

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 Commerce and Tourism

BILL: CS/SB 554

INTRODUCER: Commerce and Tourism Committee and Senator Simmons

SUBJECT: Limited Liability Companies

DATE: March 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	McKay	CM	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 554 makes changes related to the Revised Limited Liability Company Act. The bill requires a company to provide notice to third parties regarding a person's lack of authority to transfer property by filing notice of such limitation in the public records of the office that processes those transfers. Additionally, the bill allows a company to take action that requires the vote or consent of the members to be taken without a meeting, if it meets certain conditions. The bill requires a company to respond to a member's request for information within 10 days. The bill repeals language that directed companies to regard the language in a company's articles of incorporation as if it was the company's operating agreement. The bill repeals a provision that prohibits a company's operating agreement from varying the power of a person to dissociate from the company. The bill repeals a provision that provides an exception to the limitation of the remedies in an appraisal event if the event is an interested transaction. The bill also deletes or revises references to the Florida Limited Liability Company Act, which was repealed effective January 1, 2015, and provides a retroactive effective date of January 1, 2015, for those provisions related to the repeal.

II. Present Situation:

Limited Liability Companies

A Limited Liability Company (LLC) is a creature of statute created to address the gap in existing business organizations – specifically the gap between a corporation and a partnership. On the one

hand, a corporation is highly complex and requires payment of state corporate income taxes, making it less ideal for a small business. On the other hand, a partnership is simpler but carries the risk of full joint and severable liability for each member. The LLC provides its members with the limited liability of a corporation and the tax benefits and management structure of a partnership.¹

Florida Limited Liability Companies

To transact business as a limited liability company in Florida, a company must sign and file its Articles of Organization² with the Florida Department of State, and pay the appropriate fee.³ A company must file an annual report with the Department of State to maintain its ability to transact business in this state.⁴

Florida Revised Limited Liability Company Act

In 2013, the Florida Legislature enacted a comprehensive law, the Florida Revised Limited Liability Act (revised act),⁵ to replace the predecessor act, the Florida Limited Liability Act,⁶ to address the formation and operation of LLCs. The revised act is substantially based on the Revised Uniform Limited Liability Company Act,⁷ as amended in 2011, but also incorporates provisions that are unique to Florida.⁸ The revised act provides that its provisions would apply to an LLC created on or after January 1, 2014, and companies in existence prior to January 1, 2014, were given until January 1, 2015, to comply with the provisions of the revised act.⁹ The legislation repealed the predecessor law, the Florida Limited Liability Act, effective January 1, 2015.¹⁰

¹ McGinty, A. Edward, *Olmstead – A Lever from Member’s Creditor to Full Multi-member LLC Membership?* 85 FLA. BAR J., 39, 42 (Mar. 2011), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Autor/6E1AD1891CA9E76D85257845004FD5E6> (last visited Feb. 17, 2015).

² Section 605.0201, F.S. The articles of organization must state the name of the LLC, the street and mailing address of the company’s principal office, and the registered name, address, and written acceptance, The articles of organization may include a declaration that it is a member-managed company and the names and addresses of one or more of the managers, and a description of the authority or limit of authority of a specific person in the company, among other things.

³ For a list of fees associated with the formation and maintenance of an LLC in this state, see <http://www.sunbiz.org/feellc.html> (last visited Feb. 25, 2015).

⁴ Section 605.0212, F.S. The annual report must include the name of the LLC, the street address of the LLC, the date of organization, the federal employer identification number, the name and address of the person having authority to manage the LLC, and any information required by the Department of State. The annual report is due by May 1 of each year.

⁵ Chapter 2013-180, Laws of Fla.

⁶ Chapter 608, F.S.

⁷ The Revised Uniform Limited Liability Act was drafted by the National Conference of Commissioners on Uniform State Laws in 2006 and revised in 2011. A full version of the document may be found at: http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Feb. 25, 2015).

⁸ The Florida Bar Revised LLC Act Drafting Committee, *White Paper: The Proposed Florida Revised Limited Liability Company Act* (March 18, 2013) (on file with the Senate Committee on Commerce and Tourism).

⁹ Section 605.1108, F.S.

¹⁰ Chapter 2013-180, s. 5, Laws of Fla.

III. Effect of Proposed Changes:

Section 1 amends s. 605.0103(4), F.S., to require an LLC that limits the authority of a person to transfer real property in the name of the LLC in its articles of organization to record an affidavit, certificate, or other instrument of such limitation in the office for recording transfers of such real property. Under current law, the only notice required is the statement of such limitation in the LLC's articles of organization.

Section 2 amends s. 605.0105(3), F.S., to allow an LLC's operating agreement to vary the power of a person to dissociate. Current law prohibits an LLC from modifying or limiting a member's power to dissociate.¹¹

Section 3 amends s. 605.04073, F.S., to provide that an action requiring the vote or consent of members may be taken or approved without a meeting provided the action is approved by the minimum number of votes that would be necessary to take action at a meeting, and a record of such action is made.

Section 4 amends s. 605.0410, F.S., relating to member demand of records. The bill requires a member-managed LLC that has received a demand for information to respond within 10 days of the demand with either the information the company will provide in response to the demand and the manner in which it will be provided or the reason(s) the LLC will not provide the information.

Section 5 amends s. 605.1072, F.S., to delete a provision that provided an exception to the limitations of remedies that an LLC could pursue regarding the legality of an appraisal event involving an interested transaction. This repeal makes the limitation of remedies comparable to the limitations for other business entities.¹²

Section 6 amends s. 605.1108(3), F.S., to delete a provision that directed a member-managed LLC formed under ch. 608, F.S., to regard the language provided in the company's articles of organization as if that language were in the operating agreement.

Section 7 repeals ch. 608, F.S. Chapter 608, F.S., also known as the Florida Limited Liability Company Act, was repealed by the Legislature in 2013,¹³ and replaced by the Revised Limited Liability Company Act. Since ch. 608, F.S., was not repealed by a "current session" of the Legislature, it may be omitted from the 2015 Florida Statutes only through a bill duly enacted by the current Legislature.¹⁴ Therefore, the bill repeals ch. 608, F.S.

¹¹ Section 605.0601, F.S., generally governs a person's power to dissociate as a member of a limited liability company. A member may dissociate at any time, rightfully or wrongfully, by withdrawing by express will. A person who dissociates loses the right to participate in the LLC's management and incurs the liability to the LLC and remaining members for any damages caused by wrongful dissociation.

¹² See s. 607.1302(3), F.S.

¹³ Chapter 2013-180, Laws of Fla.

¹⁴ See ss. 11.242(5)(b) and (i), F.S.

Section 16 amends s. 605.0102, F.S., to amend the definition of “majority-in-interest,” to provide that the determination of what constitutes an action taken by a “majority-in-interest” is based on the percentage interest in the LLC’s profits owned by all the members of the LLC.

Section 19 amends s. 605.04091, F.S., to clarify that a member does not violate his or her duty of loyalty in interested transactions if the conflict of interest transaction satisfies the requirements under s. 605.04092, F.S.¹⁵

Sections 8-15, 17-18, and 20-27 amend ss. 15.16, 48.062, 213.758, 220.02, 220.03, 220.13, 310.181, 440.02, 605.0401, 605.04074, 606.06, 607.1108, 607.1109, 607.11101, 621.12, 636.204, 655.0201, 658.2953, 694.16, and 1002.395, F.S., respectively, to revise cross-references and make technical changes associated with the repeal of the Florida Limited Liability Company Act on January 1, 2015. The provisions related to the repeal of the Florida Limited Liability Company Act and the enactment of the Revised Limited Liability Company Act have a retroactive effective date of January 1, 2015.

Section 28 provides an effective date of July 1, 2015, for the substantive provisions. For provisions related to the repeal of the Florida Limited Liability Company Act, the provisions have a retroactive effective date of January 1, 2015.

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:

None.

¹⁵ Generally, s. 605.04092, F.S. requires an interested transaction to be “fair to the limited liability company,” meaning that it must be beneficial to the LLC and its members, taking into account whether its fair in terms of the member’s or manager’s dealings with the LLC in connection with the transaction, and if it is comparable to what might have been obtained in an arm’s length transaction.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides a retroactive effective date of January 1, 2015, for those provisions related to the repeal of the Florida Limited Liability Company Act. Retroactive application of a statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.¹⁶

To determine whether a statute should be retroactively applied, courts apply two interrelated inquiries. First, courts determine whether there is clear evidence of legislative intent to apply the statute retrospectively. If so, then courts determine whether retroactive application is constitutionally permissible.¹⁷ The first prong of the test appears to clearly be met by those sections of the bill that contain an explicit statement of retroactivity.

The second prong looks to see if a vested right is impaired. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.¹⁸ It must be an immediate, fixed right of present or future enjoyment.¹⁹ “Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.”²⁰

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 605.0103, 605.0105, 605.04073, 605.0410, 605.1072, 605.1108, 15.16, 48.062, 213.758, 220.02, 220.03, 220.13, 310.181, 440.02, 605.0102, 605.0401, 605.04074, 605.04091, 605.1025, 606.06, 607.1108, 607.1109, 607.11101, 621.12, 636.204, 655.0201, 658.2953, 694.16, and 1002.395.

The bill repeals ch. 608 of the Florida Statutes.

¹⁶ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1216 (Fla. 2nd DCA 2004).

¹⁷ *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).

¹⁸ *R.A.M.* at 1218.

¹⁹ *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).

²⁰ *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 2, 2015:

- Repeals a provision that provides an exception to the limitation of the remedies in appraisal events if the appraisal event is an interested transaction.
- Repeals ch. 608, F.S., the Limited Liability Company Act.
- Makes retroactive the effective date to January 1, 2015, those provisions that correct technical errors and cross-references associated with the repeal of the Florida Limited Liability Company Act and enactment of the Florida Revised Limited Liability Company Act in 2013.
- Adds additional cross-references that needed to be updated.

- B. **Amendments:**

None.