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Practice Update

Florida Adopts New Limited Liability Company Act

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The New Act Makes Florida a More Desirable Location for Business Owners

During the recently completed legislative session, the Florida Legislature unanimously adopted CS/SB 1300, which is a complete re-write of Florida's limited liability company statute. The new limited liability company act (the "New Act"), which will be codified in Chapter 605 of the Florida Statutes, was proposed to the Florida legislature by a task force consisting of members of The Florida Bar Business Law Section, Tax Section and Real Property, Probate and Trust Law Section. The New Act will replace Florida's current limited liability company act (the "Existing Act"), which is contained in Chapter 608 of the Florida Statutes. (Click here to view the New Act.)

The New Act does a number of important things. First, the New Act modernizes Florida's limited liability company ("LLC") law, which has not kept pace with developments in the commercial use of LLCs. In that regard, while the New Act (which is called the "Florida Revised Limited Liability Company Act") is largely based on the 2011 version of the Revised Uniform Limited Liability Company Act ("RULLCA") promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which is much improved and a more flexible statutory model on the forefront of development of LLC law, the New Act retains many

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provisions from the Existing Act that were deemed by the task force to be important to Florida users of LLCs. The New Act also includes desirable provisions taken from the ABA Revised Prototype LLC Act, the Revised Model Business Corporation Act, Florida's partnership acts, and the LLC acts of Delaware and other influential commercial states. Second, the New Act corrects significant glitches in the Existing Act, makes it more clear, easier to use for the courts and practitioners, and makes it more consistent with Florida's other business entity statutes. Finally, adoption of the New Act keeps Florida competitive with other leading commercial states, giving Florida the opportunity to retain LLC formations, businesses, and jobs that might potentially go to other states.

Assuming the New Act is signed by the governor (which is expected), it will become law on January 1, 2014, but only for LLC's organized on or after that date or for LLCs organized prior to January 1, 2014 that elect to come under the New Act. However, the New Act will become effective on January 1, 2015 for all LLCs organized in this state, including those organized before January 1, 2014. The one-year extension is intended to give existing LLC's the time to get their house in order before they become subject to the provisions of the New Act.

Limited Liability Companies in Florida

Limited liability companies are useful vehicles to conduct businesses because of the flexibility that is afforded by their use, with pass-through taxation, limited liability for the members of an LLC for the debts of the LLC, and the flexibility to contract among members regarding the manner in which the LLC will be operated. According to information posted on the website of the Florida Department of State (the "Department"), as of March 2013 there were approximately 705,000 LLCs organized in Florida, and during 2012 alone, nearly 170,000 LLCs were organized in Florida (compared to approximately 105,000 Florida corporations). This

represents continued significant growth in the number of LLCs organized in this state and continues to illustrate that LLCs have become the vehicle of choice for organizing entities in Florida.

Highlights of the New Act

The New Act makes quite a number of changes to the provisions contained in the Existing Act. Some of the key changes include:

- The New Act, like all LLC acts, is a "default" statute, meaning it provides rules that apply in the absence of an agreement among the members in an operating agreement. The New Act, like the Existing Act, sets forth certain provisions that may not be waived by the parties in an operating agreement. However, the New Act expands the list of items that are nonwaivable under Florida law. For example, a limited liability company may not prevent a court from appointing a special litigation committee in connection with a derivative action proceeding. The New Act also provides that an operating agreement may not provide for indemnification for certain kinds of wrongful conduct and under certain circumstances. Further, the New Act's non-waivable provisions contain certain differences when compared to the Existing Act, with relation to which provisions are non-waivable and the extent to which other provisions can be modified or constrained.
- The New Act, in a departure from RULLCA but consistent with the Existing Act, recognizes the agency power of members and managers, giving them "statutory apparent authority" to bind the limited liability company. In the absence of a contrary provision in the articles of organization or operating agreement, all Florida limited liability companies are considered to be member-managed, and all members have authority as agents of the limited liability company to bind the limited liability company. Since information regarding whether a particular LLC is member-

managed or manager-managed is not required in a publicly filed record, third parties will need to ask for copies of the limited liability company's operating agreement to determine the authority of a member if it is not set forth in the articles of organization.

- In order to clear up confusion as to who may bind a limited liability company, the New Act allows for the filing of a statement of authority with the Department. Derived from a similar filing authorized under Florida's partnership statutes, this section creates a safeguard for limited liability companies that want to limit the power of one or more members, managers, or other persons to bind the limited liability company. A statement of denial may also be filed under the New Act in order to deny the grant of authority to a member or manager who had previously been granted authority.
- The New Act modifies provisions addressing a limited liability company's management structure. Most importantly for existing LLCs, the New Act eliminates the use of the term "managing member," leaving LLCs to exist as either member-managed or manager-managed going forward. After the New Act takes effect, existing limited liability companies that were previously managed under the auspices of a managing member, will be deemed to be member-managed. The New Act also makes it clear that members, absent an agreement, are not necessarily entitled to compensation for services, except for services related to the winding up of a limited liability company.
- The New Act modifies default management and voting rules for both members and managers. The New Act provides that for manager-managed LLCs, except as otherwise provided in the operating agreement, a majority-in-interest of the members must approve any action outside of the ordinary course of the LLC's activities and affairs, including an organic transaction (such as a merger or conversion). Conversely, the New Act

eliminates provisions from the Existing Act that prohibited amending the articles to provide for a vote of less than a majority of interest and that gave a right to non-voting members to vote on dissolutions and mergers.

- The New Act modifies provisions related to dissociation of members and dissolution of LLCs. Based on RULLCA, the New Act provides that a member may dissociate at any time, rightfully or wrongfully, by withdrawing by "express will." This is a change from the Existing Act, where unless authorized in the articles of organization or operating agreement, a member could not dissociate at all prior to dissolution or winding up. The New Act also introduces the concept of a "wrongful dissociation," which is one in violation of the operating agreement or dissociation, through express will or otherwise, prior to winding up. A limited liability company may have the right to damages against a member who wrongfully dissociates. The New Act also modifies language of the Existing Act, maintaining uniformity with RULLCA, in setting forth default events causing dissolution. These events are upon the occurrence of an event described in the operating agreement, upon the consent of all members, upon the passage of 90 days without a member, upon the entry of a decree of judicial dissolution, or upon the filing of a statement of administrative dissolution by the Department.
- The New Act clarifies the grounds for judicial dissolution and the appointment of receivers and custodians. Under the New Act, judicial dissolution is an available remedy in a proceeding brought by a member or a manager if it is established that the company's activities are illegal or unlawful, persons in control of the company are acting illegally or fraudulently, if it is not reasonably practicable to carry on the activities of the limited liability company in accordance with its operating agreement, or if the assets are being misappropriated or wasted causing injury to the limited liability company or

its members. Further, the New Act continues to allow judicial dissolution in the event of a deadlock between the managers or members where the managers or members cannot break the deadlock and the deadlock is causing or threatening to cause irreparable injury to the limited liability company. However, the New Act contains a "deadlock sale" provision to deal with situations where the operating agreement lays out what is to happen in the event of such a deadlock. Finally, the New Act eliminates the Existing Act's provision allowing a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the limited liability company was insolvent, or where the limited liability company admitted that the creditor's claim was due and the company was insolvent.

- The New Act adds provisions, taken from RULLCA, for winding up the LLC's affairs, which are not found in the Existing Act. This includes rules for winding up the limited liability company's activities and affairs, providing for payment of its debts and the sale of its assets, as well as bringing or defending actions and proceedings, and distributing assets to its members. A member, manager, or legal representative may conduct the winding up and may seek judicial supervision of the winding up. A creditor, with good cause and under specified circumstances, may also initiate an action for judicial appointment of a trustee or receiver for winding up.
- The New Act modifies provisions for service of process on LLCs, providing clear guidance on how to serve process on a Florida limited liability company or a foreign limited liability that is authorized to transact business in Florida.
- The New Act modifies the provisions under the Existing Act relating to derivative actions and adds express provisions regarding the appointment of special litigation committees.

- The New Act deals comprehensively with both same-type and cross-type mergers and interest exchanges and with conversions and domestications. The provisions dealing with mergers and conversions are far more comprehensive than the Existing Act and clean up significant ambiguities that were in the merger and conversion provisions of the Existing Act. The New Act also adds provisions that permit interest exchanges and in-bound domestications by non-U.S. entities.
- The New Act modifies the appraisal rights provisions in the Existing Act, including adding additional events that trigger appraisal rights, and provides clarifications to the procedural aspects of appraisal rights provisions, particularly in dealing with organic transactions (such as mergers and conversions) approved by way of written consent.
- The New Act did not adopt "Series LLCs" because of the significant concerns among members of the task force as to how such entities work and their impact on various stakeholders in an LLC. However, there is currently a project ongoing at NCCUSL to draft a Uniform Series LLC Act in conjunction with RULLCA. If this occurs, it can be expected that the task force will be reconstituted to consider adoption of this new uniform act.
- The New Act does not allow "Shelf LLCs," and, consistent with the Existing Act, an LLC must have a member at the time that it files its articles of organization.

The New Act did not change certain provisions of the Existing Act. For example:

- The New Act did not change rules regarding charging orders, which left the 2011 amendments to Section 608.433, known as the Olmstead Patch, in place. (For more information on the Olmstead Patch, please click here to view our 2011 client alert on the subject.)

- The New Act did not change the overall fiduciary duties construct of existing law, with one exception to the duty of care. Particularly, the New Act adopts the RULLCA's replacement of the "ordinary care/business judgment rule" standard when examining the duty of care, and replaces it with a duty to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violations of law.
- As described above, the New Act did not change statutory apparent authority of members. LLCs have traditionally been modeled on the general partnership construct of statutory apparent authority; that is, unless there are explicit provisions to the contrary, a member can bind the LLC. The New Act retains the law from the Existing Act on this subject, except that it, in accordance with RULLCA, permits the filing of statements of authority to put parties on notice as to who has the authority to bind the LLC. The New Act, however, retains the default rule that, in the absence of notice to the contrary (such as through a statement of authority or a statement of denial), members of a member-managed LLC are agents of the LLC and thus have the implicit authority to bind the LLC.

Next Steps

The New Act represents a substantial evolution in Florida law, and will make Florida a more desirable location for business owners to use a Florida limited liability company for their business activities. Business owners who expect to start new business entities in the near future, even if before January 1, 2014, should plan their businesses with an eye towards compliance with the New Act. Owners of established limited liability companies, especially those currently operating with "managing members," should consult with counsel to determine what changes, if any, are needed in their operating agreements or articles of organization to deal with the provisions of the New Act. Further, third parties

doing business with Florida limited liability companies should consult with counsel to prepare for any changes that may occur with respect to their contractual or business arrangements with Florida limited liability companies as a result of the adoption of the New Act.

As the effective date of the New Act gets closer, we intend to publish additional client alerts discussing the types of changes that Florida LLCs may wish to consider making in their articles of organization and operating agreements in light of the New Act.

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