

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1696

SPONSOR: Senator Klein

SUBJECT: Limited Liability Companies

DATE: March 15, 1999

REVISED: 03/17/99 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Olafson</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill revises Chapter 608 of the Florida Statutes, relating to limited liability companies (LLCs). These revisions are meant to modify Florida's limited liability statutes to incorporate modern language adapted from the Uniform Limited Liability Company Act (ULLCA) and the laws of certain model states such as Delaware. The bill changes the name of the agreement for the management of the LLC from "regulations" to "operating agreement." The bill provides that unless otherwise provided in the articles or operating agreement, profits, losses, and distributions shall be allocated on the basis of the agreed value of each member's contributions in the LLC. In the absence of any provision for voting, the members shall vote in proportion to their then-current percentage or other interests in the profits of the LLC. The bill provides that members may delegate the authority and power to manage the LLC to one or more other persons, and managers need not be members. The bill provides fiduciary standards similar to those provided by the ULLCA, imposing a duty of loyalty and a duty of care on managers and managing members, including a duty to refrain from dealing with the LLC or competing with the LLC, unless provided otherwise in the articles or operating agreement. The bill adds a conflict of interest section modeled after the section provided in the Florida Business Corporation Act. The bill provides a new section addressing the initial admission of members. The bill eliminates the requirement of unanimous, written consent for the admission of new members to a LLC, and provides language specifically outlining the nature of a member's interest, including bifurcation of the economic interest and voting interest. The bill provides a default provision which includes procedures for the assignment of a member's interest. The bill removes provisions requiring the filing of a supplemental affidavit of capital contributions and lowers certain filing fees.

The bill makes the following changes to the Florida Statutes: amends ss. 608.401, 608.402, 608.403, 608.404, 608.406, 608.407, 608.408, 608.4081, 608.4082, 608.409, 608.4101, 608.411, 608.415, 608.416, 608.4211, 608.422, 608.4225, 608.423, 608.4231, 608.4232, 608.425, 608.426, 608.4261, 608.427, 608.428, 608.432, 608.433, 608.434, 608.436, 608.4362, 608.4363, 608.437, 608.438, 608.4381, 608.4383, 608.4384, 608.441, 608.4421, 608.444, 608.447, 608.448, 608.4481, 608.449, 608.4492, 608.4511, 608.452, 608.455, 608.463,

608.471, 608.502, 608.503, 608.504, 608.505, 608.507, 608.508, 608.512, and 608.5135; creates ss. 608.4115, 608.4226, 608.4235, 608.4236, 608.4237, 608.439, 608.601, 608.701, 608.702, and 608.703; and repeals ss. 608.4062, 608.412, 608.424, and 608.4494.

II. Present Situation:

In 1982, Florida became the second state in the union to authorize the formation of limited liability companies (LLCs). In part because of restrictive tax policies, LLCs never became exceedingly popular in Florida. In 1998, the Florida Legislature amended its corporate income tax code, Chapter 220, F.S., and parts of Chapter 608, F.S., to exempt from state corporate income tax LLCs which are exempt from federal income tax. Since these changes to the tax code, Florida has witnessed a surge in interest in the formation of LLCs. However, much of Florida's LLC law is currently outdated, in part due to recent changes in the Internal Revenue Code.

A limited liability company is an entity with characteristics reflective of both a corporation and a partnership. For legal purposes, an LLC is treated like a corporation and therefore affords its members certain protections from liability. For federal and state income tax purposes, however, an LLC is classified as a partnership, under which the earnings or losses of the LLC are passed through to the members, rather than treating the LLC as a separate taxable entity.

The Florida Limited Liability Company Act, ss. 608.401-608.514, F.S., governs the creation and operation of LLCs in this state. One or more persons may form an LLC by executing and filing articles of organization with the Department of State (ss. 608.405 and 608.407(1), F.S.). The articles of organization require an affidavit of capital contributions, a statement of how the LLC is to be managed, identification and addresses of all managers, and a requirement that changes of capital contributions be reported and filed with the Secretary of State (s. 608.407, F.S.).

Profits, losses, and distributions are allocated on the basis of each member's relative capital account, unless otherwise provided in the articles or regulations. Voting is tied to capital accounts. Upon withdrawal, a member is entitled to a return of his or her capital account.

Among other elements, the act provides that, generally, neither the members nor the managers of an LLC are liable for the debt of the LLC (s. 608.436, F.S.). A foreign LLC may register its name with the Department of State by filing an application that includes a certificate or similar document illustrating that the LLC is in good standing under the laws of the jurisdiction where it is organized (s. 608.4062(1) and (2), F.S.). Articles of organization must be executed by at least one member or the authorized representative of a member (s. 608.407(4), F.S.).

Section 608.406, F.S., requires that the words "Limited Liability Company" or "Limited Company," or the abbreviations "L.C." or "L.L.C." must be the last words in the name of any LLC formed under ch. 608, F.S. Omission of these words or the abbreviation in using an LLC name renders a person who participates in the omission, or who knowingly acquiesces in it, responsible for liability caused by the omission (s. 608.406(5), F.S.).

Members of the Business Law Section, Tax Law Section, and Real Property, Probate, and Trust Law Section of the Florida Bar formed a drafting committee to propose legislation to revise Florida's existing Limited Liability Company Act. The drafting committee analyzed prototype

LLC legislation as well as legislation passed by other states, such as Delaware, Hawaii, and New York.

III. Effect of Proposed Changes:

The bill makes multiple revisions to the “Florida Limited Liability Company Act” based largely upon the recommendations of the LLC drafting committee, which consists of members representing various sections of the Florida Bar. The bill attempts to modernize Florida LLC law and make it competitive with the LLC laws of other states.

The bill changes the name of the agreement for the management of the LLC from “regulations” to “operating agreement.” The bill provides that unless otherwise provided in the articles or operating agreement, profits, losses, and distributions shall be allocated on the basis of the agreed value of each member’s contributions in the LLC. With respect to voting, the articles of organization or operating agreement may provide for classes or groups of members with different rights, including voting rights. In the absence of any provision for voting, the members shall vote in proportion to their then-current percentage or other interests in the profits of the LLC.

The bill provides that members may delegate the authority and power to manage the LLC to one or more other persons, and managers need not be members. The bill provides fiduciary standards similar to those provided by the Uniform Limited Liability Company Act (ULLCA), imposing a duty of loyalty and a duty of care on managers and managing members, including a duty to refrain from dealing with the LLC or competing with the LLC, unless provided otherwise in the articles or operating agreement. The bill adds a conflict of interest section modeled after the section provided in the Florida Business Corporation Act.

The bill provides a new section addressing the initial admission of members. The bill eliminates the requirement of unanimous, written consent for the admission of new members to a LLC and provides language specifically outlining the nature of a member’s interest, including bifurcation of the economic interest and voting interest. The bill provides a default provision which includes procedures for the assignment of a member’s interest. The bill removes provisions requiring the filing of a supplemental affidavit of capital contributions and lowers certain filing fees.

Following is a description of the changes proposed by the bill based on the specific section of the Florida Statutes affected:

- Amends s. 608.401, F.S., specifying the statutory sections that compromise the Florida Limited Liability Company Act.
- Amends s. 608.402, F.S., incorporating a variety of new definitions, including articles of organization, and revising existing definitions.
- Amends s. 608.403, F.S., adding clarifying language regarding the purpose of LLC organization.
- Amends s. 608.404, F.S., conforming the enumeration of powers to those found in corporate and partnership provisions of Chapter 607 and 620 of the Florida Statutes, and analogous provisions of other states.
- Amends s. 608.406, F.S., relating to proper names and abbreviations of LLCs.

- Amends s. 608.407, F.S., relating to the articles of organization, providing for filing with the Department of State by one or more members or authorized representatives.
- Amends s. 608.408, F.S., providing that a certificate of dissolution needs to be signed by members having the same percentage of membership interests necessary to approve the dissolution or revocation of dissolution, and providing for the recovery of damages for losses caused by the reliance on false statements contained in documents filed with the Department of State.
- Amends ss. 608.4081, 608.4082, and 608.409, F.S., clarifying Department of State filing responsibilities and effect of filing articles of organization.
- Amends s. 608.4101, F.S., providing for access and inspection of records by members.
- Amends s. 608.411, F.S., clarifying the effect of amending articles of organization.
- Creates s. 608.4115, F.S., providing procedures for correcting the articles of organization of record, providing a 30-day window in which such corrections may be made upon filing with the Secretary of State.
- Amends s. 608.415, F.S., providing that a registered agent of a LLC may be a foreign or domestic entity authorized to transact business in this state.
- Amends s. 608.416, F.S., clarifying procedures regarding change of registered agent or registered office.
- Amends s. 608.4211, F.S., clarifying liability for capital contributions and defaulting members' penalties.
- Amends s. 608.422, F.S., providing that management of a member-managed LLC is vested with members in accordance with their membership interests rather than their adjusted capital contributions; providing that a majority-in-interest can make decisions; and providing for a broad delegation of management.
- Amends s. 608.4225, F.S., replacing a "good faith" standard of care with a "duty of loyalty" and a "duty of care" for managers and managing members.
- Creates s. 608.4226, F.S., providing for conflicts of interest regulations.
- Amends s. 608.423, F.S., providing for non-waivable provisions in the operating agreement, including a clause stating that such agreements need not be in writing.
- Amends s. 608.4231, F.S., providing for modernized voting; permitting, under certain circumstances, amendments to the articles of organization or operating agreement without a vote; providing that members vote in proportion to their then-current percentages or other interest in the profits of the LLC.
- Amends s. 608.4232, F.S., providing conforming language (replacing the term "regulations" with "operating agreement"), and providing that a majority-in-interest of the members may consent to the addition of new members, rather than having each member consent.
- Creates s. 608.4235, F.S., providing that, in a member-managed company, each member is an agent of the limited liability company for the purpose of its business for apparently carrying on in the ordinary course the company's business.
- Creates s. 608.4236, F.S., providing that members may delegate the authority and power to manage the LLC to one or more other persons.
- Creates s. 608.4237, F.S. providing for termination of membership upon bankruptcy, with certain exceptions.
- Amends s. 608.425, F.S., providing conforming language, (replacing the term "regulations" with "operating agreement"), and providing that property documents of the LLC shall be binding on the LLC if executed in accordance with Chapter 608.

- Amends s. 608.426, F.S., providing in general that distributions shall be allocated on the basis of the agreed value, as stated in the records of the LLC, of the contributions made by each member to the extent they have been received by the LLC and have not been returned.
- Amends s. 608.4261, F.S., providing that profits and losses shall be allocated on the basis of the agreed value, as stated in the records of the LLC, of the contributions made by each member to the extent such contributions have been received by the LLC and have not been returned.
- Amends s. 608.427, F.S., providing new language allowing a limited right of withdrawal.
- Amends s. 608.428, F.S., clarifying procedures for wrongful distribution.
- Amends s. 608.432, F.S., providing provisions relating to assignment of member's interest, including approval of all members of the LLC, and limiting the power of the assignee.
- Amends s. 608.433, F.S., providing conforming language (replacing the term "regulations" with "operating agreement").
- Amends s. 608.434, F.S., replacing gender specific language with gender neutral language.
- Amends s. 608.436, F.S., renumbering this section as s. 608.4227, F.S., specifying that, except as otherwise provided, neither a member nor manager of a LLC is liable based solely by reason of being a member or serving as manager or based on good faith reliance on the provisions of the LLCs articles of organization or operating agreement.
- Amends s. 608.4362, F.S., renumbering this section as s. 608.4228, F.S., specifying that a manager or a managing member is not personally liable for monetary damages to the LLC for their vote, or failure to act regarding management or policy decisions, with certain exceptions.
- Amends s. 608.4363, F.S., renumbering this section as s. 608.4229, F.S., specifying procedures relating to indemnification of managers, managing members, officers, employees, and agents.
- Amends s. 608.437, F.S., renumbering this section as s. 608.4238, F.S., providing for joint and several liability for all liabilities created by the unauthorized assumption of powers.
- Amends s. 608.438, F.S., providing conforming language (replacing the term "regulations" with "operating agreement").
- Amends s. 608.4381, F.S., providing that a majority-in-interest can approve a merger; adding conforming language (replacing the term "regulations" with "operating agreement").
- Amends s. 608.4383, F.S., providing conforming language (replacing the term "regulations" with "operating agreement").
- Amends s. 608.4384, F.S., replacing gender specific language with gender neutral language and providing conforming language (replacing the term "regulations" with "operating agreement").
- Creates s. 608.439, F.S., providing for the conversion of certain entities to a limited liability company.
- Amends s. 608.441, F.S., providing that the LLC is not dissolved upon the death, retirement, resignation, expulsion, bankruptcy, or after the expiration of a fixed period of time, or when the LLC has a single member.
- Amends s. 608.4421, F.S., replacing gender specific language with gender neutral language.
- Amends s. 608.444, F.S., providing for distribution of assets upon dissolution to members pro-rata in proportion with their then-current percentage, or other interests in profits of the company; rather than in proportion to their respective capital accounts; providing conforming language (replacing the term "regulations" with "operating agreement").

- Amends s. 608.447, F.S., providing conforming language (replacing the word “certificate” with “articles”).
- Amends s. 608.448, F.S., providing a LLC with 30 days to answer interrogatories propounded by the Department of State.
- Amends s. 608.4481, F.S., providing clarifying language regarding procedure for and effect of administrative dissolution.
- Amends s. 608.449, F.S., providing general clarifying language.
- Amends s. 608.4492, F.S., replacing gender specific language with gender neutral language.
- Amends s. 608.4511, F.S., providing general clarifying language.
- Amends s. 608.452, F.S., reducing Department of State filing fees. (See “Economic Impact and Fiscal Note” section below.)
- Amends s. 608.455, F.S., providing conforming language (replacing the term “regulations” with “operating agreement”).
- Amends s. 608.463, F.S., providing clarifying language.
- Amends s. 608.471, F.S., clarifying that the state corporate tax exemption applies to a single member LLC under specified conditions.
- Amends s. 608.502, F.S., specifying that a member or manager of a foreign limited liability company is not liable for LLC obligations based solely on the fact that the LLC did not acquire a certificate of authority prior to conducting business; providing that the Secretary of State functions as the LLC agent for substitute service in certain circumstances.
- Amends s. 608.503, F.S., clarifying information necessary for application for certificate of authority.
- Amends s. 608.504, F.S., providing that LLCs shall amend a certificate of authority when any statement on the original application to the Department of State is false or becomes false.
- Amends s. 608.505, F.S., providing clarifying language with respect to the rights and privileges of a foreign LLC, and specifying that the laws of the state in which a foreign LLC is organized govern its internal affairs.
- Amends s. 608.507, F.S., eliminating unnecessary language.
- Amends s. 608.508, F.S., replacing gender specific language with gender neutral language.
- Amends s. 608.512, F.S., adding failure to amend a foreign LLC’s certificate of authority pursuant to s. 608.504, F.S., as grounds for revocation of authority to transact business; replacing gender specific language with gender neutral language.
- Amends s. 608.5135, F.S., clarifying language relating to foreign LLC application for reinstatement.
- Creates s. 608.601, F.S., outlining member’s derivative actions; specifying that a person may not initiate a proceeding in the right of a LLC unless the person was a member when the transaction complained of occurred or became a member through transfer from one who was a member at that time.
- Creates s. 608.701, F.S., providing that the court shall apply corporate case law when a party seeks to set aside limited liability and hold members of the LLC personally responsible.
- Creates s. 608.702, F.S., outlining under what circumstances certain certificates and certified copies are to be received into evidence.
- Creates s. 608.703, F.S., relating to interrogatories by the Department of State.
- Repeals ss. 608.4062, 608.412, 608.424, and 608.4494, F.S., relating to registered name, application, renewal, and revocation of a foreign LLC; mandatory filing of a supplemental affidavit of capital contributions; the prohibition against contracting debts of LLCs; and the

deposit of assets of a dissolved LLC with the Department of Banking and Finance in the event of constructive or virtual abandonment.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The bill proposes various reductions in LLC filing fees charged by the Department of State:

For furnishing a certified copy:

Present fee - \$52.50, Proposed fee - \$30

For filing original articles of organization, articles of revocation of dissolution, or a foreign LLC's application for a certificate of authority to transact business:

Present fee - \$250, Proposed fee - \$100

For filing an annual report:

Present fee - \$100, Proposed fee - \$50

For filing an application for reinstatement after an administrative/judicial dissolution or revocation of authority to transact business:

Present fee - \$500, Proposed fee - \$100

For filing a certificate designating a registered agent or changing a registered agent:

Present fee - \$35, Proposed fee - \$25

For filing a registered agent's statement of resignation from an active LLC:

Present fee - \$87.50, Proposed fee - \$85

For filing a registered agent's statement of resignation from a dissolved LLC:

Present fee - \$35, Proposed fee - \$25

For filing any other limited liability company document:

Present fee - \$52.50, Proposed fee - \$25

Proposes a new fee of \$25 per constituent party to the merger for filing articles of merger of LLC or other business entity.

Proposes a fee of \$5 for furnishing a certificate of status.

Eliminates a current fee of \$250 for filing a supplemental affidavit declaring the amount of capital contributions of the members when there is an increase in capital contribution beyond the anticipated amount.

Representatives from the Department of State have estimated that any revenue lost because of the reduction in fees should be offset by additional revenue gained from an expected increase in filings.

B. Private Sector Impact:

Implementation of the modernization measures provided for in the bill may serve to promote the expanded use of LLCs in the state of Florida.

C. Government Sector Impact:

The changes to the Florida's LLC law are expected to create an increase in filings of LLCs with the Department of State. Representatives from the Department of State have indicated that the Department can handle the expected increase in filings while remaining at the current staffing level.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Commerce and Economic Opportunities:

Technical amendment, deleting the word "or" and inserting the word "of."