

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #: CS/CS/CS/HB 531

FINAL HOUSE FLOOR ACTION:

SPONSOR(S): Judiciary Committee; Economic
Development & Tourism
Subcommittee; Civil Justice
Subcommittee; McGhee; Spano
and others

114 Y's

0 N's

**COMPANION
BILLS:** CS/CS/CS/SB 554

GOVERNOR'S ACTION: Pending

SUMMARY ANALYSIS

CS/CS/CS/HB 531 passed the House on April 9, 2015, and subsequently passed the Senate on April 22, 2015. The bill amends laws related to limited liability companies.

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 a limited liability company (LLC) in Florida. The Florida LLC Act was repealed effective January 1, 2015.

The bill deletes or replaces obsolete references to the Florida LLC Act and makes technical, grammatical, and stylistic changes due to the repeal of the Florida LLC 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;
- 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;
- Specifies information administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement; and
- Authorizes an LLC's operating agreement to alter or eliminate a member or manager's fiduciary duties.

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

Subject to the Governor's veto powers, the effective date of this bill is retroactive to January 1, 2015, for those provisions related to the repeal of the Florida LLC Act; the remaining provisions will become effective on July 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Law

In 2013, the Legislature enacted the Florida Revised Limited Liability Company Act,¹ 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.²

The bill makes the following substantive changes to ch. 605, 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.

¹ ch. 2013-180, Laws of Fla.

² 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, s. 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 Company Act

As noted above, ch. 608, F.S., the Florida LLC 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.³ Accordingly, the bill repeals ch. 608, F.S., the Florida Limited Liability Company Act, but does not change the effective date of the repeal of January 1, 2015, by ch. 2013-180, L.O.F.

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 the right to participate as a member in the management and conduct of the LLC's activities and affairs.⁴ 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.

Duties of Members and Managers

Section 605.04091, F.S., provides that members and managers of an LLC owe fiduciary duties of loyalty and care to the LLC and members of the LLC. Current law *limits* the duty of loyalty to accounting to the LLC and holding as trustee any property, profit, or benefit derived in certain circumstances; refraining from dealing with the company with an interest adverse to the company; and refraining from competing with the company. Additionally, current law provides that the duty of care in the conduct or winding up of the company is *limited to* refraining from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or a knowing violation of law.

³ See s. 11.242(5)(b) and (i), F.S.

⁴ s. 605.0603(1)(a), F.S.

The bill amends s. 605.04091, F.S., to provide that the duty of care is not *limited* as provided in current law, but that the duty of care *includes* those actions provided in current law.

Section 605.1015(4)(c), F.S., provides that, if not manifestly unreasonable, an LLC's operating agreement may: alter or eliminate the the duty of loyalty under s. 605.04091; identify specific activities that do not violate the duty of loyalty; and alter the duty of care, but it may not authorize willful or intentional misconduct or a knowing violation of law. The bill authorizes an LLC's operating agreement to alter or eliminate fiduciary duties if doing so is not manifestly unreasonable.

Rules of Construction and Supplemental Principles of Law

Section 605.0111, F.S., provides that it is the intent of ch. 605, F.S., to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements, and unless displaced by particular provisions of ch. 605, F.S., the principles of law and equity supplement the chapter.

The bill amends s. 605.0111, F.S., to provide that to the extent that, at law or in equity, a member, manager, or other person has duties, including fiduciary duties, to an LLC or to another person that is a party to or bound by an operating agreement, the duties of the member, manager, or other person may be restricted, expanded, or eliminated by the operating agreement, to the extent allowed by s. 605.0105, F.S.⁵ The bill also specifies that the common law principles relating to fiduciary duties of loyalty and care are included within the principles of law and equity that supplement ch. 605, F.S., unless displaced by particular provisions of ch. 605, 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.

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

The bill also makes technical and conforming changes to ch. 605, F.S.

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.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

⁵ Section 605.0105, F.S., regulates the provisions of an LLC's operating agreement.

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.