KEY CHANGES MADE BY FLORIDA'S NEW REVISED LIMITED LIABILITY COMPANY ACT

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I. INTRODUCTION

A. **New Chapter 605**. Senate Bill 1300 created a Revised Limited Liability Company Act in Florida as a new Chapter 605 of the Florida Statutes (the current LLC Act is in Chapter 608). The revised Act was drafted by the Florida Revised LLC Act Drafting Committee, comprised of members of the Business Law, Tax, and Real Property Probate & Trust Law sections of the Florida Bar. The Act was drafted over 4-year period and reflects many compromises resulting from the competing interests involved in drafting the new Florida Revised LLC Act.

B. **Effective Date**. All LLCs formed in 2014 are subject to the new Florida Revised LLC Act on formation. Until January 1, 2015, LLCs in existence prior to January 1, 2014 may continue to operate under Chapter 608. As of January 1, 2015, however, all LLCs in Florida will be subject to Chapter 605, and Chapter 608 will be repealed.

C. **What Florida's New Revised LLC Act Does Not Change: Charging Orders**. In 2011, in response to the Florida Supreme Court's decision, *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010), the Florida legislature adopted amendments to Fl. Stat. §608.433 (which has come to be known as the "Olmstead Patch"). 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 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. Chapter 605 retains the so-called Olmstead Patch as set forth in existing Chapter 608.

D. **What This Outline Covers**. This outline covers some ***selected key changes*** made by the new Florida Revised LLC Act. ***It is not an exhaustive list of the changes*** between existing Chapter 608 and new Chapter 605. Some of the changes made by the new Florida Revised LLC Act ***not*** covered by this outline include modifications to the provisions for service of process on LLCs, modifications to the provisions for derivative actions and changes to miscellaneous other provisions.

E. **Definitions**.

1. Fl. Stat. §605.0102 includes 69 definitions (up from 26 in existing law) plus 10 additional definitions relating specifically to appraisal rights contained in Fl. Stat. §605.1061. Existing Operating Agreements should be reviewed to assure that they conform with these new definitions.

2. One term that is eliminated under Florida's new revised LLC Act that will cause many LLCs and their owners to take a hard look at their existing Operating Agreements is the elimination of the term "Managing Member." The elimination of the term "Managing Member" in the new Florida Revised LLC Act will be discussed in more detail later and presents a host of issues for LLCs formed before January 1, 2014 as member-managed LLCs.

II. OPERATING AGREEMENT

A. Definition of Operating Agreement. In general terms, an Operating Agreement is the governing instrument of an LLC which regulates the affairs of the LLC and governs relations among the members, managers and the Company. Under Florida's new revised LLC Act, the term "Operating Agreement," is expanded to provide that in addition to written or oral agreements, an Operating Agreement may be in other forms, such as "implied, in a record, or in any combination thereof." The definition of "record" means any information that can be inscribed in a tangible medium or stored in electronic or other medium, so long as it can be retrieved in perceivable form. Consequently, the definition of an Operating Agreement is ***extremely broad*** under Florida's new revised LLC Act, and as such, a person or entity becoming a member of an LLC needs to perform due diligence and obtain representations regarding the "Operating Agreement" of such LLC.

B. Functions of an Operating Agreement. Under Fl. Stat. §605.0105, the scope, function and limitations of an Operating Agreement are set forth as follows:

1. Establishes the primacy of the Operating Agreement and evidences the relationship among the LLC and its members, the rights and duties of any manager(s), and activities and affairs of the Company.

2. Recognizes the LLC statute as containing "default" rules relating to matters for which the Operating Agreement provides no guidance to the contrary.

3. Fl. Stat. §605.0105(3) lists those matters that are not subject to change by the Operating Agreement by setting forth 17 "non-waivable" statutory provisions (increased from six provisions under existing Chapter 608).

4. Lists certain provisions frequently found in Operating Agreements, authorizing some unconditionally, and others so long as the provisions are not "manifestly unreasonable."

5. Sets forth the meaning of "not manifestly unreasonable," and the factors, timing and information that a court must consider in determining whether a provision is manifestly unreasonable.

6. Confirms that the Operating Agreement may include specific penalties or other consequences if a member fails to comply with its terms upon certain events specified in the Operating Agreement.

C. **Non-Waivable Provisions**. As discussed above, under current Chapter 608, the Operating Agreement may not:

1. Unreasonably restrict a right to information or access to records required under Fl. Stat. §608.4101.

2. Eliminate the duty of loyalty under Fl. Stat. §608.4225.

3. Unreasonably reduce the duty of care under Fl. Stat. §608.4225.

4. Eliminate the obligation of good faith and fair dealing under Fl. Stat. §608.4225.

5. Vary the requirement to wind-up the LLC's business.

6. Restrict rights of a person, other than a manager, member, or transferee of a member's distributional interest, under Chapter 608.

Under the new Florida Revised LLC Act, a list of items that an Operating Agreement may not alter is far more extensive than under current law, and includes the following ***(although some of these provisions may, subject to certain limitations, be varied or even eliminated)***:

1. Vary a limited liability company's capacity to sue and be sued in its own name;

2. Vary the applicable law that governs LLCs;

3. Vary the procedure pertaining to registered agents or the Department of State;

4. Vary the requirements related to signing and filing a record pursuant to a court order;

5. Eliminate the duty of loyalty or the duty of care;

6. Eliminate the obligation of good faith and fair dealing;

7. Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law;

8. Unreasonably restrict the duties and rights to records required by the Act;

9. Vary the power of a person to dissociate;

10. Vary the grounds for dissolution;

11. Vary the requirement to wind up the company;

12. Unreasonably restrict the right of a member to maintain an action against another member or manager;

13. Prevent the formation of a special litigation committee upon a court order;

14. Vary the right of a member to approve a merger, interest exchange, or conversion;

15. Vary the required contents of a plan of merger, a plan of interest exchange, a plan of conversion, or a plan of domestication;

16. Except in certain narrow circumstances, restrict the rights under this chapter of a person other than a member or manager; and

17. 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.

D. **Parties Bound by Operating Agreement**. Fl. Stat. §605.106 provides that an Operating Agreement may be enforced by the LLC ***even where the LLC is not a party to the Operating Agreement, that a person who becomes a member of an LLC is bound by and subject to the Operating Agreement even if the new member does not sign the Operating Agreement*** and that the Operating Agreement is binding upon a manager or transferee even when not signed or formally accepted by such manager or transferee. This is especially notable because an Operating Agreement is not subject to the statute of frauds (except with respect to capital contribution obligations), and by definition an Operating Agreement may be oral. Consequently, when becoming a member of an LLC under Florida's new revised LLC Act, ***it is extremely important that the new member review the Operating Agreement and get signed statements/representations regarding any oral agreements or other records relating to the Operating Agreement that are in place***. ***This could be significant trap for the unwary***.

III. AUTHORITY

A. **Power to Bind the LLC**. Under the new Florida Revised LLC Act, a person may bind the LLC in one of four ways:

1. As an agent of the LLC under Fl. Stat. §605.04074;

2. By grant of authority to do so under the Articles or Operating Agreement;

3. By grant of authority pursuant to a filed Statement of Authority (which will be discussed in more detail below); or

4. By having the status as an agent, authority or power under laws other than Chapter 605, including common law.

B. **Apparent Authority**. Existing law is carried over in Fl. Stat. §605.0301 to provide statutory apparent authority of members in a member-managed LLC and for managers in a manager-managed LLC.

C. **Statements of Authority**. Under the new Florida Revised LLC Act, an LLC may file with the Department of State a Statement of Authority ("SOA") setting forth what authority an individual has with respect to the LLC, such as officers, managers, etc., as well as specify limitations upon the authority to make certain decisions.

1. An SOA is effective for five (5) years unless revoked earlier. If an officer is removed, the SOA should be revoked or amended, or alternatively, if five (5) years have passed, a new SOA should be filed.

2. SOAs are divided into two categories: those pertaining to real property and those pertaining to everything else. An SOA to execute an instrument transferring or otherwise affecting real property requires not only the filing of the SOA with the Department of State, but also the recording of a certified SOA in the real property records office to provide constructive notice. SOAs used to authorize non-real property actions on behalf of, or otherwise act for or bind the LLC, only require the initial filing with the Department of State, which is conclusive in favor of a person who gives value in reliance on the grant of authority, subject to certain limited exceptions.

a. When a certified copy of an effective SOA is recorded in the office for recording transfers of real property, the SOA provides constructive notice and is conclusive in favor of a person who gives value and reliance on the SOA, without knowledge to the contrary, except under certain limited circumstances.

b. Fl. Stat. §605.0303 allows a person who has been granted authority in an SOA to deny the grant of authority by subsequently filing a Statement of Denial. An effective Statement of Denial operates as a restrictive amendment of the earlier filed SOA, and may also be recorded by certified copy in the office for recording transfers of real property.

3. We believe that most banks and other third parties dealing with LLCs will require Statements of Authority to be filed in connection with any transactions between LLCs and banks or such third parties.

IV. VICARIOUS LIABILITY SHIELD

Similar to current law, the new Florida Revised LLC Act shields members and managers against the debts, obligations and liabilities of the LLC, but not does not provide a shield against a person's own conduct (such as professional malpractice) or any contractual obligation (such as a personal guarantee) he or she expressly assumes. The new Florida Revised LLC Act does, however, explicitly provide that failure to observe formalities in the activities and affairs of the LLC will ***not*** be a basis for imposing liability on members and managers. This is

consistent with existing Florida case law for corporations which provides that a creditor cannot pierce the corporate veil of a corporation merely for failure to observe corporate formalities.

V. ADMISSION OF MEMBERS

A. **Current Law**. Unless otherwise provided in the Articles of Organization or the Operating Agreement, under current law a new member cannot be added without the consent of a majority-in-interest of the members. If the prospective member is an assignee of an interest in the LLC, however, current law requires unanimous consent of the members.

B. **New Florida Revised LLC Act**. Under the new Florida Revised LLC Act, unless otherwise provided in the Articles of Organization or the Operating Agreement, a person may become a member of an LLC only with the unanimous consent of all the members.

C. **Non-Economic Members**. The new Florida Revised LLC Act also allows a person to become a non-economic member without a transferrable interest or any obligation to contribute capital. This is a significant change which facilitates so-called special purpose LLCs, and allows for participation and governance by members with no economic interest whatsoever in the LLC.

VI. CONTRIBUTIONS

A. **Forms of Contributions**. The new Florida Revised LLC Act differs from current law by expressly adding, as a permissible form of contribution, "contracts for services to be performed."

B. **Obligation to Contribute Must be in Writing**. Under Fl. Stat. §605.0403, 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 by a non-member creditor***. The right of an LLC creditor to enforce an agreement among members to make a capital contribution does not appear to be waiveable, and as such, any agreement requiring additional capital contributions should be drafted very carefully.

VII. DISTRIBUTIONS

A. **Default Rule for Distributions Among Members**. Currently, the default rule in Florida for LLCs is that distributions are made in accordance with the value of a member's capital contributions. The new Florida Revised LLC Act changes current law by ignoring the value of any capital contributions that, at the time of the particular distribution, have previously been returned.

B. **Default Rule for Allocation of Profits and Losses**. The new Florida Revised LLC Act 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.

C. **Limitation on Distributions**. Consistent with current law, the new Florida Revised LLC Act prohibits distributions that would render the LLC insolvent. The new Florida Revised LLC Act, however, provides two methods used in the determination of insolvency: (1) the LLC "would not be able to pay its debts as they become due in the ordinary course of the company's activities and affairs" and (2) if the company's total assets would be less than the sum of its total liabilities, plus the amount that would be needed if the company were to be dissolved and wound up at the time of distribution to satisfy the preferential rights of members and transferees whose preferential rights are superior to those of persons receiving the distribution. The test contained in (2) above may, however, be eliminated in the Operating Agreement.

D. **Liability for Improper Distribution**. Consistent with existing law, the new Florida Revised LLC Act provides that a member of a member-managed LLC or a manager of a manager-managed LLC can be personally liable if they consent to an improper distribution. Under the new Florida Revised LLC Act, however, a member of a member-managed LLC may escape personal liability if the Operating Agreement expressly relieves him or her of the authority and responsibility to consent to distributions. Additionally, under the new Florida Revised LLC Act, a person who receives a distribution who knows that it is in violation of Fl. Stat. §605.0405 is personally liable to the same extent that a member or manager with the authority and responsibility to consent to distributions is liable. This differs from existing law which does not impose direct liability on recipients, but rather provides for the right to seek and obtain a contribution from persons who knowingly receive an improper distribution.

VIII. MANAGEMENT

A. **Manager-Managed and Member-Managed LLCs**. As discussed above, the new Florida Revised LLC Act eliminates the concept of a "managing member." The Act states that the change was made to eliminate the confusion and varying interpretations under current law as to the ramifications that having a managing member has on the nature of the management structure of the LLC.

1. The elimination of the concept of a "managing member" will very well require changes to be made to Operating Agreements of existing LLCs that currently use the concept of a "managing member," which is a defined term under existing Chapter 608.

2. If the Articles or Operating Agreement do not expressly provide that the LLC will be "manager-managed" or "managed by managers" or that "management is or will be vested in managers" or "words of similar import," then the LLC will by default be deemed member-managed.

3. Additionally, the use of the term "managing member(s)" in pre-existing LLCs in the Articles of Organization or Operating Agreement will result in the LLC being treated as "member-managed" rather than "manager-managed."

4. Because all members of a member-managed LLC have apparent authority to bind the LLC, the best way to address management issues with respect to pre-existing member-managed LLCs is either to file a Statement of Authority expressly authorizing one of the members to make decisions and/or limiting the authority of other members to make decisions, or to simply convert the member-managed LLC into a manager-managed LLC.

B. **Amendment of Operating Agreement**. Under current law, no specific provision addresses amendments to the Operating Agreement. Consequently, unless otherwise provided in the Articles of Organization or Operating Agreement, an Operating Agreement may be amended by the vote or consent of members holding a majority-in-interest of the profits of the LLC. This default rule is changed by the new Florida Revised LLC Act which provides that the unanimous vote of the members is required to amend the Articles of Organization or the Operating Agreement.

C. **Agency Rights of Members and Managers**. Under the default rule set forth in Fl. Stat. §605.04074, for a member-managed LLC, each member is an agent of the LLC whose act binds the company, unless the member had no authority to act for the company in the matter, and the person with whom the member was dealing had notice that the member lacked authority. In a manager-managed LLC, the new Florida Revised LLC Act negates the apparent authority or agency status of a member based on the person's "member" status alone. Rather, each manager of a manager-managed LLC is an agent of the LLC, and an act of a manager binds the company unless the manager had no authority to act for the company in the matter, and the person with whom the manager was dealing knew, or had notice, that the manager lacked authority. A member of a member-managed, or a manager of a manager-managed, company may sign and deliver a deed or any other instrument transferring or affecting the LLC's interest in real property, unless a certified Statement of Authority recorded in the real estate records limits such authority. The SOA is "conclusive" in favor of persons giving value without knowledge of the lack of authority of the member or manager delivering the instrument. Again, it is likely that most banks and other third parties dealing with LLCs will require Statements of Authority to be filed in connection with any transaction between LLCs and such banks or third parties.

D. **Duty of Loyalty and Care and Standard of Conduct for Members and Managers**.

1. **Duty of Loyalty Applicable to Managers of Manager-Managed LLC and All Members of a Member-Managed LLC**.

   a. Under the new Florida Revised LLC Act, the duty of loyalty only applies to managers (and not members) of a manager-managed LLC. This is consistent with existing Chapter 608.

   b. Under the new Florida Revised LLC Act, the duty of loyalty applies to ***all members*** of a member-managed LLC (Fl. Stat. §605.04091(1)). Under existing Chapter 608, only ***managing members*** of a member-managed LLC owe a duty

of loyalty to the LLC and its members, so this constitutes a substantial departure from current law.

2. **<u>What is the Duty of Loyalty</u>**. The duty of loyalty is limited to:

   a. Accounting to the limited liability company and holding as trustee for it any property, profit, or benefit derived by the manager or member, as applicable:

      i. in the conduct or winding up of the company's activities and affairs;

      ii. from the use by the member or manager of the company's property; or

      iii. from the appropriation of a company opportunity.

   b. Refraining from dealing with the company in the conduct or winding up of the company's activities and affairs as, or on behalf of, a person having an interest adverse to the company, except to the extent that a transaction satisfies the requirements of Fl. Stat. §605.04091; and

   c. ***Refraining from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.***

3. **<u>Modification or Elimination of Duty of Care</u>**. Under the general rule, an Operating Agreement may ***not*** eliminate the duty of loyalty or the duty of care imposed under Fl. Stat. §605.04091, except as specifically provided in Fl. Stat. §605.0105(4).

   a. Fl. Stat. §605.0105(4)(b) provides that to the extent the Operating Agreement of a member-managed limited liability company expressly relieves a member of responsibility that the member would otherwise have under Chapter 605 and imposes the responsibility on one or more other members, the Operating Agreement may, to the benefit of the member that the Operating Agreement relieves of the responsibility, also eliminate or limit a duty or obligation that would have pertained to the responsibility. However, such a provision may not relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law pursuant to Fl. Stat. §605.0105(3)(g).

   b. Under Fl. Stat. §605.0105(4)(c), ***if not manifestly unreasonable***, the Operating Agreement may:

      i. alter or ***eliminate*** the aspects of the duty of loyalty.

      ii. identify specific types or categories of activities that do not violate the duty of loyalty; and

      iii. alter the duty of care, but may not authorize willful or intentional misconduct or a knowing violation of law.

4. **Definition of "Manifestly Unreasonable" under Fl. Stat. §605.0105(5)**. The court decides ***as a matter of law*** (taking the decision out of the hands of a jury) whether a term of an Operating Agreement is manifestly unreasonable. The court (a) makes its determination as of the time the challenged term became part of the operating agreement and is to consider only circumstances existing at that time; and (b) may invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is readily apparent that: (i) the objective of the term is unreasonable; or (ii) the term is an unreasonable means to achieve the provision's objective.

5. **Ability under Existing Law to Eliminate Duty of Loyalty**. Under existing law, the Operating Agreement may not ***eliminate*** the duty of loyalty under Fl. Stat. §608.4225, but the agreement may: (a) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and (b) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

6. **Drafting Note**. Because the new Florida Revised LLC Act contains a statutory non-compete as part of the fiduciary duty of loyalty that applies to managers of a manager-managed LLC and to all members of a member-managed LLC, and the terms of the statutory non-compete are far from clear, if the members desire to have a non-compete, or to not have any non-compete, the Operating Agreement should expressly set out the specific terms and conditions of the non-compete in order to avoid any uncertainties regarding the statutory non-compete or, if desired, eliminate the non-compete altogether (provided it is not "manifestly unreasonable").

E. **Conflict of Interest Transactions**. With respect to conflict of interest transactions, the new Florida Revised LLC Act defines and clarifies key terms, such as "indirect material financial interest," whether a transaction is "fair to the limited liability company," and when a member or manager is "indirectly a party" to a transaction. Significantly, under the new Florida Revised LLC Act, if the transaction in question is "fair to the LLC," no equitable relief, damages or sanctions can be imposed on the interested member or manager. Existing law suggested that liability protections could be available without necessarily meeting the fairness requirement if it was approved by disinterested members or managers who had full disclosure of the material facts. Again, however, ***under the new Florida Revised LLC Act, the transaction must be "fair to the LLC" even if approved by disinterested members or managers having full disclosure***. A transaction is "fair to the limited liability company" if the transaction, as a whole, is beneficial to the LLC and its members, and takes into account whether it is (1) fair in terms of the members or managers dealing with the LLC in connection with that transaction; and (2) comparable to what might have been obtained in an arms-length transaction.

F. **Records**.

1. The new Florida Revised LLC Act retains the list of specific records that are required to be maintained by the LLC that is found in current law.

2. However, unlike current law, the Act provides different rights for members to inspect records depending on whether the LLC is member-managed or manager-managed.

a. Specifically, in a ***member-managed LLC***, the members are allowed unlimited access to specified records, but as to "other" records maintained by the company, they have access rights only to the extent that the other records are "material to the members' rights and duties under the Operating Agreement or this Chapter."

b. In a ***manager-managed LLC***, the managers have the same access rights that inure to members in a member-managed LLC. If a member of a manager-managed LLC seeks access to information, the member must make a demand in a record received by the company, describing with reasonable particularity the information sought, why the information is sought, and whether the information sought is directly connected to the member's purpose. The standard for receiving access to information requires that the information be for a purpose "reasonably related to a member's interest as a member." This differs from a member-managed LLC as discussed above, in which members do not have to make such a record, and the information sought must only be "material to" the members' rights and duties under the Operating Agreement.

IX. TRANSFERABLE INTEREST; TRANSFEREES, AND RIGHTS OF CREDITORS

A. **Transferable Interest**. The new Florida Revised LLC Act uses the defined term "transferable interest" rather than "interest" as used in existing law. A "transferable interest" means only the transferee's rights to distributions, while the term "interest" under existing law means the distribution rights, as well as voting rights, management rights, or other member rights under the Articles of Organization and Operating Agreement.

B. **Transfer of Transferable Interest**. Under the new Florida Revised LLC Act, a transfer of a transferable interest is allowed and does not cause a dissociation of the transferor, or dissolution of the LLC. Under existing law, the transferee has the right to receive distributions and share in profits and losses and allocations of income, gain, loss, deduction and credit, or similar items to which the assigning member was entitled. Under the new Florida Revised LLC Act, however, the transferee has only the right to receive the distributions to which the transferor would have been entitled and the Act does not address the transferee's right to share in profits and losses and to receive allocations of income, gain, deduction and credit. ***Consequently, it is less likely that the transferee of a transferable interest will be subject to liability for his proportionate share of the taxes of the LLC where no distributions are made to such transferee. Under existing law, a stronger argument could be made that the judgment creditor obtaining a charging order could be liable for its share of the profits of the LLC, thus making a charging order less desirable.***

C. **Rights of Transferor of Transferable Interest**. A transferor retains the rights not associated with the transferable interest, and retains all the duties and obligations of a member. If a member transfers a transferable interest to a person who becomes a member with respect to the transferable interest, then the transferee will inherit that member's liability for a promised contribution, or liability for knowingly receiving an unlawful distribution, if these obligations are known to the transferee at the time of the transfer.

D. **Charging Orders**. As discussed above, the charging order provisions of existing law were ***not*** changed and the court can enter a "charging order" against the transferable interest of a judgment debtor (member or transferee) for payment of the debt with interest. A charging order is a lien on a judgment debtor's transferable interest, which requires the company to pay the judgment debtor's distributions to the judgment creditor to satisfy the judgment. The charging order is the sole and exclusive remedy for a judgment creditor to satisfy a judgment from the judgment debtor's transferable interest in an LLC, except when the LLC has only one member, and the LLC will not satisfy the judgment within a reasonable time. Under those circumstances, the court may order the transfer of the interest sold in a foreclosure sale and the purchaser at the foreclosure sale acquires the entire LLC interest (not just the transferable interest), and becomes the sole member while the judgment debtor is automatically deemed disassociated.

X. DISSOCIATION

A. **Right to Dissociate**. Under current law, a member is permitted to withdraw from an LLC only upon bankruptcy dissolution, and winding up, or the occurrence of an event expressly stated in the LLC's Articles of Organization or Operating Agreement. Under the new Florida Revised LLC Act, there are numerous ways in which a member may disassociate (or be dissociated), depending on whether the member is an individual or an entity, and if an entity, what type of entity.

1. Most notably, under the new Florida Revised LLC Act a member may dissociate at any time, rightfully or wrongfully, by ***withdrawing by "express will."*** The Operating Agreement cannot vary a member's right to dissociate. When a member wrongfully dissociates from an LLC, however, the wrongfully dissociated member incurs liability to the LLC and remaining members for any damage caused by the wrongful dissociation. Any dissociation in breach of the Operating Agreement is deemed to be wrongful.

2. Under the new Florida Revised LLC Act, if a person is dissociated, the person loses the right to participate in the LLC's management, which differs from 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 new Florida Revised LLC Act 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. A wrongful dissociation includes 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 the result of the person's willful dissolution or termination.

3. Dissociation by expulsion can occur under one of two circumstances under the new Florida Revised LLC Act. First, the Operating Agreement can prescribe a method by which a member may be expelled. Upon expulsion under the Operating Agreement the member is dissociated. Absent a method for expulsion in the Operating Agreement, the members may unanimously agree to expel a member. However, expulsion by unanimous consent is only available if the LLC cannot lawfully carry on its activities with the expelled member, the expelled member has transferred its entire transferable interest in the LLC (other than under a security agreement or a charging order that has not been foreclosed), or the expelled member is a corporation or other entity that has dissolved. Under existing law, the transfer of the member's entire interest will automatically terminate the transferor's status as a member, but under the new Florida Revised LLC Act, the transfer of the member's entire interest will not automatically terminate the transferor's status as a member unless the transferor's expulsion is unanimously approved. As such, the Operating Agreement should provide for automatic dissociation to avoid the need for approval by all of the members under such circumstances.

4. Expulsion of a member can also be made by judicial order where a member's wrongful conduct adversely and materially affects the company's activities and affairs, constitutes a willful or persistent and material breach of the Operating Agreement, violates fiduciary duties or other statutory standards of conduct (in the case of a member-managed company), or makes it not reasonably practical to carry on the company's activities and affairs with that person as a member.

B. **Rights and Obligations and Legal Status of Dissociated Members**. A dissociated member under the new Florida Revised LLC act holds its transferable interest as a transferee only. Thus, the dissociated member has no right to participate in management, nor has any management obligations to the LLC. A member's dissociation does not discharge any debt that the dissociated member owes to the LLC or any other member of the LLC. Additionally, as discussed above, the new Florida Revised LLC Act eliminates the existing prohibition on a dissociated member receiving distributions from the LLC.

XI. JUDICIAL DISSOLUTION PROCEDURE

A. **In General**. The new Florida Revised LLC Act has three new bases for judicial dissolution upon petition by a member or manager, creating a total of five instances for seeking a judicial dissolution. These five instances include the following:

1. The LLC's activities are unlawful;

2. It is not reasonably practical to carry on in conformity with the LLC's Articles of Organization or Operating Agreement.

3. The controlling members or managers have acted illegally or fraudulently;

4. The company's assets are being misappropriated or wasted, causing injury to the company or to one or more members; or

5. The manager or members are deadlocked and irreparable injury to the company is being threatened or suffered.

Significantly, the new Florida Revised LLC Act eliminates a creditor's right to petition a court for judicial dissolution.

B. **Deadlock Sale Provisions**. Under the new Florida Revised LLC Act, a deadlock sale provision in the LLC's Operating Agreement "trumps" a judicial dissolution action brought based on member deadlock. A "deadlock sale provision" is any provision in the Operating Agreement which is, or may be, applicable in the event of deadlock among members or managers, which can break the deadlock, including, for example, a buy-sell provision, a call or put right, a forced partition or sale of the company or its assets, etc.

C. **Election to Purchase**. Another significant change made to the dissolution procedures is the general adoption of the Florida Corporate Statutory ***"Election to Purchase Instead of Dissolution"*** provision which essentially permits a corporation or its shareholder to buy-out the shares of a shareholder seeking dissolution. The new Florida Revised LLC Act now authorizes an LLC or its members to purchase the interest of a member in proceedings seeking judicial dissolution. An election to purchase, once filed with the court, is irrevocable unless the court determines that it is equitable to satisfy or modify the election.

XII. MERGERS, CONVERSIONS, INTEREST EXCHANGES AND DOMESTICATIONS

A. **Mergers and Conversions**. Existing Chapter 608 provides a number of provisions for the merger or conversion of an existing LLC into other types of entities. The new Florida Revised LLC Act essentially keeps these rules and removes the ambiguity in current law of whether or not non-voting members have the right to vote on a merger by providing that non-voting members do ***not*** have the right to vote on a merger unless the Articles of Organization or Operating Agreement expressly provide otherwise.

B. **Interest Exchanges and Domestications**.

1. Fl. Stat. §605.1031 through 605.1036 add the concept of interest exchanges to the available options for consolidating or affiliating a Florida LLC with another entity. Current law does not apply the concept of interest exchanges to LLCs (but does apply the concept of interest exchanges to corporations). In an interest exchange, the separate existence of the acquired entity is not affected and the acquiring entity acquires all of the interests of one or more classes of interest 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. The interest exchange provisions in the Act substantially parallel the merger provisions but because the concept of interest

exchange is new to LLCs, the new Florida Revised LLC Act 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 new Florida Revised LLC Act.

2. The new Florida Revised LLC Act now allows domestication of non-U.S. entities that wish to become domestic LLCs in Florida. A domestication allows the domesticating entity to retain its status and existence in the non-U.S. jurisdiction in which it currently exists. The domestication provisions are substantially parallel to the merger provisions.

XIII. APPRAISAL RIGHTS

A. **Appraisal Rights Apply to Broader Class of Transactions**. Under current law, members of an LLC are entitled to appraisal rights only upon the consummation of a merger or conversion. The new Florida Revised LLC Act adds six additional events that trigger a member's appraisal rights:

1. Consummation of an interest exchange.

2. Consummation of a sale of substantially all of the assets of an LLC.

3. An amendment to the organic rules of the entity that reduces the interest of the members.

4. An amendment to the organic rules of the entity that alters or abolishes the voting or other rights of members.

5. An amendment to the organic rules of the entity that alters or abolishes the appraisal rights of the members.

6. If otherwise expressly authorized by the organic rules of the LLC.

B. **Waiver of Appraisal Rights**. It is important to note, however, that the new Florida Revised LLC Act ***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. Consequently, if appraisal rights are to be eliminated or limited, it is critical to expressly set forth the terms of such modification, restriction or elimination in the LLC's Operating Agreement. Query whether a so-called "drag-along provision" contained in an Operating Agreement is sufficient to eliminate the appraisal rights of a member.

C. **Determination of Fair Value**. The special definitions that apply to the appraisal right rules are set forth in a separate section and are essentially the same as those under existing law. However, the new Florida Revised LLC Act provides that the valuation must ***not*** reflect any discount for "lack of marketability or minority status." Under current law, the prohibition on applying this discount applies only to LLCs with ten (10) or fewer members. This provision now creates a difference between the determination of fair value in the LLC context versus the corporate context which still allows for the

application of a discount for lack of marketability or minority status to corporations with more than ten (10) shareholders pursuant to Fl. Stat. §607.1301(4)(c).

XIV. APPLICATION TO CHARITABLE (AND OTHER NONPROFIT) LLCs

A. Legislative History Regarding Charitable Provisions. The legislative history of Chapter 605 regarding charitable provisions addresses charitable restrictions on property held for charitable purposes: "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."

B. Section 605.1002 Charitable and Donative Provisions.

1. Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this chapter becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred unless, to the extent required under or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of the appropriate court specifying the disposition of the property.

2. A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance that is made to a merging entity that is not the surviving entity and that takes effect or remains payable after the merger inures to the surviving entity. A trust obligation that would govern property if transferred to the nonsurviving entity applies to property that is transferred to the surviving entity under this section.

C. Chapter 605 Clarifies that a Limited Liability Company May be a Not For Profit Entity.

1. Comparison of Sections, Old and New.

a. Section 608.403 (repealed): "A limited liability company may be organized under this chapter for any lawful purpose, but remains subject to statutes and regulations of the laws of this state for regulating and controlling its business, which shall control when in conflict with this chapter."

b. Section 605.0108(2): "A limited liability company may have any lawful purpose, regardless of whether the company is a for-profit company."

2. Uniform Law Comment: Although some LLC statutes continue to require a business purpose, this act follows the current trend and takes a more expansive approach.

However, many of the act's default rules presuppose at least a profit-making purpose. See e.g., Sections 102(24) (defining a transferable interest in terms of the right to receive distributions), 404 (pertaining to operating distributions) and 810 (pertaining to liquidating distributions). If a limited liability company is organized for an essentially non-pecuniary purpose, the organizers should carefully review the act's default rules and override them as necessary via the partnership agreement.

The phrase "any lawful purpose, regardless of whether for profit" encompasses even charitable activities, ...

3. **Single Member LLCs May be Owned by Section 501(c)(3) Charitable Organizations**.

   a. Disregarded entities for federal tax purposes; treated as a division of the tax-exempt parent.

   b. No requirement to file Form 1023, Application for Recognition of Exemption.

   c. No separate Form 990 filing requirement; all information included on parent's Form 990.

   d. Consider state law exemptions of a single member LLC of a tax-exempt Section 501(c)(3) organization (sales tax, ad valorem property tax).

4. **Multi-Member LLCs**. Many state law and federal tax law issues remain regarding using multi-member LLCs with any tax-exempt organization members.

XV. CONCLUSION

Because the new Florida Revised LLC Act contains numerous changes that may be applicable to existing LLCs as of January 1, 2015, it is highly recommended that members of an LLC contact legal counsel to review their Operating Agreement to recommend any changes that must or should be made based on the new Florida Revised LLC Act.