

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 1300

INTRODUCER: Judiciary Committee and Senator Simmons

SUBJECT: Limited Liability Companies

DATE: April 5, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Shankle	Cibula	JU	Fav/CS
2.	Malcolm	Hrdlicka	CM	Pre-meeting
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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

I. Summary:

CS/SB 1300 creates the Revised Limited Liability Companies Act. The bill carries over many provisions in current law to new ch. 605, F.S., but makes some substantial changes to the rules governing limited liability companies (LLCs). The bill is the result of efforts by representatives of the Business Law Section, the Tax Section, and the Real Property, Probate, and Trust Law Section of The Florida Bar. The bill is substantially based on the Revised Uniform Limited Liability Company Act of 2006 as amended in 2011 (RULLCA)¹ with deviations to reflect unique situations present in Florida.² The bill:

- Expands the list of non-waivable default rules that cannot be “trumped” by the operating agreement;
- Modifies rules for the power of members and managers to bind the company;

¹ *Uniform Limited Liability Company act of 2006 as amended in 2011*, National Conference of Commissioners on Uniform State Laws, 2011, available at <http://uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20%28Revised%29> (last visited April 3, 2013).

² 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).

- Modifies provisions addressing the LLC’s management structure (including the elimination of the term “managing member”);
- Modifies default management and voting rules;
- Modifies provisions relating to member dissociation and company dissolution;
- Modifies provisions for service of process on LLCs;
- Modifies provisions for derivative actions;
- Adds provisions to permit interest exchanges and in-bound domestications by non-U.S. entities; and
- Modifies appraisal rights provisions, including adding events that trigger appraisal rights.

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

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

This bill creates the following sections of the Florida Statutes: 48.062, 605.0101, 605.0102, 605.0103, 605.0104, 605.0105, 605.0106, 605.0107, 605.0108, 605.0109, 605.011, 605.0111, 605.0112, 605.0113, 605.0114, 605.0115, 605.0116, 605.0117, 605.0118, 605.0119, 605.0201, 605.0202, 605.0203, 605.0204, 605.0205, 605.0206, 605.0207, 605.0208, 605.0209, 605.0210, 605.0211, 605.0212, 605.0213, 605.0214, 605.0215, 605.0216, 605.0301, 605.0302, 605.0304, 605.0401, 605.0402, 605.0403, 605.0404, 605.0405, 605.0406, 605.0407, 605.04071, 605.04072, 605.04073, 605.04074, 605.0408, 605.04091, 605.04092, 605.04093, 605.0410, 605.0411, 605.0501, 605.0502, 605.0503, 605.0504, 605.0601, 605.0602, 605.0603, 605.0701, 605.0702, 605.0703, 605.0704, 605.0705, 605.0706, 605.0707, 605.0708, 605.0709, 605.0710, 605.0711, 605.0712, 605.0713, 605.0714, 605.0715, 605.0716, 605.0717, 605.0801, 605.0802, 605.0803, 605.0804, 605.0805, 605.0806, 605.0901, 605.0902, 605.0903, 605.0904, 605.0905, 605.0906, 605.0907, 605.0908, 605.0909, 605.0910, 605.0911, 605.0912, 605.0913, 605.1001, 605.1002, 605.1003, 605.1004, 605.1005, 605.1006, 605.1021, 605.1022, 605.1023, 605.1024, 605.1025, 605.1026, 605.1031, 605.1032, 605.1033, 605.1034, 605.1035, 605.1036, 605.1041, 605.1042, 605.1043, 605.1044, 605.1045, 605.1046, 605.1051, 605.1052, 605.1053, 605.1054, 605.1055, 605.1056, 605.1061, 605.1062, 605.1063, 605.1064, 605.1065, 605.1066, 605.1067, 605.1068, 605.1069, 605.1070, 605.1071, 605.1072, 605.1101, 605.1102, 605.1103, 605.1104, 605.1105, 605.1106, 605.1107, and 605.1108.

This bill repeals ch. 608, F.S., effective January 1, 2015.

II. Present Situation:

Limited Liability Companies (LLCs) are creatures of statute created to address the gap in existing business organizations – specifically the gap between corporations and partnerships. On the one hand, corporations are often highly complex and require payment of state corporate taxes, making them less ideal for small businesses. On the other hand, partnerships are simpler but carry the risk of full joint and severable liability for each member. The LLC provides its

members with the limited liability of a corporation and the tax benefits and management structure of a partnership.³

Florida's Limited Liability Company Act was codified in ch. 608, F.S., in 1982.⁴ The chapter has been amended multiple times since its inception,⁵ with the last significant modifications made in 2002.⁶

In 2011, in response to the Florida Supreme Court decision, *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010), the Florida Legislature adopted amendments to s. 608.433, F.S. (which has come to be known as the "Olmstead Patch").⁷ The Olmstead Patch clarified that a charging order is the sole and exclusive remedy afforded a judgment creditor of a member in a multi-member LLC with respect to seeking recourse against the member's membership interest. However, it allowed a judgment creditor of the member in a single-member LLC to seek a court supervised foreclosure against the sole member's interest, but only upon a showing to the court issuing the charging order that the judgment will not be satisfied out of LLC distributions within a "reasonable time."⁸

III. Effect of Proposed Changes:

Sections 1 and 2 of the bill create ch. 605, F.S., and designates 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., and ch. 608, F.S., is repealed.

Operating Agreement

Current law allows for the members of an LLC to enter into an operating agreement to regulate the affairs of the LLC and govern relations among the members, managers, and company.⁹ To the extent the operating agreement does not otherwise provide, ch. 608, F.S., governs relations among the members, managers, and the LLC. However, the operating agreement may not:

- Unreasonably restrict a right to information or access to records required under s. 608.4101, F.S.;
- Eliminate the duty of loyalty under s. 608.4225, F.S.;
- Unreasonably reduce the duty of care under s. 608.4225, F.S.;
- Eliminate the obligation of good faith and fair dealing under s. 608.4225, F.S.;
- Vary the requirement to wind up the limited liability company's business; or
- Restrict rights of a person, other than a manager, member, or transferee of a member's distributional interest, under ch. 608, F.S.¹⁰

³ McGinty, A. Edward, *Olmstead – A Lever from Member's Creditor to Full Multi-member LLC Membership?* 85 FLA. BAR J., 39, 42 (March 2011), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/6E1AD1891CA9E76D85257845004FD5E6> (last visited March 3, 2013).

⁴ Chapter 82-177, s. 2, L.O.F.

⁵ See ch. 99-315, L.O.F.

⁶ Chapter 2002-272, L.O.F.

⁷ Chapter 2011-77, s. 1, L.O.F.

⁸ Section 608.433(6)-(7), F.S.

⁹ Section 608.423(1), F.S.

¹⁰ Section 608.423(2), F.S.

The bill retains many similarities to current law. Like current law, the bill provides a gap-filler provision for when the operating agreement does not provide a specific rule.¹¹ Additionally, the bill delineates matters that the operating agreement may not alter. This is a far more extensive list than exists under current law.¹² The operating agreement may not, except as required by law:

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

Registered Agent

Under current law, each LLC must maintain a registered agent with an office in Florida and must file a statement, including the address of the agent, with the Department of State.¹³ The bill retains this requirement but limits the duties of a registered agent to forwarding process, forwarding notices or demands served upon him or her to the company, and providing notice of the agent's resignation.

Service of Process

Under current law, service of process against an LLC must be effected in the same manner as service is made upon a partnership under chs. 48 or 49, F.S., or upon the LLC's registered

¹¹ See s. 608.423(4), F.S.

¹² See s. 608.423(2), F.S.

¹³ Section 608.415(2), F.S.

agent.¹⁴ This has caused considerable confusion, particularly because of the significant differences between “manager-managed” and “member-managed” LLCs, and how those differences impact the application of the principles of agency and constructive notice.¹⁵

The bill provides the ordering of the persons upon whom service against an LLC must be made, starting with the registered agent. It provides alternative methods of service if the registered agent cannot be served and recognizes different methods of service based on the type of LLC being served. The bill allows for service to be made upon the Department of State, but only as a last resort. The bill also creates s. 48.062, F.S., to provide for service of process on an LLC within ch. 48, F.S., which relates to service of process.

Formation

Under current law, in order to form an LLC one or more members or authorized representatives of the LLC must file articles of incorporation with the Department of State.¹⁶ Consistent with current law, the bill requires an LLC to have at least one member in order for the formation of the LLC to be effective.¹⁷ “Shelf” LLCs, where there are no members when the LLC is formed, are not authorized.¹⁸ Only a minimal amount of disclosure is necessary in the articles of organization. For example, the bill does not require the articles to state whether the LLC is member-managed or manager-managed. However, the filing party may include this or any other items in the articles so long as they are not inconsistent with the non-waivable provisions set forth in the new requirements for the operating agreement.

Amending the Articles of Organization

Currently, s. 608.411, F.S., allows an LLC to amend its articles of organization by filing an amendment with the Department of State.¹⁹ The bill is substantively the same as current law. The bill sets forth the differences between an amendment and a restatement, and adds a provision, consistent with current law, to more specifically outline the process and requirements for simultaneously amending and restating articles of organization. However, contrary to current law, the bill imposes an obligation directly on the members or managers to correct information in articles of organization that have become inaccurate. A member or manager’s failure to meet the obligation exposes the member or manager to potential liabilities to third-parties who suffers a loss by relying on the information if the member or manager had notice of the inaccuracy in time to correct the inaccuracy before the third-party relied on the information.

Filing of Records

Currently, a number of records must be filed with the Department of State including articles of organization and any amendments or restatements to the articles as well as an annual report.²⁰ Unlike current law, the bill allows an LLC to file a document and specify the date and time the document takes effect, though it cannot be retroactive by more than 5 days. The bill also allows an LLC to withdraw a statement that has been filed as long so it has not yet taken effect, in

¹⁴ Section 608.463(1), F.S.

¹⁵ *Supra* note 2.

¹⁶ Section 608.407(1), F.S.

¹⁷ *See* s. 608.463(3), F.S.

¹⁸ *See supra* note 2.

¹⁹ Section 608.411(1), F.S.

²⁰ *See id.*; s. 608.4511(1), F.S.

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

The bill addresses liability to third parties for inaccurate information in a filed record and provides that an operating agreement may relieve and shift the liability to third parties from certain specified members to other specified members. Current law expressly states that the execution of a certificate filed with the Department of State is an affirmation of accuracy under penalties of perjury.²¹ The bill clarifies this provision in current law by providing that the affirmation under penalty of perjury applies to all records authorized or required to be filed with the Department of State.

Authority

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

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

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

The bill also provides that an LLC may file with the Department of State, a statement of authority that delineates the authority of a member, manager, or other person to enter into certain transactions on behalf of the LLC. This is a concept that comes from the RULLCA and is currently unavailable under Florida law. The statement provides constructive notice as to who can bind the LLC. A person who has been granted authority in a statement of authority may subsequently file a statement of denial to deny the grant of authority.

Liability

Under current law, the members of an LLC are not liable, solely by reason of being a member or serving as a manager or managing member, for a debt, obligation, or liability of the limited liability company unless this liability is altered by an LLC's articles of organization or operating agreement.²² Similar to current law, the bill shields members and managers against the debts, obligations, and liabilities of the LLC, but does not provide any shield against a person's own conduct or any contractual obligation he or she expressly assumes. The bill makes no changes to the common law concept of "piercing the veil," which allows individual liability in certain situations. Therefore, this concept will likely still apply to LLCs.

²¹ Section 608.408(3), F.S.

²² Section 608.4227, F.S.

Members

The bill changes the membership requirements from current law while retaining some language for consistency. Under current law, unless otherwise provided in the articles of organization or the operating agreement, a new member cannot be added without the consent of majority-in-interest of the members.²³ Current law also requires unanimous consent if the new member is a person that has been assigned an interest in the LLC.²⁴

The bill requires unanimous consent of all the members in all cases in which a new member is admitted unless the operating agreement provides otherwise. Additionally, unlike current law, the bill allows a person to become a non-economic member without a transferable interest or any obligation to contribute capital.

Contributions

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

Distributions

Currently, the default rule in Florida for LLCs is that distributions are made in accordance with the value of the members' capital contributions.²⁵ The bill changes current law by ignoring the value of any capital contributions that, at the time of the particular distribution, have previously been returned.

The bill clarifies current 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. Nor does the member have a right to a distribution in any form other than money. A member or transferee that becomes entitled to a distribution has the status and remedies of a creditor with respect to the distribution. The bill changes the default rule under current law in that although it allocates profits and losses based on the value of contributions, consistent with current law, it does not, in making the calculation, subtract any contributions that have been returned.

Like current law, the bill prohibits distributions that would render the LLC insolvent. The bill, however, provides 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.²⁶ The bill also provides that debts owed by an LLC to a member as a result of a permitted distribution puts the

²³ Section 608.4232, F.S.

²⁴ Section 608.433, F.S.

²⁵ Section 608.426(1), F.S.

²⁶ See s. 608.426(2), F.S.

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 for improper distributions. The bill also makes a member that receives a distribution that the member knows violates the law directly liable to the LLC for the improper distribution.

Management

Currently, Florida law contains the concept of a “managing member,” who is elected from among the existing members.²⁷ The term “managing member” is fairly unique to Florida and is not used in the RULLCA or LLC statutes in any of the more prominent states.²⁸ The bill does not follow either the RULLCA or current law with respect to the management structure of an LLC.

The bill changes current law by eliminating the concept of a “managing member.” This change was made to eliminate the confusion and disparate interpretations under current law as to the ramifications that having a managing member has on the nature of the management structure of the LLC.²⁹ The bill provides that existing LLCs that are managed by a managing member are deemed to be member-managed rather than manager-managed. The bill provides that, absent an agreement, a member in a member-managed LLC is not entitled to compensation for its services, except for reasonable compensation for services to wind up the LLC. Additionally, a member that advances funds to an LLC is entitled to reimbursement. Finally, the bill provides that the management provisions of the bill apply in the event of dissolution of the LLC, except that a person that wrongfully causes the dissolution cannot participate in management as either a member or manager.

The bill authorizes an operating agreement to establish an LLC’s status as a manager-managed limited liability company, in addition to the right to so authorize in the articles of organization. This is a carryover from current law, which provides that an LLC may (but is not required to) identify whether it is “manager-managed” in its articles of organization.³⁰ 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.”³¹

The voting rights provisions of the bill are based on a combination of current law and RULLCA. 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;³²

²⁷ Section 608.422(2)(a), F.S.

²⁸ *Supra* note 2.

²⁹ *Supra* note 2.

³⁰ Section 608.422, F.S.

³¹ *See id.*

³² *See s.* 608.422(a), F.S.

- 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;³³
- 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;³⁴ and
- That managers may act by unanimous written consent or by proxy vote.³⁵

Under current law, no specific provision addresses amendments to the operating agreement. Therefore, under current law, the general rule applies, requiring the vote or consent by members holding a majority of the then-current interests in the profits of the LLC.³⁶ The bill adopts the RULLCA approach by providing that in a member-managed LLC, the unanimous vote of the members is required to amend the operating agreement or the articles of organization.

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

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

Indemnification

Under current law, an LLC has discretion to indemnify and hold harmless any person from and against any claims, subject to any restrictions in the articles of organization or operating agreement.³⁷ Current law prohibits indemnification and advancement of expenses for violations of criminal law, a transaction in which the person seeking indemnification received an improper personal benefit, liability in connection with improper distributions, and willful misconduct or a conscious disregard for the best interests of the LLC in a proceeding to procure a judgment in its favor.³⁸

The bill varies from current law by expanding the categories for which indemnification of a current or former member or manager is prohibited by including any violation of the statutory requirements related to management of the LLC and any violation of the standards of conduct of a manager or a member, which includes the duties of care and loyalty.

³³ See ss. 608.422(a) and 608.4231, F.S.

³⁴ See ss. 608.4231(8), F.S.

³⁵ See ss. 608.4231(6), F.S.

³⁶ See s. 608.422(a), F.S.

³⁷ Section 608.4229(1), F.S.

³⁸ Section 608.4229(2), F.S.

Conflict of Interest Transactions

Current law provides a safe harbor for approving an interested transaction, which is a transaction between an LLC and a member or manager that has a direct or indirect financial interest or is a direct or an indirect party to the transaction.³⁹ Under the safe harbor, an interested member or manager is protected from liability if the transaction is:

- Approved by the disinterested members, provided they have knowledge or disclosure of the relationship or interest;
- Approved by the members entitled to vote, provided they have knowledge or disclosure of the relationship or interest; or
- The transaction is fair or reasonable.⁴⁰

The bill modifies the safe harbor by providing that if the transaction is fair to the LLC, no equitable relief, damages, or sanctions can be imposed on the interested member or manager. The bill also clarifies which party has the burden of proving fairness or lack of fairness in actions challenging the validity of an interested transaction. If the material facts of the transaction and the member's or manager's interest were disclosed to the managers or members who voted on the transaction, the burden of proving unfairness lies with the person challenging the transaction. However, if the material facts and the member or manager's interest were not disclosed, then the member or manager defending the transaction bears the burden of proving the transaction was fair to the LLC.

Records

The bill retains the list of specific records that are required to be maintained by the LLC that is found in current law.⁴¹ However, unlike current law, the bill provides different rights for members to inspect records depending on whether the LLC is member-managed or manager-managed. The bill is also consistent with current law in providing a cause of action for a member that is improperly denied access to the records, but it includes new provisions related to a court-ordered inspection of records. Specifically, if a court orders an inspection of records, it must also require the LLC to pay the costs incurred by the person seeking enforcement, unless the LLC shows that it refused the request in good faith. Additionally, a court may impose reasonable restrictions on the use or distribution of the information in the record.

Transferable Interests

The bill provides for a "transferable interest," which is generally defined as a member's right to distributions. This is distinguishable from a member's "interest," which is the entire membership interest that includes all the rights of a member, such as rights to manage, vote, and access records and information. The bill allows a member to transfer his or her transferable interest to another. A transfer of a transferable interest does not cause the transferring member to dissociate or cause the LLC to dissolve or wind up nor does it transfer management rights or access to records. The bill also deletes the provision under current law that provides the transferee the right to share in profits and losses and to receive allocations of income, gain, deduction, and credit.⁴²

³⁹ Section 608.4226, F.S.

⁴⁰ *Id.*

⁴¹ Section 606.4101(1), F.S.

⁴² *See s.* 608.432(2)(b), F.S.

Charging Orders

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

Power to Dissociate

Under current law, a member does not have the right, unless in the articles of organization or operating agreement state otherwise, to withdraw or resign prior to dissolution and winding up.⁴³ In accordance with the RULLCA, the bill allows a member to dissociate at any time, rightfully or wrongfully, by withdrawing by “express will.” The bill provides that if a person is dissociated, the person loses the right to participate in the LLC’s management, which is not consistent with current law. If the LLC is member-managed, the dissociated person has no further duties or liability for breaches of the standards of care for members with respect to matters and events that take place after the dissociation. The bill eliminates the provision from current law that a withdrawing member is not entitled to any distributions upon withdrawal but is entitled to payment equal to the fair value of the person’s interest based on the withdrawing member’s rights to distributions.

The bill also provides for wrongful dissociations, which means:

- A dissociation in violation of the operating agreement; or
- If before the LLC is wound up the person withdraws, is expelled by judicial order, or is dissociated as a result of the person’s willful dissolution or termination.

A person who wrongfully dissociates is liable for damages the dissociation causes to the LLC and the other members.

Events Causing Dissolution

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

- At the time specified in the articles of organization or operating agreement;
- Upon the occurrence of events specified in the articles of organization or operating agreement;
- Upon the written consent of all of the members of the limited liability company unless this is forbidden by the articles of organization or the operating agreement;
- At any time there are no members; or
- Upon the entry of an order of dissolution by a circuit court.⁴⁴

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

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

⁴³ Section 608.427(1), F.S.

⁴⁴ Section 608.441, F.S.

Consistent with current law, the bill provides that the Department of State may file for administrative dissolution when an LLC does not timely file required documents or fails to pay a required fee.⁴⁵ The bill simplifies the process by which the Department of State can commence an action for dissolution by allowing for electronic transmission of notice and automatic dissolution under certain circumstances.

Additionally, the bill eliminates the ability of a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the LLC was insolvent, or if the LLC admitted that the creditor's claim was due and owing and the LLC was insolvent.⁴⁶ The bill does not make substantial changes to how articles of dissolution are handled.

Winding Up

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

Direct Action by a Member

Current law does not have a provision concerning a direct action by a member against another member, manager, or the LLC. The bill provides that a member may maintain a direct action against another member, manager, or the LLC 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 by the LLC.

Derivative Action

Current law requires that, as a prerequisite to a derivative action, the plaintiff must make a demand on the managing members of a member-managed company or the managers of a manager-managed company and that the demand must be refused or ignored.⁴⁷

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

⁴⁵ See s. 608.448, F.S.

⁴⁶ See s. 608.449(3), F.S.

⁴⁷ Section 608.601(2), F.S.

Foreign LLCs

The bill provides consistent incorporation of the provisions related to foreign LLCs in ch. 608, F.S., with some minor modifications. Current law provides that a foreign LLC may not withdraw from this state until it obtains a certificate of withdrawal from the Department of State.⁴⁸ The bill provides that a foreign LLC may withdraw and cancel its Certificate of Authority to transact business by delivering to the Department of State a notice of withdrawal of the Certificate of Authority.

Charitable Provisions

The bill prevents nonprofit LLCs from using the provisions in the bill to avoid restrictions on the use of property donated, granted, devised, or transferred for charitable purposes. The bill also clarifies the legal effect of a merger on bequests, gifts, grants, or promises that were originally made to an entity that does not survive a merger. Under the bill, the gift, bequest, grant, or promise inures to the surviving entity following the merger. This provision applies only to mergers, because in an interest exchange, conversion, or domestication transaction, the entity to which the bequest was made continues in existence.

Appraisal Rights

Under current law, members of an LLC are entitled to appraisal rights only upon the consummation of a merger or conversion.⁴⁹ The bill adds six additional events that trigger members' appraisal rights:

- Consummation of an interest exchange;
- Consummation of a sale of substantially all of the assets of a LLC;
- An amendment to the organic rules of the entity that reduce the interest of the member;
- An amendment to the organic rules of the entity that alter or abolish the voting or other rights of the member;
- An amendment to the organic rules of the entity that alters or abolishes that appraisal rights of the member ; or
- If otherwise expressly authorized by the organic rules of the LLC.

The bill also allows an LLC to modify, restrict, or eliminate appraisal rights as long as it is approved by each member affected by the modification, restriction, or elimination.

Merger

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

- Each LLC that is a party to the merger complies with the applicable statutory LLC provisions and with the terms of its articles of organization and operating agreement;
- Each partnership that is a party to the merger complies with the applicable statutory partnership provisions;
- Each domestic corporation that is a party to the merger complies with the applicable statutory domestic corporation provisions; and
- The merger is permitted by the laws of the state, country, or jurisdiction under which each other business entity that is a party to the merger is formed.⁵⁰

⁴⁸ Section 608.511(1), F.S.

⁴⁹ Section 608.4352(1), F.S.

Under s. 608.4231, F.S., “[n]otwithstanding any provision to the contrary in the articles of organization or operating agreement, members shall have the right to vote on . . . a merger of the limited liability company as provided in s. 608.4381.” Read literally, this provision gives all members of the limited liability company a vote on a merger, whether or not such members have voting rights under the articles of organization or operating agreement of the LLC. At the same time, this provision was not one of the non-waivable provisions in ch. 608, F.S. Thus, arguably this provision could be modified in the articles of organization or operating agreement of the LLC.⁵¹

The bill removes the ambiguity in current law and provides that non-voting members do not have the right to vote on a merger unless the articles of organization or operating agreement provide otherwise. However, the bill requires that anyone who will have “interest holder liability” (i.e., general personal liability) as a result of the merger must expressly approve the merger.

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

Interest exchange

Current law does not apply the concept of interest exchange to LLCs. The bill applies this concept from corporate law to LLCs. In an interest exchange, the separate existence of the acquired entity is not affected and the acquiring entity acquires all of the interest of one or more classes of the interests in the acquired entity. An interest exchange also allows for an indirect acquisition through the use of consideration in an exchange that is not provided by the acquiring entity, such as consideration from another or related entity.⁵²

The interest exchange provisions in the bill substantially parallel the merger provisions but because the concept of an interest exchange is new to LLCs, the bill protects a person contracting with or loaning money to an LLC when that person has drafted and negotiated special rights related to the transaction before the effective date of the bill.

Conversions

Current law allows an entity to change into a different type of entity, or in the case of an LLC, to remain an LLC but change its jurisdiction of formation.⁵³ The bill substantially incorporates and is consistent with current law.

Domestication

The new act, for the first time, allows domestications of non-U.S. entities who wish to become domestic LLCs in Florida. A domestication allows the domesticating entity to retain its status

⁵⁰ Section 608.438(2), F.S.

⁵¹ *Supra* note 2.

⁵² *Supra* note 2.

⁵³ *See* ss. 608.439, 608.4401, 608.4402, 608.4403, and 608.4404, F.S.

and existence in the non-U.S. jurisdiction in which it currently exists. The domestication provisions in the bill substantially parallel the merger provisions. The bill allows domestication of all non-U.S. entities. Much like a merger, the bill requires a plan of domestication and approval of domestication and allows amendment or abandonment of the plan. The plan becomes effective upon the passage and filing of the articles of domestication.

The bill includes a severability clause within the act.

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.

Sections 4 repeals ch. 608, F.S., on January 1, 2015.

Sections 5 and 6 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 7 and 8 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 9 and 10 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 11 and 12 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 13 and 14 amend s. 620.2104, 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 15 and 16 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 17 and 18 amend s. 620.8914, 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 19 and 20 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 21 and 22 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 23 and 24 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 25 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 26 and 27 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 28 provides that except as otherwise provided, the bill takes effect January 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill does not increase any current filing fees. However, because certain new filing fees are authorized under the bill to account for new transactions and documents, the filing fees for these new filings are added; the fees are comparable to filing fees for other similar documents in current law.

B. Private Sector Impact:

This bill is a substantial rewrite of the laws governing LLCs in Florida. Existing LLCs will need to ensure that they are in compliance with the new laws by January 1, 2015.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

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

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

B. Amendments:

None.