct of a manager or a member.

### **Power to Dissociate**

Under current law, a member does not have the right, unless in the articles of organization or operating agreement state otherwise, to withdraw or resign prior to dissolution and winding up. In accordance with the RULLCA, the bill allows a member to dissociate at any time, rightfully or wrongfully, by withdrawing by “express will.” The bill provides that if a person is dissociated, the person loses the right to participate in the LLC’s management, which is not consistent with current law, and if the LLC is member-managed, the person has no further duties or liability for breaches of the standards of care for members under the new act with respect to matters and events that take place after the dissociation. The bill eliminates the provision from current law that a withdrawing member is not entitled to any distributions upon withdrawal but is entitled to payment equal to the fair value of the person’s interest based on the withdrawing member’s rights to distributions.

In addition, the bill provides 14 causes of dissociation that are new to existing law, other than the bankruptcy or insolvency of a member, which are generally the same in both the bill and current law.

### **Events Causing Dissolution**

Under current law, an LLC must be dissolved upon the occurrence of any of the following events:

- At the time specified in the articles of organization or operating agreement;
- Upon the occurrence of events specified in the articles of organization or operating agreement;

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<sup>16</sup> Section 608.4229(1), F.S.

<sup>17</sup> Section 608.4229(2), F.S.

- Upon the written consent of all of the members of the limited liability company unless this is forbidden by the articles of organization or the operating agreement;
- At any time there are no members; or
- Upon the entry of an order of dissolution by a circuit court.<sup>18</sup>

The bill provides for a similar set of circumstances with slightly altered wording. Under the bill, an LLC must be dissolved:

- Upon the occurrence of an event described in the operating agreement;
- Upon the consent of all members;
- Upon the passage of 90 days without a member, unless certain circumstances apply;
- Upon the entry of a decree of judicial dissolution; or
- Upon the filing of a statement of administrative dissolution by the Department of State.

The Department of State may file for administrative dissolution when an LLC does not timely file required documents or fails to pay a required fee. The bill simplifies the process by which the Department of State can commence an action for dissolution by allowing for electronic transmission of notice and automatic dissolution under certain circumstances.

Additionally the bill eliminates the ability of a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the LLC was insolvent, or if the LLC admitted that the creditor's claim was due and owing and the LLC was insolvent.<sup>19</sup> The bill does not make substantial changes to how articles of dissolution are handled.

### **Winding Up**

Existing law does not have a comprehensive winding up provision. Winding up occurs following dissolution and results in termination of the existence of the LLC. The bill provides rules for winding up the LLC's activities and affairs, providing for payment of its debts, and sale of its assets, as well as bringing or defending actions and proceedings, and distributing assets to its members. A member, manager or legal representative may conduct the winding up, and may seek judicial supervision of the process, or the appointment of one or more persons to wind up the company's activities and affairs. A creditor may, upon establishing good cause, ask for judicial appointment of a trustee to handle the wind up.

The bill authorizes an LLC dissolved by administrative dissolution to file for reinstatement upon payment of all fees owed and providing all information required.

### **Direct Action by a Member**

Existing law does not have a provision concerning a comprehensive direct action by a member. The bill provides that a member may maintain a direct action against another member, manager, or the limited liability company to enforce the member's rights and protect the member's

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<sup>18</sup> Section 608.441, F.S.

<sup>19</sup> See s. 608.449(3), F.S. This provision does not exist under new chapter 605, F.S., and will be repealed on January 1, 2015.

interests. A member maintaining a direct action under this provision must plead an actual or threatened injury that is not solely the result of an injury suffered by the LLC.

### **Derivative Action**

Existing law requires that, as a prerequisite to a derivative action, the plaintiff make a demand on the managing members of a member-managed company or the managers of a manager-managed company and that the demand be refused or ignored.<sup>20</sup>

The new act allows a member to maintain a derivative action to enforce a right of the LLC when either of two circumstances occurs. First if, within a reasonable time not to exceed 90 days, an action is not instituted after a member on the managing members of a member-managed company or the managers of a manager-managed company makes a demand. Second, if a demand is not made but the demand would be futile or irreparable injury would result to the company by waiting for the members or managers to bring the action.

### **Charitable Provisions**

The bill prevents nonprofit LLCs from using the provisions in the bill to avoid restrictions on the use of property held for charitable purposes for other than the use permitted without order of an appropriate court specifying the disposition of the property. The bill also provides a legal effect of a merger on bequests, etc., that were originally made to an entity that does not survive a merger. This provision applies only to mergers, because in an interest exchange, conversion, or domestication transaction, the entity to which the bequest was made continues in existence.

### **Merger**

Under current law, unless counter to the articles of organization or the operating agreement, an LLC may merge with another business entity if:

- Each LLC that is a party to the merger complies with the applicable provisions of ch. 608, F.S., and with the terms of its articles of organization and operating agreement;
- Each partnership that is a party to the merger complies with the applicable provisions of ch. 620, F.S.;
- Each domestic corporation that is a party to the merger complies with the applicable provisions of ch. 607, F.S.; and
- The merger is permitted by the laws of the state, country, or jurisdiction under which each other business entity that is a party to the merger is formed.<sup>21</sup>

Under s. 608.4231, F.S., “[n]otwithstanding any provision to the contrary in the articles of organization or operating agreement, members shall have the right to vote on . . . a merger of the limited liability company as provided in s. 608.4381.”

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<sup>20</sup> Section 608.601(2), F.S.

<sup>21</sup> Section 608.438, F.S.

Read literally, this provision gives all members of the limited liability company a vote on a merger, whether or not such members have voting rights under the articles of organization or operating agreement of the LLC. At the same time, this provision was not one of the nonwaivable provisions in ch. 608, F.S. Thus, arguably this provision could be modified in the articles of organization or operating agreement of the LLC.

The bill removes the ambiguity in existing law and provides that non-voting members do not have the right to vote on a merger unless the articles of organization or operating agreement provide otherwise.

The bill requires that each entity of a merger approve the plan in accordance with the laws that govern the LLC. The plan may be amended or abandoned thereafter so long as the articles of merger have not yet been approved. To make the merger effective, articles of merger must then be approved by each merging entity and filed with the Department of State. When the merger becomes effective, the surviving LLC continues and the other merging entities cease to exist.

### **Interest exchange**

Current law does not apply the concept of interest exchange to LLC's. The bill applies this concept from corporate law to LLCs. In an interest exchange, the separate existence of the acquired entity is not affected and the acquiring entity acquires all of the interest of one or more classes of the interests in the acquired entity. An interest exchange also allows for an indirect acquisition through the use of consideration in an exchange that is not provided by the acquiring entity, such as consideration from another or related entity.

### **Domestication**

The new act, for the first time, allows domestications of non-U.S. entities who wish to become domestic LLCs in Florida. A domestication allows the domesticating entity to retain its status and existence in the non-U.S. jurisdiction in which it currently exists. The bill allows domestication of all non-U.S. entities. Much like a merger, the bill requires a plan of domestication and approval of domestication and allows amendment or abandonment of the plan. The plan becomes effective upon the passage and filing of the articles of domestication.

### **Charging Orders**

The bill does not change the rules regarding charging orders, and therefore the 2011 amendments to s. 608.433, F.S., made as a result of the Olmstead Patch continue unchanged. These rules continue to exist under new s. 605.0503, F.S.

The bill includes a severability clause.

The bill takes effect January 1, 2014.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

This bill is substantial rewrite of the laws governing Limited Liability Corporations in Florida. Existing LLCs will need to ensure that they are in compliance with the new laws.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

## A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/SB 1300 by Judiciary on April 1, 2013:**

The committee substitute creates ch. 605, F.S., to house the new LLC provisions in order to reduce confusion that may result from including these provisions in existing ch. 608, F.S. The committee substitute amends ss. 607.1109, 607.1113, 607.193, 617.1108, 620.2104, 620.2108, 620.8914, 620.8918, 621.051, 621.07, 621.12, and 621.13, F.S., to conform to provisions in the act. The committee substitute also creates s. 48.062, F.S., to provide for service of process on an LLC within the chapter of the Florida Statutes relating to service of process.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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