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Key Points of The New Florida LLC Act

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The 2013 Florida Legislature adopted a new LLC act which was signed by the Governor on June 14, 2013. The new law creates Chapter 605 of the Florida Statutes, which will be effective January 1, 2014. Generally speaking, until January 1, 2015, LLCs formed in Florida before January 1, 2014 will continue to be subject to current law (Chapter 608), unless they elect to be governed by the new law earlier than 2015. In addition, all records filed on or after January 1, 2014 with the Department of State by a Florida or foreign LLC must comply with the filing requirements of the new law. On January 1, 2015, all LLCs must adhere to the new law.

The new law is based for the most part on the Revised Uniform Limited Liability Company Act (2006, as amended in 2011), but retains many existing Florida LLC statute provisions or concepts and incorporates concepts from other sources, including the Florida corporation statute, the American Bar Association's Prototype LLC Act and the business entity laws of other states. The new law strikes a balance between a "minimal" intrusion (or complete "freedom of contract") approach like that of Delaware, a more paternalistic approach that protects persons who may be less knowledgeable about the law and issues affecting LLCs. The new law will remain a "default statute," which means that except for the 17 "nonwaivable" provisions (listed in new Section 605.0105), the members may override the statutory default rules by their operating agreement. Thus, the operating agreement remains the focal point for examination of the rights and responsibilities among the members, and as a result, careful drafting of the operating agreement remains essential for any LLC, including single-member LLCs.

Among some of the more important changes in the new law are the following:

- adds more "nonwaivable" rules pertaining to operating agreements, meaning that certain rules cannot be overridden by the operating agreement, while others can be modified within certain limitations
- delineates the liability of members and managers with respect inaccurate records filed with the Department of State
- clarifies that there are only two management structures for LLCs and defines more precisely than existing law the respective duties of members and managers in each case (and eliminates in the process the status definition of a "managing member")
- permits LLCs to file Statements of Authority with the Department of State to place third parties on notice of the authority (or restricted authority) of certain persons or groups of persons associated with the LLC

- changes and clarifies the authority of members and managers to bind the LLC
- changes the voting rights of members in certain circumstances
- clarifies the rights and duties of a transferee (formerly an "assignee") of a membership interest
- adds new provisions relating to the withdrawal of a member from an LLC (dissociation)
- incorporates new grounds for judicial dissolution and adds new rules for appointment of receivers and custodians and other remedies in the event of a judicial dissolution (including a right to buy-out the aggrieved member's interest in some cases)
- adds new provisions for derivative actions, including new special litigation committee procedures
- adds new provisions governing service of process on LLCs and creates a new section in Florida Statutes, Chapter 48, that addresses service of process on LLCs
- while retaining the merger and conversion constructs of existing law, the new law now allows interest exchanges, as well as the domestication of non-U.S. entities desiring to become a Florida LLC
- adds additional transactions and events for the dissenter appraisal remedy
- continues the same charging order provisions added to the existing statute in 2011 to address the effect of the Florida Supreme Court's *Olmstead* case

It is also noteworthy that the new law does not permit the organization of a "series LLC' in Florida, as the drafters of the new law believed that significant issues still need be addressed before this kind of entity should be permitted to organize in Florida.

The new law is intended to make Florida a more attractive place to organize and operate an LLC. It modernizes the existing law, which was adopted more than 30 years ago and contains a "quilt-work" of amendments made over the years, making it more difficult to understand and use than the comparable statutes in many other states. While eliminating much of the uncertainty that exists in some parts of the prior law, the new law emphasizes the importance of the operating agreement (recognizing that LLCs are primarily a "creature of contract") and provides businesses and their advisers with a significant degree of flexibility in designing management structures, capital and profit participation schemes, and other features unique to their objectives and circumstances.

Owners and managers of Florida LLCs, and their attorneys and other advisers, should determine how the new law will affect them. It is likely that many LLCs will wish to amend or update their operating agreements and their articles of organization in order to address various provisions of the new law. In addition, parties doing business with LLCs in Florida may also wish to consult with counsel to determine whether any changes may be necessary in their contractual relationship with the LLC.

Here are some practical examples of why members of an existing LLC may want to revise their operating agreement or take other appropriate actions under the new law:

- Designating the management structure as either "manager-managed" or "member-managed" to avoid any doubt about which of them was intended by the parties. This is more important than ever before because many important parts of the new law are expressly conditioned on which of these two structures applies, including how management and other decisions must be approved, who has the authority to approve them and how member votes are tabulated. The type of management structure also dictates who has the authority to be an agent of the company, or who has fiduciary duties or could be liable for various other matters, such as providing information to members, making improper distributions, or correcting inaccuracies in records filed with the Department of State.

- Eliminating the term "managing member," or if the parties still wish to use that term for some reason, at least clarifying that the use of the term is not intended to be evidence of any particular management structure. Its continued usage could imply that the parties intend the LLC to be "member-managed," in which case all of the members would have the authority to act as an agent of the company and management decisions would require their participation even for day-to-day matters.
- Determining whether the operating agreement contains provisions inconsistent with or otherwise affected by the "nonwaivable rules" in new Section 605.0105. If it does, then corrective action can be taken by modifying those provisions in a manner that adheres to the reasonableness standards or "permissible modification" parameters in the new law.
- Providing that a member who assigns or disposes of all of his member interest will no longer be deemed a member. The new law would otherwise require that all of the other members vote to dissociate that member to remove his member status.
- In a member-managed LLC, it may be in the interest of a "passive" member to have the operating agreement expressly exonerate that member from various obligations or liabilities that could otherwise apply by statute. This must be done by having the operating agreement expressly impose the obligations or liabilities in question on another member (presumably one who is more active in the company's affairs).
- Using the new Statement of Authority filing procedures to empower specific persons with the authority to act as an agent, to restrict the authority that a person would otherwise have under the default rules, or to prevent a person from having apparent authority to act in that capacity.
- Correcting the articles of organization of an LLC when it contains information inconsistent with the operating agreement. Under the new law, a third party relying on the inaccurate information in the articles may assert that it overrides the inconsistent provision of the operating agreement.
- Because the new definition of "operating agreement" is very broad and could conceivably include matters expressed orally, implied by conduct, or contained in any "record" (which is itself broadly defined, and includes electronic transmissions), or any combination of those expressions, it would be important to have a written operating agreement with a well-drafted integration or merger clause. The operating agreement should also contain language to the effect that it is the exclusive source of the operating agreement provisions, cannot be amended except in a written instrument, and that any other communications, actions or conduct involving the members or managers will be not considered part of the operating agreement, or be considered to amend it.
- When the members desire to over-ride any of the default rules that are of particular concern the operating agreement should expressly state that it is intended to displace the default rule in question. The same can be said for those parts of the operating agreement which the members desire to be a permitted modification of one of the nonwaivable rules. In that case, the operating agreement can stipulate that the members believe that their modification meets the applicable requirements of Section 605.0105 and should be deemed a valid provision of their operating agreement.
- Since judicial dissolution can no longer be waived under the new law, the members may wish to provide for a specific deadlock resolution or other remedy in the case of a deadlock. The new law permits a "deadlock sale provision" in the operating agreement to control over a judicial dissolution action brought based upon a deadlock. A "deadlock sale provision" is any provision that applies to a deadlock among members or managers, which is intended to break the deadlock, and would include, for example, a put or call right or other buy-sell provision, a governance change, a "tie-breaking" vote, forced partition or a required sale of the company or any or all of its assets.

- Because there are several new transactions or events to which the appraisal remedy will apply, the parties to the operating agreement may want to provide for the waiver of this remedy for some or all of the transactions or events.
- Electing to have the "balance sheet" test be the sole determinant of whether a company has made an improper distribution to its members. This would avoid an analysis of whether the "equity" (or bankruptcy) test applies, which can often be an uncertain science.
- Over-riding some of new the "automatic" dissociation rules that will otherwise apply to a member, especially in the case of members which are entities.
- Determining whether certain amendments of the operating agreement should not be binding upon a transferee of a transferable interest. For example, the surviving heirs of a member, or a former member itself (in the case of a dissociation) might be surprised to learn that the remaining members have the power to change the distribution provisions of the operating agreement.
- Preapproving or ratifying related party transactions that might otherwise infringe the "duty of loyalty" or "conflict of interest" criteria in the new law, or providing for a specific approval mechanism (which is a permitted "over-riding" provision).
- The new law provides that a transfer to a transferee with notice of a transfer restriction in the operating agreement will automatically be of no effect (void). Therefore, members may wish to require that the LLC's interests be evidenced solely by certificates, with the certificates containing a legend referring to the transfer. By requiring all transfers to be made via a delivery of the certificate to the transferee, they could assure that the transferee has notice of the restriction.

These are just a few examples, and others would likely apply to a specific situation.

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