

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1079 Limited Liability Companies

**SPONSOR(S):** Appropriations Committee, Civil Justice Subcommittee; McBurney

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1300

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Cary	Bond
2) Appropriations Committee	24 Y, 0 N, As CS	Rayman	Leznoff
3) Judiciary Committee			

### SUMMARY ANALYSIS

The bill creates the Florida Revised Limited Liability Company Act, effectively carrying over current law to a new Chapter 605, F.S.

In 2006, the National Conference of Commissioners on Uniform State Laws developed a revision of the Uniform Limited Liability Company Act of 1996. Florida's Limited Liability Company (LLC) law is based on the 1996 uniform act, however there have been many changes in the law and the development of complex business organization since Florida's LLC act had its most recent significant modifications in 1999 and 2002.

An LLC is a business entity with characteristics of both a corporation and a partnership. For most legal purposes, an LLC is treated like a corporation and therefore affords its owners, which are referred to as "members," certain protections from liability. Key features of the current Florida LLC law include:

- Pass-through taxation where members report their share of the LLC's profit or loss on individual tax returns;
- No limitation on the number of members allowed;
- Members control the distribution of profits;
- No corporate formalities such as meeting minutes or annual meetings;
- Florida LLCs may have subsidiaries;
- Indefinite life: a Florida LLC does not dissolve at the death or other termination of a member;
- Single member LLC;
- Liability is limited to the extent of the member's capital contribution; and
- Less expensive to organize and maintain than other forms of business organization.

CS/CS/HB 1079 largely adopts the Revised Uniform Limited Liability Act of 2006, however the Executive Committee of The Florida Bar Chapter 608 LLC Act Drafting Committee departed from the model act in several areas. The drafting committee adopted provisions from the existing Florida LLC act and the Delaware LLC Act. Highlights of the bill include:

- An expanded list of nonwaivable default rules that cannot be overridden by the operating agreement;
- Modified rules regarding the power of members and managers to bind the LLC;
- Modified provisions addressing the LLC's management structure;
- Modified default management and voting rules; and
- Modified provisions for dissociation, dissolution, merger, conversion, interest exchanges, and domestication.

The bill may have an indeterminate, positive fiscal impact on state revenue if additional LLCs elect to file with the state.

The bill provides an effective date of January 1, 2014, except as otherwise provided in the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1079c.APC

DATE: 4/19/2013

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Florida's current Limited Liability Companies (LLC) law remains largely unchanged since its last significant modification in 2002. Significant amendments were made in 1999. In 2006, the National Conference of Commissioners on Uniform State Laws developed a revision of the Uniform Limited Liability Company Act of 1996.<sup>1</sup> Seven states, California, New Jersey, Iowa, Nebraska, Wyoming, Utah, and Idaho, plus Washington, DC, have enacted the Uniform Act while South Carolina recently introduced the bill in its current legislative session. The Constitution of the National Conference of Commissioners on Uniform State Laws states that the Commissioners' purpose is to "promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable."<sup>2</sup>

The first state to pass an LLC act was Wyoming in 1977. The statute required a form of the word "limited" in the company name and allowed a partner to control the admission of new partners. The Wyoming law also required that the LLC be dissolved if a member died and excluded members<sup>3</sup> or managers from personal liability from litigation involving the business.<sup>4</sup> Florida became the second state to pass an LLC act in 1982, but the use of LLCs in Florida was limited because Florida taxed LLCs as corporations until 1998.<sup>5</sup>

The Florida Limited Liability Company Act is entirely contained within chapter 608 of the Florida Statutes. The current Florida LLC Act was originally passed in 1982<sup>6</sup> and has been amended many times since, including significant modifications in 1983<sup>7</sup>, 1993<sup>8</sup>, 1997<sup>9</sup>, 1999<sup>10</sup>, and 2002.<sup>11</sup>

Limited liability company statutes were created because neither corporations nor partnerships were ideal types of business organizations in some cases. A partnership carries with it full joint and several liability for each of the members, and a corporation is often too complex for a smaller business and must pay state corporation taxes. The LLC has been described as a quasi-partnership that provides limited liability with the management structure of a general partnership and the income tax structure of a partnership.<sup>12</sup>

Key features of the current Florida LLC law include:

- Pass-through taxation where members report their share of the LLC's profit or loss on individual tax returns;
- No limitation on the number of members allowed;

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<sup>1</sup> For detailed comments from the National Conference of Commissioners on Uniform State Laws as to each section of the model act, visit their website at [http://uniformlaws.org/Act.aspx?title=Limited Liability Company \(Revised\)](http://uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20(Revised)) (last visited March 12, 2013).

<sup>2</sup> Article 1, Section 2, Constitution of the National Conference of Commissioners on Uniform State Laws.

<sup>3</sup> A "member" is similar to a shareholder. It is a person with some ownership interest in the LLC.

<sup>4</sup> Wyo. Stat. Sec. 17-15-103 (1977).

<sup>5</sup> Section 220.02, F.S., must be read in conjunction with s. 220.03(1)(e), F.S., which excludes from the definition of corporation, "limited liability companies that are taxable as partnerships for federal income tax purposes." The corresponding change was codified in the LLC law in ss. 608.471(1) and (3), F.S.

<sup>6</sup> Chapter 82-177, L.O.F.

<sup>7</sup> Chapter 83-216, L.O.F.

<sup>8</sup> Chapter 93-284, L.O.F.

<sup>9</sup> Chapter 97-102, L.O.F.

<sup>10</sup> Chapter 99-315, L.O.F.

<sup>11</sup> Chapter 2002-272, L.O.F.

<sup>12</sup> McGinty, A. Edward, *Olmstead – A Lever from Member's Creditor to Full Multi-member LLC Membership?* Fla. Bar J., Vol. 85, No. 3, p. 42 (March 2011).

- Members control the distribution of profits;
- No corporate formalities such as meeting minutes or annual meetings;
- Florida LLCs may have subsidiaries;
- Indefinite life: a Florida LLC does not dissolve at the death or other termination of a member;
- Single member LLC;<sup>13</sup>
- Liability is limited to the extent of the member's capital contribution; and
- Less expensive to organize and maintain than other forms of business organization.<sup>14</sup>

## **Applicability**

The bill creates the new LLC act in chapter 605, F.S. Chapter 608, F.S., remains in effect as to LLCs in existence when the bill becomes law on January 1, 2014. Prior to then, a company may elect to be subject to chapter 605, F.S., at its formation. As of January 1, 2015, all LLCs are subject to chapter 605, F.S., and chapter 608, F.S., is repealed.

## **Significant Current Law Retained by the Bill**

### Charging Orders

The bill retains current law with respect to charging orders. Section 605.0503, F.S., retains the "Olmstead Patch" that was passed by the Legislature in 2011.<sup>15</sup> A creditor with a judgment against a member of an LLC can obtain a charging order from a court to be paid from the profits of the LLC, and the charging order is the debtor's exclusive remedy against an LLC. In *Olmstead*,<sup>16</sup> the Florida Supreme Court decided that a creditor has other remedies against a single-member LLC, a decision that appeared to run contrary to the intent of the Legislature when it created the LLC act. The Legislature responded by expressing its clear intent that a charging order is the exclusive remedy when the LLC has multiple members, but left a single-member LLC open to other remedies.<sup>17</sup>

### Fiduciary Duties

The uniform act adopts an "un-cabined" approach to fiduciary duties, which describes core duties but does not make them exclusive. The bill limits fiduciary duties to those specifically enumerated. Also, the uniform act allows members to substantially eliminate fiduciary duties by agreement of the members, which the bill does not allow.

### Apparent Authority of Members

In the absence of explicit provisions to the contrary, a member of an LLC has apparent authority to bind the LLC. The uniform act adopted rules of agency to determine who has authority to bind the LLC, which allows a court to determine if somebody entering into a contract with the LLC should reasonably believe that the person he entered into agreement with has authority to bind the LLC to a contract. This may include a manager who is not a member, and in some cases, a member may not have apparent authority. Florida maintains existing law, where a member always has apparent authority to bind the LLC. However, the bill, in a departure from current law, allows an LLC to be negated or limited by the operating agreement of the LLC or by allowing the LLC to file Statements of Authority to put third parties on notice as to who has the authority to bind the LLC.

<sup>13</sup> For discussion on a Florida Supreme Court case that may make a single-member LLC an undesirable option, see McGinty, *supra*.

<sup>14</sup> For a more detailed discussion about the advantages and disadvantages of Florida's current LLC law, except where subsequent bills have modified the law, see Lacasa, Carlos A., Klein, Ronald J., and Wells, Thomas O., *The New Limited Liability Company in Florida*, Fla. Bar J., Vol. LXXIII, No. 7 (July/August 1999).

<sup>15</sup> Chapter 2011-77, L.O.F.

<sup>16</sup> *Olmstead v. Federal Trade Commission*, 44 So.3d 76 (Fla. 2010).

<sup>17</sup> For a more detailed discussion of the effects of the *Olmstead* decision, see McGinty, *supra*.

## Other Changes

The bill makes other changes to the model act that are either less substantively significant or to conform the model act to Florida law in terms of language and grammar. The bill adopts many definitions that are not defined in the model act and changes some definitions.

## **Effects of the Bill**

In general, the bill provides default rules, meaning that an operating agreement may override most of the statutory rules created by the bill. However, s. 605.0105(3), F.S., of the bill provides a number of provisions that the operating agreement may not override.

## General Provisions

### *Knowledge*

This section is substantially the same as the model act except for s. 605.0103(4)(b), F.S., which carries over substantially similar provisions in existing law governing the effect of provisions in articles of organization pertaining to the management structure of an LLC and the grant of authority to or restriction on authority of any persons. As is the case under existing law, there is a 90-day “burn in” period if any changes are made to those provisions in the articles.

### *Governing Law and Operating Agreement*

The governing law provides that the law of Florida governs the internal affairs of the LLC and the liability of members and managers. The operating agreement, found in s. 605.0105, F.S., of the bill, performs six essential functions. Subsection (1) establishes the primacy of the operating agreement in establishing relations within the limited liability company, its member or members, and any manager. This affirms existing law. Subsection (2) recognizes the new act as comprising mostly default rules – i.e., gap fillers for issues on which the operating agreement provides no rule. Subsection (3) lists the mandatory provisions of the new act (i.e., those provisions that may not be waived). Subsection (4) lists some provisions frequently found in operating agreements, authorizing some provisions unconditionally and other provisions so long as “not manifestly unreasonable.” Subsection (5) delineates in detail both the meaning of “not manifestly unreasonable” and the information relevant to determining a claim that a provision of an operating agreement is manifestly unreasonable. Subsection (6) provides that an operating agreement may include specific penalties or other consequences if a member fails to comply with its terms or upon certain events specified in the operating agreement.

Section 605.0106, F.S., of the bill provides that an LLC is bound by and may enforce the operating agreement, and that a member is deemed to be a party to the agreement whether or not that person actually signs the operating agreement. The first three subsections are based on the uniform act, while the remaining five are based on Delaware law and they recognize or affirm the correctness of certain common practices and help clarify recurring questions about the matters dealt with in those subsections.

Section 605.0107, F.S., of the bill is adopted from the uniform act, which:

- Allows a non-member to be given veto rights over amendments to the operating agreement;
- Provides the rights and obligations of a transferee or dissociated member under an operating agreement;
- Provides that an LLC cannot by way of a record filed with the Department of State include and make effective a provision that would be ineffective under certain provisions of the new LLC act if such provisions were placed in an operating agreement; and
- Recognizes the important maxim that a limited liability company is a creature of contract as well as a creature of statute.

### *Nature, Purpose, Duration, and Powers*

The nature, purpose, and duration provision is based on the uniform act and provides an indefinite duration, meaning the LLC does not dissolve when a member dies or otherwise leaves the company. The powers of the company are specifically defined by the bill, while the uniform act provides a general power to sue and be sued and to do all things necessary or convenient to carry on its activities. The bill, on the other hand, lists 14 different specific powers in addition to the general language, all of which appear to be encompassed by the general language. Also, an LLC must contain the words “limited liability company” or the initials “LLC” or “L.L.C.”

### *Property*

The property provisions of the bill are a combination of current law, the uniform act, and Delaware law, and provide for the ownership of property by the LLC.

### *Registered Agent*

Most of the sections of the bill requiring and providing requirements for a registered agent come from existing law rather than the uniform act. Each LLC must maintain a registered agent with an office in Florida and must file a statement, including the address, with the Department of State.

### *Service of Process, Notice, and Delivery*

The bill attempts to provide more certainty than current law does with respect to service of process. Current law does not contain a dedicated section relating to service of process on an LLC. A person serving process on an LLC does so in the same manner as if it were a partnership. However, some LLCs are managed by a manager, rather than a member, which can cause confusion. 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 and Filings

### *Formation*

The formation of an LLC is modeled after the uniform act, though it changes some terminology to conform to existing law in Florida. Consistent with existing law, this provision requires there to be at least one member of the LLC in order for the formation of the LLC to be effective; in other words, “shelf” LLCs are not authorized. However, under the new act, unlike the uniform act, the person who signs the articles of organization is deemed to affirm that the LLC has or will have at least one member as of the time the articles of organization become effective, and the definition of “authorized representative” in the new act takes this into account. Thus, although the new act specifies that an LLC is not formed until both the articles become effective and at least one member has become a member, because of the deemed affirmation, the two conditions will have both been satisfied at the time the articles become effective.

Consistent with current law and the uniform act, the new act requires only the most “bare bones” of disclosure in the articles of organization. In particular, the new act 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 Section 605.0105(3), F.S. For example, although not required, the articles may declare that the LLC is to be “manager-managed” and/or may name one or more managers of a manager-managed LLC or one or more members of a member-managed LLC.

### *Amendment of Articles of Organization*

The method of amending or restating the articles of organization remains largely unchanged from current law, though the language of the bill more closely tracks the language of the uniform act.

However, s. 605.0202(5), F.S., of the bill is not the same as current law, and it imposes an obligation directly on the members or managers, as applicable, to correct information in articles of organization that has become inaccurate. A member's or manager's failure to meet the obligation exposes the member or manager, as applicable, to potential liabilities to third-parties under s. 605.0205(1), F.S., of the bill.

### *Signing of Records*

These provisions are similar to the language of the model act, and provide who must or may sign certain records. However, the bill adds a requirement to the model act by requiring a registered agent to sign the acceptance of duties statement and also by adding the obligation that an agent, legal representative or attorney in fact who has the authority to sign a record must actually recite in the record that such person has that authority.

### *Filed Records*

The filing requirements are mostly consistent with current law. Records must be filed with the Department of State. A new provision not in current law allows an LLC to file a document with a specification of when it should take effect, though it cannot be retroactive by more than five days. Another new provision allows an LLC to withdraw a statement that has been filed as long so it has not yet taken effect, in which case the record may be corrected but not withdrawn. 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 acknowledges that an operating agreement can have the effect of relieving and shifting from certain specified members to other specified members the liability to third parties for inaccurate information in filed records. Existing law expressly states that 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 making it clear that the affirmation under penalties of perjury applies to any and all records authorized or required to be filed with the Department of State under the New Act.

### *Department of State*

The bill provides requirements to the Department for the filing of records and procedures for rejecting a record. When the Department has accepted and filed an LLC's articles of incorporation, it must provide a certificate of status upon request. The bill sets forth in detail what is to be stated in a certificate of status for a Florida LLC and what is to be stated in a certificate of status for a foreign LLC that has a certificate of authority to transact business in Florida. Consistent with current law, this bill expressly states that a certificate of status is conclusive evidence that a Florida LLC exists or that a foreign limited liability company is authorized to transact business in Florida, as applicable.

The bill authorizes the Department to collect filing fees, consistent with current law, however there are several new categories of filings. Most of the new fees are consistent with current law as they are \$25, which is the default filing fee for anything not listed in the current statute. The bill retains current law with respect to the power of the Department to administer the LLC law.

### Members, Management, and Voting

#### *Authority and Liability*

The model act departs from tradition and the law in most states by eliminating apparent statutory authority to bind the LLC. The bill retains the traditional Florida rule by providing four ways in which someone has the power to bind the LLC, if the person:

- 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 and 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 model act 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. The bill shields members and managers against the debts, obligations and liabilities of the LLC, but does not provide any shield against such person's own conduct or a contractual obligation expressly assumed by such person such as a written guarantee of indebtedness. This section also pertains to the equitable doctrine of "piercing the veil," and presumably the case law in the corporate context can be expected to be applied in interpreting that portion of this section, as it does under current law.

### *Members*

Membership criteria are modeled after the uniform law, while retaining some existing terminology. For instance, references to the "organizer" under the model act have been changed to the "authorized representative" consistent with Florida law. However, unlike current law, a person can become a non-economic member without a transferable interest (i.e., without any right to distributions) 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, while under current law the required consent under the default rule is a majority in interest of the members unless the new member is an assignee (a person that has been assigned an interest in an LLC) that is becoming a member, which under the default rule of current law requires unanimous consent.

### *Contributions*

The form of contribution required by the bill is similar to current law, except that it adds new permissible contributions in accordance with the model act. 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 model act, the bill allows an operating agreement to provide penalties for failure to meet the obligation.

### *Distributions*

Subsection (1) of s. 605.0404, F.S., of the bill is based on the model act while maintaining portions of existing law. It generally continues the existing default rule in Florida for LLCs and limited partnerships that distributions are made in accordance with the value of the members' capital contributions. It changes current law by ignoring the value of any capital contributions that, at the time of the particular distribution, have previously been returned. Removing the existing requirement of subtracting returned capital contributions makes the standard the same for LLCs in Florida as is currently in place for limited partnerships in Florida.<sup>18</sup> It does not follow the model act, which provides that distributions must be equal shares among members.

Subsection (2) of s. 605.0404, F.S., of 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. Subsection (3) is a new provision that provides that a person does not have a right to distributions in kind and that to make distributions in kind, each part of the asset is fungible with each other part and each person receives a percentage of the asset distributed equal to that person's share of distributions.

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<sup>18</sup> See s. 620.1503(2), F.S., for limited partnerships; but see s. 620.8401, F.S., with respect to general partnerships.

Subsection (4) is a new provision that provides that a member or transferee that becomes entitled to a distribution has the status and remedies of a creditor with respect to the distribution. Subsection (5) departs from the model act and is based on existing law. However, it 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.

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 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*

The bill does not follow either the model act 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 term “managing member” is fairly unique to Florida and is not used in the model act or LLC statutes in any of the more prominent states. The bill provides that existing LLCs that are managed by a managing member are deemed to be member-managed rather than manager managed. The following provisions of s. 605.0407, F.S., of the bill are from the model act and are new to existing law. Subsection (4) 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. Subsection (5) provides that a member that advances funds to an LLC is entitled to reimbursement. Subsection (6) 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.”

In a manager-managed LLC, the bill is consistent with current law and deviates from the model act by providing that managers are chosen or removed by members holding a majority of the then-current interest in the profits of the LLC. By contrast, the model act provides for the appointment and removal of managers by a simple majority of the members (i.e., on a per capita basis).

The voting rights provisions of the bill are based on a combination of existing law and the model act. The following provisions of the bill are consistent with current law and different than or not provided by the model act. The bill provides:

- For a member-managed LLC, each member votes in accordance with its then-current percentage of the profits interest of the LLC, while the model act provides that each member has an equal vote;

- 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, while the default rule under the uniform act for member-managed LLCs is that the vote by a simple majority of members is required for actions in the ordinary course; and the unanimous vote of the members is required for actions outside of the ordinary course of the LLC's activities and affairs;
- For manager-managed LLCs, except as otherwise provided, a majority in interest of the members must approve any action outside of the LLC's ordinary course of the activities and affairs, while the model act requires this vote to be unanimous;
- 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; 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.

The bill adopts the model act 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. This is a change to existing law, which does not expressly address amendment to the operating agreement and 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 new act eliminates the following provisions under existing law, none of which is in the model act:

- 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. This change eliminates an ambiguity under existing law as to whether non-voting member may vote on a dissolution or merger.
- Section 608.4231(7), F.S., which expressly allows the articles of organization or the operating agreement to provide for the mechanics of voting. This provision appears to be unnecessary as the bill provides that default rules may be changed by the operating agreement or the articles of organization.

The bill provides for agency rights of members and managers. The default rule for agency rights of members and managers follows current law. That is, in a member-managed LLC, all members are automatically agents of the company. However, in a manager-managed LLC, all managers are agents of the company and members are not automatically agents of the company. Acts of an agent bind the company, so long as the act was in the name of the company and was apparently for carrying on the ordinary course of the company's activities and affairs. There is an exception which provides that the general rule will not apply if the agent did not have actual authority to act in the particular matter, and the person with whom the agent was dealing knew, or had notice, that the agent lacked authority. An act of an agent which is not for apparently carrying on in the ordinary course of the company's activities and affairs, binds the company only if the act was authorized by the appropriate vote of the members.

#### *Reimbursement and Indemnification*

The bill is based on the model act, but deviates by making reimbursements and indemnification discretionary rather than mandatory. Discretionary indemnification is consistent with current law.

#### *Standards of Conduct*

These provisions are modeled in part on the uniform act, but have been revised to be consistent with current law and significantly depart from the model act in places. The model act presents an “un-cabined” approach by providing that the duties of care and loyalty include but are not limited to certain specified and defined obligations. The bill, consistent with current law, departs from the model act's “un-cabined” approach and instead limits the definition of the duties of care and loyalty as only those stated in the new act. Subsection (1) of s. 605.04091, F.S., of the bill changes existing law by using the term “fiduciary” to describe the duties of care and loyalty. This varies from the model act, which identifies the duty of loyalty as a “fiduciary” duty but does not use the term fiduciary relative to the duty of care. Subsection (2) is from the model act, but limits the duty of loyalty to certain specified duties that are substantively consistent with the definition of the duty of loyalty under existing law. Subsection (3) provides that the duty of care also arises in connection with conducting or winding up of the activities and affairs of the LLC.

The bill varies from both the model act and existing law by changing the references to “intentional misconduct” to instead reference “willful or intentional misconduct.” This change was made throughout the bill to reflect the various inconsistent interpretations by the courts of the definitions of willful misconduct vs. intentional misconduct and to make sure that serious misconduct is covered, whether it is called intentional misconduct or willful misconduct.

The bill eliminates a provision of existing law, which provides that a manager or member that complies with the applicable section of existing law in connection with the performance of its, his, or her duties with respect to the LLC will have no liability with respect to such actions.

The bill generally provides a safe harbor from conflict of interest claims for approving a transaction between an LLC and a member or manager that has a direct or indirect financial or other interest in or is a direct or indirect party to the transaction if the transaction is generally fair to the LLC.

### *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. 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.

### Dissociation

#### *Power to Dissociate*

In accordance with the model act, the bill allows a member to dissociate at any time, rightfully or wrongfully, by withdrawing by “express will.” Under current law a member does not have the right, unless in the articles of organization or operating agreement, to withdraw or resign prior to dissolution and winding up. 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 further generally provides that any transferable interest that the person had immediately prior to dissociation continues to be owned by the person as a transferee. 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.

## *Events Causing Dissociation*

Another provision from the model act provides that a person dissociates as a member by express will at the time the LLC has notice of the member's intent to withdraw, unless the notice makes the withdrawal effective as of a later date. As discussed in the previous section, a person has no right to withdraw as a member under existing law. 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.

## Dissolution and Winding Up

### *Events Causing Dissolution*

The bill provides for five default events causing dissolution, which are very similar to the events causing dissolution under s. 608.441, F.S., although language similar to the model act was adopted rather than the language in current law. The five default events are:

- 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 circumstance 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.

Judicial dissolution is generally the same as current law. The bill provides for venue, the litigation parties, and alternative remedies to dissolution, and provides that the judge may issue a decree of dissolution and appoint a receiver. The grounds for judicial dissolution in the bill are:

- In a proceeding brought by the Department of Legal Affairs if it is established that the articles of organization were obtained through fraud, or where the LLC has exceeded or abused its authority; or if special proceedings are brought based on other causes as provided in any other law of Florida;
- In a proceeding brought by a member or manager if it is established the company's activities are unlawful, or persons in control of the company are acting illegally or fraudulently, or if it is not reasonably practicable to carry on the activities of the LLC in accordance with its operating agreement, or if the assets are being misappropriated or wasted causing injury to the LLC or its members; or
- In a proceeding brought by the LLC to have its voluntary dissolution continued under court supervision.

One change from current law is the elimination of s. 608.449(3), F.S. which permitted a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the LLC was insolvent, or where the LLC admitted that the creditor's claim was due and owing and the LLC was insolvent. This provision is not found in the model act or Delaware law.

### *Articles of Dissolution*

The requirements for filing the articles of dissolution in the bill are substantially the same as current law, with one major difference. The bill combines ss. 608.445 and 608.446, F.S., into one section. The requirements for the minimum content in the articles of dissolution remain similar to current law with changes to style and language. The filing requirements with the Department of State are essentially the same as current law and the consequence of the filing is affirmatively stated as causing the LLC to cease doing business and to begin winding up its activities and affairs.

The filing of the articles of dissolution begins the process of dissolution, which requires winding up, and ultimately, once winding up is completed, the "termination" of the existence of the LLC with the permissive filing of a statement of termination. Dissolution does not change applicable law for determining actual and apparent authority, unless the court intervenes and appoints a receiver, trustee,

or some legal representative of the members or the company to conduct the winding up and termination of the LLC. There is no stated time requirement for dissolution, as the circumstances of each LLC dissolution may be unique, with some companies requiring a much longer time to wind up their activities and affairs.

The bill allows an LLC to revoke its filed articles of dissolution, so long as it has not filed an effective "statement of termination," at any time prior to 120 days after the effective date of its articles of dissolution. If filed properly, the LLC may resume its activities and affairs as if the articles of dissolution were never filed. The bill provides protection for third parties who acted in reliance on the initially filed articles of dissolution. The provision further provides that the third parties may not be adversely affected by the revocation.

### *Winding Up*

The provision of the bill relating to the winding up of an LLC is substantially adopted from the model act and provides for rules, payments, and appointment of persons responsible for winding up the LLC, and if necessary, the appointment of a trustee or receiver. The bill also provides an order for distribution of surplus assets after all creditors have been paid in full. The bill also provides a statute of limitations for known and unknown claims against a dissolved LLC and a safe harbor for a member's personal assets.

The bill allows an LLC to file an application in the appropriate circuit court to determine the amount and form of security required to pay for contingent and unknown claims, or claims that are reasonably expected to arise after dissolution as well as a provision for administrative dissolution. An LLC that is administratively dissolved may apply to the Department of State for reinstatement. If approved, the reinstatement would relate back to the date of the administrative dissolution. The bill also provides an LLC with judicial review for a denial of reinstatement by the Department. Finally, the bill provides that dissolution does not transfer title of company assets, prevent the company from engaging in legal proceedings, abate or suspend legal proceedings, or terminate the authority of the registered agent.

### Actions by Members

#### *Direct Action and Derivative Action*

The provisions relating to actions by members mostly follow the uniform act. Existing law does not have a comprehensive direct action by member provision. 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 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 or threatened to be suffered by the LLC.

The bill also allows a member to maintain a derivative action to enforce a right of the LLC in two circumstances: when an action is not instituted after a demand on the managing members of a member-managed company or the managers of a manager-managed company "within a reasonable time", not to exceed 90 days; or without demand if demand would be futile or irreparable injury would result to the company by waiting for the members or managers to bring the action. The model act does not contain the 90-day outside time limit, but rather relies solely on the concept of "a reasonable time" for the company to bring the suit. The model act also does not contain an irreparable injury requirement, which provides some level of protection for the limited liability company from frivolous derivative actions. The addition of "demand futility" is a change from s. 608.601, F.S., which requires "universal demand" before a derivative action may be filed by a member. A derivative action must be filed by a member at the time the action is commenced.

#### *Litigation*

If an LLC is named in a derivative action, disinterested members may appoint a special litigation committee. The bill provides for the appointment of such a committee and the powers of the committee.

The bill provides that all proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, are the property of the limited liability company. However, the bill allows for a court to award reasonable expenses that include reasonable attorney fees and costs to the plaintiff in a derivative action from the recovery of the LLC. The court must approve a voluntary dismissal or settlement.

### Foreign LLCs

The bill provides a framework for a foreign LLC that registers to do business in Florida. The laws of the jurisdiction under which the foreign LLC is registered govern the organization of the LLC and the liabilities of the LLC and its members and managers.

#### *Certificate of Authority*

The bill provides that a foreign LLC may not transact business in the state until it obtains a certificate of authority. This provision substantially follows current law, including requiring the foreign LLC to apply with the Department of State on forms prescribed by the Department. If the name of the foreign LLC is already in use in Florida, the bill provides a requirement to file under an alternate name with a cross-reference to the proper name. The bill also provides a non-exhaustive list of activities that do not constitute “transacting business” in the state, and thus may be engaged in without obtaining a certificate of authority.

The bill adopts and expands upon a model act provision allowing an amendment to a certificate of authority. The bill provides that a foreign LLC must deliver an amendment to its Certificate of Authority to the Department of State, to reflect any change to its name, principal office and mailing address (unless that change is made in the Annual Report filing), the name and street address of its registered agent (unless that change is made in the Annual Report filing), or if there is a change of person, title or capacity, or address from the original application for a Certificate of Authority. The filing must be made within 30 days after the occurrence of the change, signed by an authorized representative, and the information to be set forth in the amendment is further specified. The bill also permits the foreign LLC to use an amendment to add, remove, or change the name, title, capacity, or address of any person who has authority to manage the foreign LLC. The foreign LLC may also withdraw and cancel a certificate of authority. If certain conditions are met, the Department of State may also revoke the certificate of authority, though the foreign LLC is allowed an opportunity to cure the defect that led to the decision by the Department to revoke the certificate. If a certificate is revoked, it may be reinstated and the bill provides a one-year period after revocation before another entity may use the name of the foreign LLC.

Finally, the Attorney General may maintain an action to enjoin a foreign LLC from transacting business in Florida if it is in violation of this chapter. The authority for this kind of injunctive action has been part of corporate law for more than a century and has been carried over to unincorporated business entities.

### Mergers, Interest Exchange, Conversion, and Domestication

#### *Charitable and Donative Provisions*

These provisions are new to Florida law and are based on the uniform act. The bill prevents nonprofit LLCs from using the provisions in the new act 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, since in an interest exchange, conversion or domestication transaction, the entity to which the bequest was made continues in existence.

#### *General Provisions*

The bill provides several provisions that are important for an LLC, including status of filings, nonexclusivity, and reference to external facts in a plan, appraisal rights, assertion of rights, intent to demand payment, perfection of rights, and remedies, many of which are retained from existing law.

### *Merger*

The bill authorizes LLCs to merge with foreign LLCs. To do so, a domestic LLC must approve a plan of merger that contains details about how to merge the interests, securities, obligations, money, property, etc. The plan must then be approved by a majority-in-interest of the members. Each entity of a merger must approve the plan in accordance with the laws that govern the LLC. The plan can 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*

The concept of an interest exchange is new to limited liability companies, but has been a part of corporate law for many years. 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. In large measure, the interest exchange provisions of the bill parallel the merger provisions of the bill and substantially follow the model act.

### *Conversion*

This provision allows an entity to change into a different type of entity or, in the case of an LLC, to remain an LLC, but to change its jurisdiction of formation. The bill, unlike the model act, allows conversions of limited liability companies. Much like a merger, the bill requires a plan of conversion and approval of conversion and allows amendment or abandonment, and becomes effective upon the passage and filing of the articles of conversion.

### *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 differs from a conversion in that it allows the domesticating entity to retain its status and existence in the non-U.S. jurisdiction in which it currently exists. The bill follows Delaware rather than the uniform act by allowing domestication of all non-U.S. entities, whereas the model act only allows domestications by LLCs. Much like a merger, the bill requires a plan of domestication and approval of domestication and allows amendment or abandonment, and becomes effective upon the passage and filing of the articles of domestication.

### Miscellaneous Provisions

The bill provides guidance to practitioners and courts to apply and construe the new act in accordance with the uniform act upon which it is based, even though very little of the bill is taken word-for-word from the model act.

The bill also provides guidance with respect to federal and state laws concerning electronic signatures.

The bill substantively maintains s. 608.471, F.S., relating to tax exemptions on income of certain LLCs, which is not a part of the uniform act.

The bill substantively maintains s. 608.703, F.S., relating to interrogatories by, and other powers of, the Department of State.

The bill also contains a savings clause to ensure the continuing validity of LLCs in Florida after the adoption of the new act.

The bill contains a severability clause.

The bill provides an effective date of January 1, 2014, except as otherwise provided.

## B. SECTION DIRECTORY:

Sections 1 and 2 create ch. 605, F.S., and designate it 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 current law. On January 1, 2015, all LLCs are subject to the provisions under ch. 605, F.S.

Section 3 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.

Section 4 provides for future and contingent amendment of fees of Department of State.

Section 5 repeals ss. 608.401-608.705, F.S., on January 1, 2015.

Sections 6 and 7 amend s. 607.1109, F.S., to add a cross-reference to s. 605.1025, F.S., and remove the cross-reference to s. 608.4382, F.S., on January 1, 2015.

Sections 8 and 9 amend s. 607.1113, F.S., to include the phrase "articles of conversion," add a cross-reference to s. 605.1041, F.S., and remove the cross-reference to s. 608.439, F.S., on January 1, 2015.

Sections 10 and 11 amend s. 607.193, F.S., to add a cross-reference to s. 605.0212, F.S., and remove the cross-reference to s. 608.4511, F.S., on January 1, 2015.

Sections 12 and 13 amend s. 617.1108, F.S., to add a cross-reference to s. 605.1025, F.S., and remove the cross-reference to s. 608.4382(1), F.S., on January 1, 2015.

Sections 14 and 15 amend s. 620.2104, F.S., to include the phrase "articles of conversion," add a cross-reference to s. 605.1045, F.S., and remove the cross-reference to s. 608.439, F.S., on January 1, 2015.

Sections 16 and 17 amend s. 620.2108, F.S., to include a cross-reference to s. 605.1025, F.S., and remove the cross-reference to 608.4382(1), F.S., on January 1, 2015.

Sections 18 and 19 amend s. 620.8914, F.S., to include the phrase "articles of conversion," add a cross-reference to s. 605.1045, F.S., and remove the cross-reference to s. 608.439, F.S., on January 1, 2015.

Sections 20 and 21 amend s. 620.8918, F.S., to include a cross-reference to s. 605.1025, F.S., and remove the cross-reference to s. 608.4382(1), F.S., on January 1, 2015.

Sections 22 and 23 amend s. 621.051, F.S., to include a cross-reference to ch. 605, F.S., and remove the cross-reference to ch. 608, F.S., on January 1, 2015.

Sections 24 and 25 amend s. 621.07, F.S., to include a cross-reference to ch. 605, F.S., and remove the cross-reference to ch. 608, F.S., on January 1, 2015.

Section 26 amends s. 621.12, F.S., to include the phrase "professional limited liability corporation," the abbreviations "P.L.L.C.," or the designations "PL" or "PLLC" among the options that a corporation or LLC formed under ch. 621, F.S., before January 1, 2014 must include in its company name. After January 1, 2014, a professional limited liability company must include the words "professional limited

liability company,” the abbreviation “P.L.L.C.” or the designation “PLLC,” in lieu of the words “limited liability company,” or the abbreviation “L.L.C.” or the designation “LLC.”

Sections 27 and 28 amend s. 621.13, F.S., to provide that before January 1, 2014, ch. 608, F.S., applies to a LLC organized before January 1, 2014, but ch. 605, F.S., applies to any LLC organized on or after January 1, 2014. An LLC formed before January 1, 2015, may voluntarily become subject to ch. 605, F.S., before January 1, 2014, if it amends its certificate of organization in the manner provided under ch. 605, F.S. Effective January 1, 2015, all cross-references to ch. 608, F.S., are removed from s. 621.13, F.S.

Section 29 provides that except as otherwise provided, the bill takes effect January 1, 2014.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

Indeterminate positive. See fiscal comment.

#### **2. Expenditures:**

See fiscal comment.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

An LLC may elect to file to do business in the state and therefore have costs associated with filing fees.

### **D. FISCAL COMMENTS:**

The bill adds new options for LLC filings in chapter 605, F.S. The bill creates two sets of overlapping LLC law for a one year period, after which chapter 605, F.S. becomes the only statute. The bill will add language and supporting forms that allow LLCs to define themselves similar to partnerships. Specifically, new forms providing the ability to file statements of dissociation, manager’s statement of resignation, statements of termination, or statements of denial, among others. Most carry a filing fee of \$25. The Department of State estimates, based on filing habits of existing Limited Partnerships, usage of these new forms may generate additional revenues. According to the department, even if one in ten utilizes the forms, that number equates to 70,000 filings at \$25.00, or revenue of \$1,750,000.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

The bill may require rulemaking and provides the Department of State with adequate authority to do so.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

This bill largely adopts the Revised Uniform Limited Liability Act of 2006, however the Executive Committee of The Florida Bar Chapter 608 LLC Act Drafting Committee departed from the uniform act in several areas. Uniform acts are drafted with the intent to create a uniform system of laws across the nation. The purpose of the National Conference of Commissioners on Uniform State Laws is to “promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”<sup>19</sup> It is unclear why the bill deviates from the uniform act.

As discussed previously, the bill retains current law with respect to charging orders. A creditor with a judgment against a member of an LLC can obtain a charging order from a court to be paid from the profits of the LLC, and the charging order is usually the debtor’s exclusive remedy against an LLC. In *Olmstead*, the Florida Supreme Court decided that a creditor has other remedies against a single-member LLC, a decision that appeared to run contrary to the intent of the Legislature when it created the LLC act. In 2011, the Legislature responded to the *Olmstead* decision by expressing its clear intent that a charging order is the exclusive remedy when the LLC has multiple members, but left a single-member LLC open to other remedies. This provision diverges from the uniform act and potentially makes Florida a less desirable state than others for a single-member LLC.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2013, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The first amendment corrects four cross-references to other sections of the bill. The second amendment renumbers a section that was used twice in the bill. The third amendment creates a section for service of process on an LLC in the service of process chapter of the Florida Statutes. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

On April 17, 2013, the Appropriations Committee adopted a strike all amendment and reported the bill favorably as a committee substitute. The strike all amendment conforms the bill to the Senate bill and corrects glitches in current law.

This analysis is drafted to the committee substitute as passed by the Appropriations Committee.

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<sup>19</sup> Article 1, Section 2, Constitution of the National Conference of Commissioners on Uniform State Laws.  
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**DATE:** 4/19/2013