

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 531 Limited Liability Companies

**SPONSOR(S):** Economic Development and Tourism Subcommittee; Civil Justice Subcommittee; McGhee and Spano

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 554

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Economic Development & Tourism Subcommittee	11 Y, 0 N, As CS	Lukis	Duncan
3) Judiciary Committee			

### SUMMARY ANALYSIS

In 2013, the Legislature enacted the Florida Revised Limited Liability Company Act to replace its predecessor, the Florida Limited Liability Company Act. These acts regulate the formation and operation of limited liability companies (LLCs) in Florida. The Florida LLC Act was repealed effective January 1, 2015.

The bill deletes or replaces obsolete references to the Florida Limited Liability Company Act and makes technical, grammatical, and stylistic changes due to the repeal of the Florida Limited Liability Company Act.

The bill also makes the following changes to the Revised LLC Act:

- provides that a third-party does not have notice of a person's lack of authority to transfer real property on behalf of the LLC unless the limitation of authority is in certain public records of the real property transfer;
- allows for actions that require the vote or consent of members to be taken without a meeting subject to certain conditions;
- requires a member-managed LLC to respond to a member demand for certain information within 10 days;
- repeals a provision that resulted in confusion regarding which document—between an LLC's articles of organization and an LLC's operating agreement—is controlling if there is a conflict of language with respect to the LLC's management structure;
- repeals a provision that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC;
- repeals the exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction; and
- specifies information administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining provisions of the bill have an effective date of July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Law**

In 2013, the Legislature enacted the Florida Revised Limited Liability Company Act,<sup>1</sup> Ch. 605, F.S., to replace its predecessor act, Ch. 608, F.S., which regulated the formation and operation of limited liability companies (LLCs) in Florida. The Revised LLC Act was based in large part on the Revised Uniform Limited Liability Act of 2006 developed by the National Conference of Commissioners on Uniform State Laws with some deviations to reflect unique circumstances in Florida. Because the Revised LLC Act did not apply to all LLCs in Florida until January 1, 2015, the predecessor act in Ch. 608, F.S., remained in effect until that date.

LLC 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>2</sup>

The bill makes the following substantive changes to Ch. 608, F.S., the Revised LLC Act:

##### **Notice of Authority to Transfer Real Property**

Section 605.0103(4), F.S., generally provides that a person who is not a member of an LLC is deemed to have notice of the LLC's grant or limitation of authority to a person to act on behalf of the LLC if such grant or limitation is contained in the LLC's articles of organization.

The bill amends s. 605.0103(4), F.S., to provide that any provisions in the LLC's articles of organization that limit the authority of a person to transfer real property held in the name of the LLC are not effective to put third parties on notice of that limited authority, unless the limitation of authority appears in an affidavit, certificate, or other instrument, recorded in the office for recording transfers of real property.

##### **Voting Rights of Members and Managers**

Section 605.04073(4), F.S., provides that any action that requires the vote or consent of the members of the LLC may be taken without a meeting. The bill amends subsection (4) to provide that an action requiring the vote or consent of members and managers may be taken without a meeting if the action was approved by the members with at least the minimum number of votes necessary to take the action at a meeting and a record of the action is made.

##### **Member Demand for Records and Information**

Generally, an LLC must make its corporate records and documents available for inspection to its members. Specifically, s. 605.0410(2), F.S., provides that a member-managed LLC must, on demand of a member, provide information concerning the company's activities, affairs, financial condition, and other circumstances that the LLC is not otherwise required to provide.

The bill amends s. 605.0410(2), F.S., to require a member-managed LLC that has received a demand for information to respond within 10 days of the demand either with the information demanded or with an explanation why the LLC will not provide the information.

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<sup>1</sup> Chapter 2013-180, L.O.F.

<sup>2</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).

## **Application of Revised LLC Act to LLCs formed under the Prior LLC Act**

Section 605.1108, F.S., provided for the one year phase in of the Revised LLC Act and allowed LLCs formed under the previous act before January 1, 2014, to remain under the previous act until January, 1, 2015, at which date all Florida LLCs became subject to the Revised LLC Act exclusively. For member-managed LLCs formed under the prior LLC Act, section 605.1108(3)(b), F.S., provides that the language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

In some situations, a company's articles of organization may differ from its operating agreement in how the company's management structure is designated. Consequently, there may be confusion as to which language controls the company's management structure. To remedy this problem, the bill deletes s. 605.1108(3)(b), F.S.

## **Repeal of Ch. 608, F.S., the Florida Limited Liability Act**

As noted above, Ch. 608, F.S., the Florida Limited Liability Company Act, was repealed by Ch. 2013-180, L.O.F., effective January 1, 2015, and replaced by Ch. 605, F.S., the Revised LLC 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.<sup>3</sup> Accordingly, the bill repeals Ch. 608, F.S., the Florida Limited Liability Company Act.

The bill also deletes obsolete references to Ch. 608, F.S., and replaces them with references to Ch. 605, F.S. Where necessary to retain references to Ch. 608, F.S., the bill adds the word "former" before the reference. The bill also makes technical, grammatical, and stylistic changes due to the repeal of Ch. 608, F.S.

## **Power to Dissociate as a Member of an LLC**

Section 605.0601(1), F.S., provides that a person has the power to dissociate as a member of an LLC at any time. A member who dissociates loses right to participate as a member in the management and conduct of the LLC's activities and affairs.<sup>4</sup> Currently, s. 605.0105, F.S., provides that certain matters, including a member's power to dissociate under s. 605.0601, F.S., cannot be modified in an LLC's operating agreement.

The bill repeals the provision in s. 605.0105, F.S., that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC. Consequently, an LLC's operating agreement may limit or vary a person's power to dissociate as a member of the LLC in ways that differ from the default dissociation provision in s. 605.0601, F.S.

## **Other Effects of the Bill**

The bill amends 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.

The bill provides that in order for the exception to a member or manager's duty of loyalty to apply in cases of conflict of interest transactions, the conflict of interest transaction provisions in s. 605.04092, F.S., must be satisfied.

The bill repeals the provision in s. 605.1072(2), F.S., that provides an exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction. This repeal makes the limitation of remedies in appraisal events comparable to the limitations in other business entity statutes.

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<sup>3</sup> See ss. 11.242(5)(b) and (i), F.S.

<sup>4</sup> Section 605.0603(1)(a), F.S.

The bill specifies information that administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement. The bill also provides for an alternative to filing an application for such reinstatement.

To correct technical errors associated with the 2013 enactment of the Revised LLC Act and the January 1, 2015 repeal of the prior LLC Act, the bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining substantive provisions of the bill have an effective date of July 1, 2015.

**B. SECTION DIRECTORY:**

Section 1 amends s. 605.0103, F.S., related to knowledge and notice.

Section 2 amends s. 604.04073, F.S., related to voting rights of members and managers.

Section 3 amends s. 605.0410, F.S., related to records to be kept and the rights of members, managers, and persons dissociated to information.

Section 4 amends s. 605.1108, F.S., related to application of Ch. 605, F.S., to limited liability companies formed under the Florida Limited Liability Company Act.

Section 5 amends s. 605.0715, F.S., related to reinstatement of an administratively dissolved LLC.

Section 6 amends s. 605.0909, F.S., related to reinstatement of an administratively dissolved foreign LLC.

Section 7 repeals Ch. 608, F.S., the former statutes governing limited liability companies.

Section 8 amends s. 15.16, F.S., related to the reproduction of records, admissibility of evidence, electronic receipt and transmission of records, certifications, and acknowledgments.

Section 9 amends s. 48.062, F.S., related to service on a limited liability company.

Section 10 amends s. 213.758, F.S., related to transfer of tax liabilities.

Section 11 amends s. 220.02, F.S., related to legislative intent.

Section 12 amends s. 220.03, F.S., related to definitions.

Section 13 amends s. 220.13, F.S., related to the definition of "adjusted federal income."

Section 14 amends s. 310.181, F.S., related to corporate powers.

Section 15 amends s. 440.02, F.S., related to definitions.

Section 16 amends s. 605.0102, F.S., related to definitions.

Section 17 amends s. 605.0401, F.S., related to becoming a member.

Section 18 amends s. 605.04074, F.S., related to agency rights of members and managers.

Section 19 amends s. 605.0408, F.S., related to reimbursement, indemnification, advancement, and insurance.

Section 20 amends s. 605.04091, F.S., related to standards of conduct for members and managers.

Section 21 amends s. 605.0712, F.S., related to other claims against a dissolved limited liability company.

Section 22 amends s. 605.0805, F.S., related to proceeds and expenses.

Section 23 amends s. 605.0717, F.S., related to dissolution.

Section 24 amends s. 605.1025, F.S., related to articles of merger.

Section 25 amends s. 606.06, F.S., related to uniform business reports.

Section 26 amends s. 607.1108, F.S., related to the merger of a domestic corporation and other business entity.

Section 27 amends s. 607.1109, F.S., related to articles of merger.

Section 28 amends s. 607.11101, F.S., related to the effect of a merger of a domestic corporation and other business entity.

Section 29 amends s. 621.12, F.S., related to identification with individual shareholders or members.

Section 30 amends s. 636.204, F.S., related to license requirements.

Section 31 amends s. 655.0201, F.S., related to service of process, notice, or demand on financial institutions.

Section 32 amends s. 658.2953, F.S., related to interstate branching.

Section 33 amends s. 694.16, F.S., related to conveyances by a merger or conversion of business entities.

Section 34 amends s. 1002.395, F.S., related to the Florida Tax Credit Scholarship Program.

Section 35 provides an effective date of July 1, 2015, except as otherwise expressly provided in the act.

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

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

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

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

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

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

### **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:**

The bill does not appear to have any direct economic impact on the private sector.

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

None.

### 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:

The bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining provisions of the bill have an effective date of July 1, 2015.

Retroactive application of a statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> It must be an immediate, fixed right of present or future enjoyment.<sup>8</sup>

"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."<sup>9</sup>

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

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

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 17, 2015, the Civil Justice Subcommittee adopted an amended proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- repealing Ch. 608, F.S., the Florida Limited Liability Company Act;
- providing a retroactive effective date of January 1, 2015 for those provisions related to the repeal of Ch. 608, F.S.;

<sup>5</sup> *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1216 (Fla. 2nd DCA 2004).

<sup>6</sup> *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).

<sup>7</sup> *R.A.M.* at 1218.

<sup>8</sup> *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).

<sup>9</sup> *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

- repealing the provision in s. 605.0105, F.S., that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC;
- repealing the provision in s. 605.1072(2), F.S., that provides an exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction; and
- making technical and drafting corrections and conforming cross-references.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

On March 10, 2015, the Economic Development and Tourism Subcommittee adopted an amendment to the bill. The amendment specifies information that administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement. The amendment also provides for an alternative to filing an application for such reinstatement.

This analysis is drafted to the committee substitute as passed by the Economic Development and Tourism Subcommittee.