

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/CS/CS/SB 554

INTRODUCER: Rules Committee; Judiciary Committee; Commerce and Tourism Committee; and Senator Simmons

SUBJECT: Limited Liability Companies

DATE: April 2, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Siples</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Siples</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/CS/SB 554 deletes or replaces obsolete references to the Florida Limited Liability Company Act which has been replaced by the Florida Revised Limited Liability Company Act and makes technical, grammatical, and stylistic changes due to the repeal of the earlier act.

The bill also makes the following changes to the Revised Limited Liability Company 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 recorded in the official records of the county where the property is located;
- Authorizes an LLC to alter or eliminate a fiduciary duty in its operating agreement if it is not manifestly unreasonable and is not prohibited by law;
- Provides that the duties of a member of an LLC may be restricted, expanded, or eliminated by the operating agreement and in accordance with law;
- Provides that common law principles relating to the fiduciary duties of loyalty and care apply unless abrogated by ch. 605, F.S.
- Conditions the authority of the members of an LLC to vote outside of a meeting on having a certain minimum number of votes and recording those votes;
- Requires a member-managed LLC to identify within 10 days after a member's request for information about the LLC, the information that the LLC will provide or reasons why the LLC will not provide the information;

- Clarifies that, in the event of a conflict between an operating agreement and the LLC's articles of organization, the provisions of the operating agreement prevail over inconsistent provisions of the LLC's articles of organization;
- Repeals a provision that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC; and
- Limits the circumstances under which an appraisal event that is an interested transaction may be contested or set aside.

## II. Present Situation:

### Current Law

The Legislature enacted the Florida Revised Limited Liability Act<sup>1</sup> in 2013 to replace its predecessor, the Florida Limited Liability Company Act. The original act is contained in ch. 608, F.S., and the new act is contained in ch. 605, F.S. Both chapters govern the formation and operation of limited liability companies in the state.

The revised act became effective January 1, 2014, and applied to all Florida limited liability companies formed on or after that date, with a one year transition period for limited liability companies that existed before January 1, 2014. Foreign limited liability companies that were formed outside of the state, but which qualified to do business in the state, became subject to the revised act on January 1, 2014. On January 1, 2015, the one year transition period for Florida limited liability companies ended and the revised act now governs all limited liability companies in the state. The previous limited liability act contained in ch. 608, F.S., was repealed at that same time.<sup>2</sup>

A limited liability company (LLC) is a type of hybrid business entity that draws from the structure of a corporation and a partnership. It provides its members with limited liability against the entity's debts and obligations, as a corporation does. It also provides its members with the flexibility to choose the federal income tax classification of the entity. For multi-member limited liability companies, the members may choose federal income tax classification as a partnership, S corporation, or C corporation. For single-member limited liability companies, the member may choose federal income tax classification as an S corporation, C corporation, or disregarded entity.<sup>3</sup>

In order to lawfully transact business as a limited liability company in Florida, a company must sign and file its articles of organization<sup>4</sup> with the Florida Department of State and pay the

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<sup>1</sup> Chapter 2013-180, s. 2, Laws of Fla. This act is based upon the Uniform Law Commission's Revised Uniform Limited Liability Company Act of 2006, as amended through 2013.

<sup>2</sup> The Florida Bar Business Law Section Drafting Committee, *White paper for SB 554 and HB 531, An Act Relating to Limited Liability Companies* (February 9, 2015)(on file with the Senate Committee on Commerce and Tourism).

<sup>3</sup> Telephone interview and e-mail correspondence with A. Edward McGinty, Attorney, March 13, 2015 (E-mail on file with the Senate Committee on Judiciary).

<sup>4</sup> Section 605.0201, F.S.

appropriate fee.<sup>5</sup> A company must file an annual report with the Department of State to maintain its ability to transact business in this state.<sup>6</sup>

Because ch. 608, F.S., the original Florida Limited Liability Company Act, was repealed on January 1, 2015, the statutes need to be updated to reflect those changes.

### III. Effect of Proposed Changes:

The bill makes the following changes to ch. 605, F.S.:

#### **Knowledge and Notice Provision (Section 1)**

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

The bill amends s. 605.0103(4)5, F.S., to provide that a provision in the articles of organization limiting the authority of a person to transfer real property held in the name of the LLC is *not* effective notice of the limitation to a nonmember unless the limitation appears in an affidavit, certificate, or other instrument bearing the name of the LLC and recorded in the "office for recording transfers of real property." Statutes outside of ch. 605, F.S., provide that property and related records are maintained by the clerk of circuit court in the official records of the county where the property is located.<sup>7</sup>

#### **Operating Agreement (Sections 2 and 3)**

Section 605.0105(3), F.S., provides a lengthy list of what an operating agreement of an LLC may not do. The bill amends this section to provide that an operating agreement may not vary the power of a person to dissociate.

The bill amends s. 605.0105(4), F.S., to allow an LLC to alter or eliminate any fiduciary duty except conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law.

The bill amends s. 605.0111, F.S., to provide that an operating agreement may restrict, expand, or eliminate the duties of a member, manager, or other person who has duties to an LLC or to another member, manager, or other person that is a party to the operating agreement. This restriction, expansion, or elimination must be in accordance with s. 605.0105, F.S., which provides limitations and allowances for the contents of an operating agreement.

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<sup>5</sup> 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 February 25, 2015).

<sup>6</sup> 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.

<sup>7</sup> Section 28.222, F.S.

### **Supplemental Principles of Law (Section 3)**

The bill provides that the common law principles relating to the fiduciary duties of loyalty and care supplement ch. 605, F.S., unless displaced by its provisions.

### **Voting Rights of Members and Managers (Section 4)**

Section 605.04073(4), F.S., provides that any action requiring the vote or consent of the members may be taken without a meeting. The bill amends this section to provide that a vote or consent of members may be taken without a meeting if the action is approved by the members with at least the minimum number of votes necessary to authorize the action at a meeting of the members. Additionally, a record of the meeting must be made.

### **Duty of Loyalty (Sections 5 and 23)**

The bill amends s. 605.04091, F.S., to clarify that the duty of loyalty includes, *but is not limited to*, the duties outlined in law.

The bill also 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.

### **Member Demand for Records (Section 6)**

Section. 605.0410, F.S., provides the circumstances under which a member managed LLC must provide records and information to its members. The bill amends this section to require that a member managed LLC provide a member, within 10 days after receiving a demand, a record of the information, and when and where the company will provide the information. If the LLC is not providing the requested information, it must state the reasons why.

### **Reinstatement (Sections 7 and 8)**

Sections 605.0715 and 605.0909, F.S., specify what information must be included in a reinstatement application. As permitted previously in ch. 608, F.S., domestic and foreign LLCs may submit a current annual report form in lieu of a reinstatement application.

### **Other Remedies (Section 9)**

This bill amends s. 605.1072(2), F.S., to delete a provision that provides an exception to the limitations of remedies that an LLC may pursue regarding the legality of an appraisal event involving an interested transaction. This repeal makes the limitation of remedies in appraisal events comparable to the limitations for other business entities.<sup>8</sup>

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<sup>8</sup> See s. 607.1302(3), F.S.

### **Application of the Revised LLC Act to LLCs Formed Under the Previous LLC Act (Section 10)**

Section 605.1108, F.S., established the 1-year transition period of the Revised LLC Act and permitted LLCs formed before January 1, 2014, under the previous act, to operate under the previous act until January 1, 2015, when all Florida LLCs became subject to the Revised LLC Act. For member-managed LLCs formed under the previous act, s. 605.1108, (3)(b), F.S., states 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.” Some situations exist in which a company’s articles of organization may differ from its operating agreement as to how the company’s management structure is established, leading to confusion over which language controls. In an effort to remedy this problem, s. 605.1108(3)(b), F.S., is deleted. Thus, the bill clarifies that the provisions of an operating agreement prevail over inconsistent provisions of an LLC’s articles of organization.

### **Repeal of Chapter 608, F.S., the Florida Limited Liability Act (Section 11 and others)**

As discussed in the “Present Situation” section of this analysis, the Florida Limited Liability Company Act was repealed by ch. 2013-180, Laws of Fla., effective January 1, 2015, and replaced by the Florida Revised Limited Liability Company Act.<sup>9</sup> It is the duty of the Office of Legislative Services in its operation of a statutory revision program to omit from the statutes all sections of the statutes that are expressly repealed by “any *current session* of the Legislature.”<sup>10</sup> Because the act was not repealed by a current session of the Legislature, it may be omitted from the 2015 Florida Statutes only by a bill enacted by a current Legislature. Therefore, this bill repeals ch. 608, F.S., the Florida Limited Liability Company Act.

To correctly reflect the repeal of ch. 608 from the Florida Statutes, obsolete references to ch. 608, F.S., are deleted and replaced with current references to ch. 605, F.S. If it is necessary to retain a reference to ch. 608, F.S., the bill adds the word “former” before the reference to ch. 608, F.S. This bill also makes technical, stylistic, and conforming changes necessitated by the repeal of ch. 608, F.S.

### **“Majority-in-interest” Definition (Section 20)**

This bill amends s. 605.0102, F.S., to revise the definition of “majority-in-interest” to provide that the determination of what constitutes an action taken by a “majority-in-interest” is based upon the percentage interest in the LLC’s profits owned by all of the members and not by those who have the right to vote.

### **Additional Provisions**

This bill amend ss. 15.16, 48.062, 213.758, 220.02, 220.03, 220.13, 310.181, 440.02, 605.0401, 605.04074, 605.04091, 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

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<sup>9</sup> Chapter 2013-180, s. 5, Laws of Fla. Section 5 provides “Effective January 1, 2015, the Florida Limited Liability Company Act, consisting of ss. 608.401-608.705, Florida Statutes, is repealed.”

<sup>10</sup> Section 11.242(5)(b), F.S.

technical changes associated with the repeal of the Florida Limited Liability Company Act on January 1, 2015.

**Effective Date**

This act is effective July 1, 2015, unless otherwise expressly provided. 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.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, it does not appear to be a mandate for constitutional purposes.

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.

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.<sup>11</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>12</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>13</sup> It must be an immediate, fixed right of present or future enjoyment.<sup>14</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>15</sup>

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 605.0103, 605.0105, 605.0111, 605.04073, 605.0410, 605.0712, 605.0715, 605.0717, 605.0805, 605.0909, 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, 606.06, 607.1108, 607.1109, 607.11101, 621.12, 636.204, 655.0201, 658.2953, 694.16, and 1002.395.

The bill repeals chapter 608, Florida Statutes.

## IX. Additional Information:

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

### **CS/CS/CS by Rules on April 2, 2015:**

The committee substitute:

- Provides that if it is not manifestly unreasonable and in compliance with this section, an operating agreement may alter or eliminate a fiduciary duty;
- Provides that an operating agreement may restrict, expand, or eliminate the duties of a member, manager, or other person to an LLC or to another member, manager, or other person that is bound by the operating agreement;
- Provides that common law principles relating to the fiduciary duties of loyalty and care supplement ch. 605, F.S., to the extent that such common law principles are not abrogated by its provisions;

<sup>11</sup> *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1216 (Fla. 2nd DCA 2004).

<sup>12</sup> *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

<sup>13</sup> *R.A.M.* at 1218.

<sup>14</sup> *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).

<sup>15</sup> *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

- Clarifies that the duty of loyalty includes, *but is not limited to*, the duties outlined in law; and
- Makes grammatical and stylistic changes.

**CS/CS by Judiciary on March 24, 2015:**

The CS/CS:

- Specifies what information must be included in a reinstatement application by an LLC; and
- Permits domestic and foreign LLCs to submit an annual report, in lieu of a reinstatement application, when seeking reinstatement with the department.

**CS by Commerce and Tourism on March 2, 2015:**

The committee substitute:

- 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.