White Paper

For

The
Florida Revised
Limited Liability Company
Act

March 18, 2013
(updated to October 1, 2013)

Prepared by
The Executive Committee of The Florida Bar
Florida Revised LLC Act Drafting Committee

Table of Contents

Page

ARTICLE 1: GENERAL PROVISIONS ... 6

Section 605.0101. SHORT TITLE. (corresponds to RULLCA Section 101; corresponds to Existing Law Section 608.401). ... 6

Section 605.0102. DEFINITIONS. (corresponds to RULLCA Section 102; corresponds to Existing Law Section 608.402). ... 6

Section 605.0103. KNOWLEDGE; NOTICE. (corresponds to RULLCA Section 103; corresponds to Existing Law Section 608.407(5)) ... 8

Section 605.0104. GOVERNING LAW. (corresponds to RULLCA Section 104; no corresponding provision in Existing Law) ... 9

Section 605.0105. OPERATING AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS. (corresponds to RULLCA Section 105; corresponds to Existing Law Section 608.423) ... 9

Section 605.0106. OPERATING AGREEMENT; EFFECT ON LIMITED LIABILITY COMPANY AND PERSON BECOMING MEMBER; PREFORMATION AGREEMENT; OTHER MATTERS INVOLVING OPERATING AGREEMENT. (corresponds to RULLCA Section 106; no corresponding provision in Existing Law). ... 11

Section 605.0107. OPERATING AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 107; no corresponding provision in Existing Law). ... 12

Section 605.0108. NATURE, PURPOSE, AND DURATION OF LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 108; corresponds to Existing Law Section 608.403 and Subsections 608.441(1)(a) and 608.402(5)). ... 13

Section 605.0109. POWERS. (corresponds to RULLCA Section 109; corresponds to Existing Law Section 608.404) ... 13

Section 605.0110. LIMITED LIABILITY COMPANY PROPERTY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.425) ... 13

Section 605.0111. RULES OF CONSTRUCTION AND SUPPLEMENTAL PRINCIPLES OF LAW. (corresponds in part to RULLCA Section 111; no corresponding provision in Existing Law) ... 13

Section 605.0112. NAME. (corresponds to RULLCA Section 112; corresponds to Existing Law Sections 608.406 and 608.506) ... 14

Section 605.0113. REGISTERED AGENT. (corresponds to RULLCA Section 115; corresponds to Existing Law Sections 608.415 and 608.507) ... 14

Section 605.0114. CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE. (corresponds to RULLCA Section 116; corresponds to Existing Law Sections 608.416 and 608.508) 14

Section 605.0115. RESIGNATION OF REGISTERED AGENT. (corresponds to RULLCA Section 117; corresponds to Existing Law Sections 608.416(2) and 608.509) 14

Section 605.0116. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT. (corresponds to RULLCA Section 118; partially covered in Existing Law Subsections 608.416(3) and 608.508(2)) 15

Section 605.0117. SERVICE OF PROCESS, NOTICE, OR DEMAND. (corresponds to RULLCA Section 119; corresponds to Existing Law Sections 608.463 and 608.5101) 15

Section 605.0118. DELIVERY OF RECORD. (corresponds to RULLCA Section 120; no corresponding provision in Existing Law) 16

Section 605.0119. WAIVER OF NOTICE. (no corresponding RULLCA provision; corresponds to Existing Law Section 608.455) 16

ARTICLE 2: FORMATION; ARTICLES OF ORGANIZATION AND OTHER FILINGS 16

Section 605.0201. FORMATION OF LIMITED LIABILITY COMPANY; ARTICLES OF ORGANIZATION. (corresponds to RULLCA Section 201; corresponds to Existing Law Sections 608.405 and 608.407). 16

Section 605.0202. AMENDMENT OR RESTATEMENT OF ARTICLES OF ORGANIZATION. (corresponds to RULLCA Section 202; corresponds to Existing Law Section 608.411). 17

Section 605.0203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO DEPARTMENT. (corresponds to RULLCA Section 203; corresponds to Existing Law Section 608.408). 17

Section 605.0204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER. (corresponds to RULLCA Section 204; no corresponding provision in Existing Law). 18

Section 605.0205. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD. (corresponds to RULLCA Section 205; corresponds to Existing Law Subsections 608.408(3) and (4)). 18

Section 605.0206. FILING REQUIREMENTS. (corresponds to RULLCA Section 206; corresponds to Existing Law Section 608.4081). 18

Section 605.0207. EFFECTIVE DATE AND TIME. (corresponds to RULLCA Section 207; corresponds to Existing Law Section 608.409). 18

Section 605.0208. WITHDRAWAL OF FILED RECORD BEFORE EFFECTIVENESS. (corresponds to RULLCA Section 208; no corresponding provision in Existing Law). 19

Section 605.0209. CORRECTING FILED RECORD. (corresponds to RULLCA Section 209; corresponds in part to Existing Law Section 608.4115). 19

Section 605.0210. DUTY OF DEPARTMENT TO FILE; REVIEW OF REFUSAL TO FILE; TRANSMISSION OF INFORMATION BY DEPARTMENT. (corresponds in part to RULLCA Section 210; corresponds in part to Existing Law Section 608.4082). 19

Section 605.0211. CERTIFICATE OF STATUS. (corresponds to RULLCA Section 211; no corresponding provision in Existing Law). 19

Section 605.0212. ANNUAL REPORT FOR DEPARTMENT. (corresponds in part to RULLCA Section 212; corresponds in part to Existing Law Section 608.4511). 19

Section 605.0213. FEES OF THE DEPARTMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.452). 20

Section 605.0214. POWERS OF DEPARTMENT. (no corresponding provision in RULLCA; no corresponding provision in Existing Law). 20

Section 605.0215. CERTIFICATES TO BE RECEIVED IN EVIDENCE AND EVIDENTIARY EFFECT OF COPY OF FILED DOCUMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.702). 20

Section 605.0216. STATEMENT OF DISSOCIATION OR RESIGNATION. (no corresponding provision in RULLCA; no corresponding provision in Existing Law). 20

ARTICLE 3: RELATIONS OF MEMBERS AND MANAGERS TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY 21

Section 605.0301. POWER TO BIND LIMITED LIABILITY COMPANY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4235). 21

Section 605.0302. STATEMENT OF AUTHORITY. (corresponds to RULLCA Section 302; no corresponding provision in Existing Law). 22

Section 605.0303. STATEMENT OF DENIAL. (corresponds to RULLCA Section 303; no corresponding provision in Existing Law). 23

Section 605.0304. LIABILITY OF MEMBERS AND MANAGERS. (corresponds to RULLCA Section 304; corresponds to Existing Law Sections 608.4227 and 608.701). 23

ARTICLE 4: RELATIONS OF MEMBERS TO EACH OTHER AND TO LIMITED LIABILITY COMPANY 23

Section 605.0401. BECOMING A MEMBER. (corresponds to RULLCA Section 401; corresponds to Existing Law Sections 608.402(21), 608.4232 and 608.433). 23

Section 605.0402. FORM OF CONTRIBUTION. (corresponds to RULLCA Section 402; corresponds to Existing Law Section 608.4211(1)). 23

Section 605.0403. LIABILITY FOR CONTRIBUTIONS. (corresponds to RULLCA Section 403; corresponds to Existing Law Subsections 608.4211(2)-(5)). 24

Section 605.0404. SHARING OF DISTRIBUTIONS BEFORE DISSOLUTION AND PROFITS AND LOSSES. (corresponds to RULLCA Section 404; corresponds in part to Existing Law Sections 608.426(1) and 608.4261). 24

Section 605.0405. LIMITATIONS ON DISTRIBUTIONS. (corresponds to RULLCA Section 405; corresponds to Existing Law Subsection 608.426(1) and (2)). 25

Section 605.0406. LIABILITY FOR IMPROPER DISTRIBUTIONS. (corresponds to RULLCA Section 406; corresponds to Existing Law Subsections 608.426(3) and (5) and Section 608.428). 25

Section 605.0407. MANAGEMENT OF LIMITED LIABILITY COMPANY. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.422). 26

Section 605.04071. DELEGATION OF RIGHTS AND POWERS TO MANAGE. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.4236). 27

Section 605.04072. SELECTION AND TERMS OF MANAGERS IN A MANAGER-MANAGED LLC. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.422). 27

Section 605.04073. VOTING RIGHTS OF MEMBERS AND MANAGERS. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Sections 608.422 and 608.4231). 27

Section 605.04074. AGENCY RIGHTS OF MEMBERS AND MANAGERS. (contrast with Section 407 of RULLCA; corresponds to Existing Law Section 608.4235) 29

Section 605.0408. REIMBURSEMENT, INDEMNIFICATION, ADVANCEMENT AND INSURANCE. (corresponds to RULLCA Section 408; corresponds to Existing Law Section 608.4229). 29

Section 605.04091. STANDARDS OF CONDUCT FOR MEMBERS AND MANAGERS. (corresponds to portions of RULLCA Section 409; corresponds to Existing Law Section 608.4225). 30

Section 605.04092. CONFLICT OF INTEREST TRANSACTIONS. (corresponds to RULLCA Subsections 409(f) and (g); corresponds to Existing Law Section 608.4226). 31

Section 605.04093. LIMITATION OF LIABILITY OF MANAGERS AND MEMBERS. (no corresponding RULLCA provision; corresponds to Existing Law Section 608.4228). 33

Section 605.0410. RECORDS TO BE KEPT; RIGHTS OF MEMBER, MANAGER, AND PERSON DISSOCIATED TO INFORMATION. (corresponds to RULLCA Section 410; corresponds to Existing Law Subsection 608.4101(1)).......................... 33

ARTICLE 5: TRANSFERRABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS 36

Section 605.0501. NATURE OF TRANSFERABLE INTEREST. (corresponds to RULLCA Section 501; corresponds to Existing Law Section 608.431). 36

Section 605.0502. TRANSFER OF TRANSFERABLE INTEREST. (corresponds to RULLCA Section 502; corresponds to Existing Law Section 608.432). 36

Section 605.0503. CHARGING ORDER. (corresponds to RULLCA Section 503; corresponds to Existing Law Subsections Section 608.433(4)-(9)). 37

Section 605.0504. POWER OF LEGAL REPRESENTATIVE. (corresponds to RULLCA Section 504; corresponds to Existing Law Section 608.434). 38

ARTICLE 6: DISSOCIATION 38

Section 605.0601. POWER TO DISSOCIATE AS MEMBER; WRONGFUL DISSOCIATION. (corresponds to RULLCA Section 601; corresponds to Existing Law Section 608.427). 38

Section 605.0602. EVENTS CAUSING DISSOCIATION. (corresponds to RULLCA Section 602; corresponds to Existing Law Section 608.4237). 38

Section 605.0603. EFFECT OF DISSOCIATION. (corresponds to RULLCA Section 603; corresponds to Existing Law Section 608.427). 39

ARTICLE 7: DISSOLUTION AND WINDING UP 39

Section 605.0701. EVENTS CAUSING DISSOLUTION. (corresponds to RULLCA Section 701; corresponds to Existing Law Section 608.441). 40

Section 605.0702. GROUNDS FOR JUDICIAL DISSOLUTION. (corresponds to RULLCA Subsection 701(a)(4); corresponds to Existing Law Sections 608.441(3) and 608.449). 40

Section 605.0703. PROCEDURE FOR JUDICIAL DISSOLUTION; ALTERNATIVE REMEDIES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4491) 41

Section 605.0704. RECEIVERSHIP OR CUSTODIANSHIP. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4492). 42

Section 605.0705. DECREE OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4493) 42

Section 605.0706. ELECTION TO PURCHASE INSTEAD OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Florida Business Corporation Act Section 607.1436) 42

Section 605.0707. ARTICLES OF DISSOLUTION; FILING OF ARTICLES OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Sections 608.445 and 608.446) 42

Section 605.0708. REVOCATION OF ARTICLES OF DISSOLUTION. (corresponds to RULLCA Section 703; corresponds to Existing Law Section 608.4411). 43

Section 605.0709. WINDING UP (corresponds to RULLCA Section 702; no corresponding provision in Existing Law) 43

Section 605.0710. DISPOSITION OF ASSETS IN WINDING UP. (corresponds to RULLCA Section 707; corresponds to Existing Law Section 608.444) 44

Section 605.0711. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 704; corresponds to Existing Law Section 608.4421) 44

Section 605.0712. OTHER CLAIMS AGAINST A DISSOLVED LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 705; no corresponding provision in Existing Law) 45

Section 605.0713. COURT PROCEEDINGS. (corresponds to RULLCA Section 706; corresponds to Existing Law Section 608.4421) 45

Section 605.0714. ADMINISTRATIVE DISSOLUTION. (corresponds primarily to RULLCA Section 708; corresponds in part to Existing Law Sections 608.448 and 608.4481) 46

Section 605.0715. REINSTATEMENT. (corresponds to RULLCA Section 709; corresponds to Existing Law Section 608.4482) 46

Section 605.0716. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT. (corresponds to RULLCA Section 710; corresponds to Existing Law Section 608.4483) 47

Section 605.0717. EFFECT OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4431) 47

ARTICLE 8: ACTIONS BY MEMBERS 47

(RULLCA ARTICLE 8;; EXISTING LAW SECTION 608.601; NEW ACT SECTIONS 605.0801 THROUGH 605.0806) 47

Section 605.0801. DIRECT ACTION BY MEMBER. (corresponds to RULLCA Section 801; no corresponding provision in Existing Law) 48

Section 605.0802. DERIVATIVE ACTION. (corresponds to RULLCA Section 802; corresponds to Existing Law Section 608.601) 48

Section 605.0803. PROPER PLAINTIFF. (corresponds to RULLCA Section 803; corresponds to Existing Law Section 608.601) 49

Section 605.0804. SPECIAL LITIGATION COMMITTEE (corresponds to RULLCA Section 805; corresponds to Existing Law Section 608.601) 49

Section 605.0805. PROCEEDS AND EXPENSES. (corresponds to RULLCA Section 806; corresponds to Existing Law Section 608.601) 50

Section 605.0806. VOLUNTARY DISMISSAL OR SETTLEMENT; NOTICE. (corresponds in part to RULLCA Section 806(c); corresponds to Existing Law Subsection 608.601(4)) 50

ARTICLE 9: FOREIGN LIMITED LIABILITY COMPANIES 50

Section 605.0901. GOVERNING LAW (corresponds to RULLCA Section 901; corresponds to Existing Law Subsection 608.505(3)) ... 51

Section 605.0902. APPLICATION FOR CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Sections 902 and 903; corresponds to Existing Law Section 608.503) ... 51

Section 605.0903. EFFECT OF A CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Section 902; corresponds to Existing Law Section 608.505) ... 51

Section 605.0904. EFFECT OF FAILURE TO HAVE A CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 902; corresponds to Existing Law Section 608.513) ... 52

Section 605.0905. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS (corresponds to RULLCA Section 905; corresponds to Existing Law Section 608.501) ... 52

Section 605.0906. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 906; corresponds to Existing Law Section 608.506) ... 53

Section 605.0907. AMENDMENT TO CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 904; corresponds to Existing Law Section 608.504) ... 53

Section 605.0908. REVOCATION OF CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 910; corresponds to Existing Law Sections 608.512 and 608.513) ... 53

Section 605.0909. REINSTATEMENT FOLLOWING REVOCATION OF CERTIFICATE OF AUTHORITY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.5135) ... 54

Section 605.0910. WITHDRAWAL AND CANCELLATION OF CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Section 911; corresponds to Existing Law Section 608.511) ... 54

Section 605.0911. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC FILING ENTITY. (corresponds to RULLCA Section 907; no corresponding provision in Existing Law) ... 55

Section 605.0912. WITHDRAWAL ON DISSOLUTION, MERGER OR CONVERSION TO NONFILING ENTITY. (corresponds to RULLCA Section 908; no comparable provision in Existing Law) ... 55

Section 605.0913. ACTION BY DEPARTMENT OF LEGAL AFFAIRS. (corresponds to RULLCA Section 912; corresponds to Existing Law Section 608.512) ... 55

ARTICLE 10: MERGERS, INTEREST EXCHANGES, CONVERSIONS AND DOMESTICATIONS ... 56

I. General Provisions. (RULLCA Article 10, Part I; New Act Sections 605.1001-605.1006) ... 56

Section 605.1001. RELATIONSHIP OF THE PROVISIONS OF ss 605.1001-605.1072TO OTHER LAWS. (corresponds to RULLCA Section 1002; no corresponding provision in Existing Law). ... 57

Section 605.1002. CHARITABLE AND DONATIVE PROVISIONS. (corresponds to RULLCA Section 1003; no corresponding provision in Existing Law). ... 57

Section 605.1003. STATUS OF FILINGS. (no corresponding provision in RULLCA Section; no corresponding provision in Existing Law). ... 57

Section 605.1004. NONEXCLUSIVITY. (corresponds to RULLCA Section 1004; no corresponding provision in Existing Law). ... 58

Section 605.1005. REFERENCE TO EXTERNAL FACTS. (corresponds to RULLCA 1005; no corresponding provision in Existing Law). ... 58

Section 605.1006. APPRAISAL RIGHTS. (contrast with RULLCA Section 1006; corresponds to Existing Law Section 608.4352) ... 58

II. Mergers (RULLCA Sections 1021 through 1026; New Act Sections 605.1021 through 605.1026) ... 59

Section 605.1021 EFFECT OF MERGER. (corresponds to RULLCA Section 1021; corresponds to Existing Law Subsection 608.438(2)). ... 59

Section 605.1022. PLAN OF MERGER. (corresponds to RULLCA Section 1022; corresponds to Existing Law Subsection 608.438(3)). ... 60

Section 605.1024. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER. (corresponds to RULLCA Section 1024; corresponds to Existing Law Subsections 608.4381(6) and (7)). ... 61

Section 605.1025. ARTICLES OF MERGER. (corresponds to RULLCA Section 1025; corresponds to Existing Law Section 608.4382). ... 62

Section 605.1026. EFFECT OF MERGER. (corresponds to RULLCA Section 1026; corresponds to Existing Law Section 608.4383). ... 63

III. Interest Exchange (corresponds to RULLCA Sections 1031-1036; New Act Sections 605.1031 through 605.1036). ... 63

Section 605.1031. INTEREST EXCHANGE AUTHORIZED. (corresponds to RULLCA Section 1031; no corresponding provision in Existing Law). ... 63

Section 605.1032. PLAN OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1032; no corresponding provision in Existing Law). ... 64

Section 605.1033. APPROVAL OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1033; no corresponding provision in Existing Law). ... 64

Section 605.1034. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1034; no corresponding provision in Existing Law). ... 65

Section 605.1035. ARTICLES OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1035; no corresponding provision in Existing Law). ... 65

Section 605.1036. EFFECT OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1036; no corresponding provision in Existing Law). 65

IV. Conversions (corresponds to RULLCA Sections 1041-1046; New Act Sections 605.1041 through 605.1046) 65

Section 605.1041. CONVERSION AUTHORIZED. (corresponds to RULLCA Section 1041; corresponds to Existing Law Section 608.439). 65

Section 605.1042. PLAN OF CONVERSION. (corresponds to RULLCA Section 1042; corresponds to Existing Law Section 608.4401). 66

Section 605.1043. APPROVAL OF CONVERSION. (corresponds to RULLCA Section 1043; corresponds to Existing Law Section 608.4402). 66

Section 605.1044. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION. (corresponds to RULLCA Section 1044; corresponds to Existing Law Section 608.4401). 67

Section 605.1045. ARTICLES OF CONVERSION. (corresponds to RULLCA Section 1045; corresponds to Existing Law Section 608.4403). 67

Section 605.1046. EFFECT OF CONVERSION. (corresponds to RULLCA Section 1046; corresponds to Existing Law Section 608.4404). 68

V. Domestications (corresponds to RULLCA Sections 1051 through 1056; no corresponding provisions in Existing Law; New Act Sections 605.1051 through 605.1056). 68

Section 605.1051. DOMESTICATION AUTHORIZED. (corresponds to RULLCA Section 1051; no corresponding provision in Existing Law). 68

Section 605.1052. PLAN OF DOMESTICATION. (corresponds to RULLCA Section 1052; no corresponding provision in Existing Law). 68

Section 605.1053. APPROVAL OF DOMESTICATION. (corresponds to RULLCA Section 1053; no corresponding provision in Existing Law). 69

Section 605.1054. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION. (corresponds to RULLCA Section 1054; no corresponding provision in Existing Law). 69

Section 605.1055. ARTICLES OF DOMESTICATION. (corresponds to RULLCA Section 1055; no corresponding provision in Existing Law). 69

Section 605.1056. EFFECT OF DOMESTICATION. (corresponds to RULLCA Section 1056; no corresponding provision in Existing Law). 69

VI. Appraisal Rights. (New Act Sections 605.1061 through 605.1072). Also see New Act Section 605.1006, which sets forth when appraisal rights are available. 69

Section 605.1061. APPRAISAL RIGHTS; DEFINITIONS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4351). 69

Section 605.1062. ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4353)....71

Section 605.1063. NOTICE OF APPRAISAL RIGHTS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4354)....71

Section 605.1064. NOTICE OF INTENT TO DEMAND PAYMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4355)....71

Section 605.1065. APPRAISAL NOTICE AND FORM. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4356)....71

Section 605.1066. PERFECTION OF RIGHTS; RIGHT TO WITHDRAW. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4357)....72

Section 605.1067. MEMBER'S ACCEPTANCE OF LIMITED LIABILITY COMPANY'S OFFER. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43575). 72

Section 605.1068. PROCEDURES IF MEMBER IS DISSATISFIED WITH OFFER. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4358)....72

Section 605.1069. COURT ACTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43585)....72

Section 605.1070. COURT COSTS AND ATTORNEY FEES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4359)....72

Section 605.1071. LIMITATION ON LIMITED LIABILITY COMPANY PAYMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43595)....72

Section 605.1072. OTHER REMEDIES LIMITED. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4352(3)). 72

ARTICLE 11: MISCELLANEOUS PROVISIONS 73

Section 605.1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. (corresponds to RULLCA Section 1101; no corresponding provision in Existing Law)....73

Section 605.1102. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. (corresponds to RULLCA Section 1102; no corresponding provision in Existing Law). 73

Section 605.1103. TAX EXEMPTION ON INCOME OF CERTAIN LIMITED LIABILITY COMPANIES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.471). 73

Section 605.1104. INTERROGATORIES BY DEPARTMENT; OTHER POWERS OF DEPARTMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.703). 73

Section 605.1105. RESERVATION OF POWER TO AMEND OR REPEAL. (corresponds to RULLCA Section 121; corresponds to Existing Law Section 608.704). 73

Section 605.1106. SAVINGS CLAUSE. (corresponds in part to RULLCA Section 1103; corresponds to Existing Law Section 608.705). 73

Section 605.1107. SEVERABILITY CLAUSE. (corresponds to RULLCA Section 1104; no corresponding provision in Existing Law). 73

Section 605.1108. APPLICATION TO LIMITED LIABILITY COMPANY FORMED UNDER THE FLORIDA LIMITED LIABILITY COMPANY ACT. (corresponds to RULLCA Section 110; no corresponding provision in Existing Law). 74

BACKGROUND

The laws affecting limited liability companies ("LLCs" and individually an "LLC") have continued to develop nationally over the past twenty years. During that period, LLCs have become the entity of choice for most new business formations. Florida currently has more than 690,000 LLCs operating in the state. New LLCs are now formed or registered to do business in Florida more often than all other business entities combined. The existing Chapter 608 of the Florida Statutes was drafted over thirty years ago and has endured patchwork amendments that were intended to address the evolution of LLCs over the years. However, there has remained a necessity to adopt a comprehensive amended and restated statute so that Florida can keep pace with modern statutory developments relating to LLCs.

The Revised LLC Act (the "New Act") is based substantially on the Revised Uniform Limited Liability Company Act of 2006, as amended in 2011 ("RULLCA"), drafted by the Uniform Law Commission ("ULC") which is also known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). For information about the ULC, please visit www.uniformlaws.org.

The comments and summaries of all positions stated in this White Paper[1] *are those of a six member Executive Committee of The Florida Bar Florida Revised LLC Act Drafting Committee (the "Drafting Committee") which has worked on this LLC Act legislation continuously since 2008. The Drafting Committee is comprised of representatives of the Business Law Section, the Tax Section, and the Real Property Probate and Trust Law Section, of The Florida Bar.*

The Drafting Committee was formed in 2008 to study Florida's limited liability company statute and to propose a more cohesive amendment and restatement with the purpose of bringing Florida's limited liability company statute in line with the trends affecting the use of LLCs by businesses today, to maintain Florida's competiveness with other jurisdictions, and to encourage formation and use of Florida business entities.

The Executive Committee which prepared this White Paper is comprised of Committee Chair: Louis T. M. Conti; Reporter: Gregory Marks, Recording Secretary: Steven Lear; Philip B. Schwartz; Gary Teblum; and Professor Manuel Utset of Florida State University School of Law, with input from Brenda L. Tadlock, Director, Division of Corporations, Florida Department of State. A list of the members of the Drafting Committee is attached as Exhibit A.

References in this White Paper to "Existing Law" refer to existing Chapter 608 of the Florida Statutes. References to "New Act" refer to the Florida Revised Limited Liability Company Act. The New Act will replace the Existing Law in its entirety.

---

[1] This version of the White Paper, which is dated October 1, 2013, represents a revised version that has been updated from an earlier version that had been provided to the Florida legislative committees in March 2013 in connection with their consideration of the proposed legislation. This version of the White Paper updates discussions and explanations to be consistent with the legislation as finally enacted, corrects typographical errors and incorporates certain other clarifications and corrections.

HISTORY OF UNIFORM LLC ACTS

The ULC was formed 121 years ago to provide states with non-partisan, well-conceived and well drafted legislation that brings clarity and stability to critical areas of state statutory law. Commissioners are appointed to the ULC by each state, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Florida currently has three Commissioners representing the state on the ULC: Donald J. Weidner, Dean of the Florida State University School of Law, Professor Randolph Braccialarge, Nova Southeastern University School of Law, and Louis T.M. Conti, Chair of the Drafting Committee, Adjunct Professor, University of Florida Levin School of Law, and a Holland & Knight partner.

The first Uniform Limited Liability Company Act ("ULLCA") was promulgated by the ULC in 1994. ULLCA derived substantially from the then recently adopted Revised Uniform Partnership Act ("RUPA"), but also borrowed heavily, particularly in connection with management, from the 1985 Revised Uniform Limited Partnership Act ("RULPA"), the ABA Prototype Limited Liability Company Act ("ABA Prototype"), and the Revised Model Business Corporation Act ("RMBCA").

Florida's existing Limited Liability Company Act, Chapter 608, Florida Statutes, was first enacted in 1982 (the second state to adopt an LLC statute) and substantially modified in 1993. Florida's Limited Liability Company Act was little used prior to 1998 because Florida imposed a corporate income tax on limited liability companies. However in 1998, the corporate income tax on limited liability companies was eliminated. In 1999, Florida's Limited Liability Company Act underwent its most significant revisions since its enactment. Additional revisions were made in 2002 to clean up various aspects of the act and, in 2005, revisions were made to coordinate mergers and conversions and appraisal rights among Florida business entities.

In 2011, in response to the Florida Supreme Court decision, Olmstead v. Federal Trade Commission, 44 So.3d 76 (Fla. 2010), with the assistance of an ad hoc committee comprised of members of the Business Law Section, the Tax Section and the Real Property, Probate and Trust Law Section, the Florida legislature adopted amendments to Section 608.433, which have come to be known as the "Olmstead Patch." The Olmstead Patch clarified that, with respect to seeking recourse against the member's membership interest, a charging order is the sole and exclusive remedy afforded a judgment creditor of a member in a multi-member LLC. It also allowed for a judgment creditor of the member in a single member LLC to seek a court supervised foreclosure against the single member's membership 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." The New Act retains the Olmstead Patch as adopted in 2011.

As part of its work, the Drafting Committee also considered the provisions of the ABA Prototype LLC Act (as revised in 2011), and the LLC Acts of several other states, including: California, Colorado, Delaware, Illinois, New Jersey, North Carolina, Pennsylvania, Texas, and Virginia.

OVERVIEW OF THE NEW ACT

The New Act creates an entirely new LLC act in new Chapter 605, which will become effective for all new limited liability companies formed or registered to do business in Florida as of January 1, 2014.

It repeals the existing LLC act in Chapter 608 for limited liability companies in existence before January 1, 2014, as of January 1, 2015.

The New Act is modeled on RULLCA (2006), as amended in 2011, yet deviates in a number of respects by:

(i) retaining provisions contained in existing Chapter 608;

(ii) borrowing language from the Delaware LLC Act; and

(iii) borrowing parallel language and approaches from Florida's Revised Uniform Partnership Act, Florida's Revised Uniform Limited Partnership Act, and Florida's Business Corporation Act.

The New Act introduces a number of improvements and additions to Florida statutory LLC law. It remains a default statute, which means that except for the "non-waivable" provisions in new Section 605.0105, the members may override the statutory default rules through their operating agreement. Thus, the operating agreement remains the principal focal point for examination of the rights and responsibilities among the members; so careful drafting of the operating agreement remains essential.

The New Act introduces more definitions than were set forth in Existing Law, many of which are necessary because of new provisions not contained in Existing Law (e.g., new provisions permitting domestication in Florida of non U.S. entities as Florida LLCs, and new provisions permitting "Interest Exchanges" in Florida).

The New Act changes a few other things as well:

- expands the list of non-waivable default rules which cannot be "trumped" by the operating agreement,
- modifies rules for the power of members and managers to bind the company,
- modifies provisions addressing the LLC's management structure (including the elimination of the term "managing member"),
- modifies default management and voting rules,
- modifies provisions relating to member dissociation and company dissolution,
- modifies provisions for judicial dissolution and appointment of receivers and custodians,

- modifies provisions for service of process on LLCs,

- modifies provisions for derivative actions and adds express provisions regarding special litigation committees,

- modifies provisions governing organic transactions like mergers and conversions, and adds provisions to permit interest exchanges and in-bound domestications by non-U.S. entities, and

- modifies appraisal rights provisions, including adding events that trigger appraisal rights, and provides clarifications to the procedural aspects of the appraisal rights provisions, particularly in dealing with organic transactions approved by way of written consent.

A few things did not change. The Drafting Committee:

- Did **NOT** change the rules regarding charging orders and therefore the 2011 amendments to Existing Law Section 608.433 (the Olmstead Patch) continue unchanged.

- Did **NOT** change the overall fiduciary duties construct of Existing Law, with one exception to the duty of care described below. The New Act does not adopt the "un-cabined" fiduciary duty approach of RULLCA, which describes core duties but does not make them exclusive, and the New Act does not adopt RULLCA's ability to substantially eliminate fiduciary duties by agreement of the members.

- Did **NOT** change statutory apparent authority of members. LLCs have traditionally been modeled on the general partnership construct of statutory apparent authority for its members. That is, in the absence of explicit provisions to the contrary, a member of an LLC has statutory apparent authority to bind the LLC. RULLCA deviated from this fundamental construct because more LLCs are manager-managed and, in the modern world of business, it was often unclear to third parties who possessed the authority to bind the LLC. Thus, RULLCA turned to a model which eliminated statutory apparent authority for members and relied on the law of agency generally to address who possessed the power to bind the company. In contrast with RULLCA, the New Act retains Existing Law on apparent authority but follows the aspect of RULLCA that permits the filing of Statements of Authority to put third parties on notice as to who has authority to bind the LLC if not the members. Importantly, the New Act retains the default rule that members are agents of the LLC and have the authority to bind the LLC. Nevertheless, because this default rule is not one of the enumerated “non-waivable” items, this default agency rule can be negated or limited in the articles of organization or operating agreement as between the members of the LLC.

- Did **NOT** adopt the concept of a "Shelf" LLC (an entity which has no members when it is formed).

- Did **NOT** adopt "Series" LLCs in Florida. RULLCA also declined to provide for Series LLCs because there are a number of serious concerns and questions regarding Series LLCs. Because of those significant concerns, the ULC has recently created a national drafting committee to draft a Uniform Series LLC Act; and the Florida Drafting Committee (or its successor) expects to consider Series LLC provisions further after the ULC drafting committee completes its work in another year or two.

Following the lead of RULLCA, in contrast with the approach of Existing Law, the New Act intentionally chooses not to repeat the words “unless otherwise provided in the operating agreement” in each place where the operating agreement provisions are permitted to override the default rules in the New Act. The omission of those words is not intended to be a substantive change from Existing Law.

Technically, under Existing Law, any default provisions (other than certain non-waivable provisions) can be overridden in the operating agreement. However, because Existing Law uses the words “unless otherwise provided in the operating agreement” extensively throughout the statute, there was occasionally uncertainty about whether provisions which were not in the list of non-waivable provisions but also did not contain such “unless otherwise provided” qualifying language could actually be overridden by agreement of the members. In an attempt to eliminate the potential for that uncertainty, the New Act uses a different convention. Under the New Act, as under RULLCA, the members are free to deviate from any of the default rules in the statute, with the exception of those limitations expressly set forth in the New Act’s list of non-waivable provisions. In other words, under the New Act, the concept of “unless otherwise provided in the operating agreement” is implicitly read into every single provision of the New Act, subject only to those limitations on the ability to override or limit that are expressly in the New Act’s list of non-waivable positions.

DESCRIPTION OF THE NEW ACT BY SECTION

Article 1: General Provisions

Section 605.0101. SHORT TITLE. (corresponds to RULLCA Section 101; corresponds to Existing Law Section 608.401).

The New Act is designated as "The Florida Revised Limited Liability Company Act." The Drafting Committee, while electing to use RULLCA as the model, decided that the term "uniform" should not be included in the title of the New Act since the New Act differs from RULLCA in many respects.

Section 605.0102. DEFINITIONS. (corresponds to RULLCA Section 102; corresponds to Existing Law Section 608.402).

This Section comes from both RULLCA and Existing Law and contains definitions for terms used repetitively throughout the New Act, including definitions that RULLCA had separately placed in Article 10 (which deals with mergers, interest exchanges, conversions, and domestications). Section 605.1061 of the New Act contains definitions specific to the appraisal rights of members of a Florida limited liability company, which follows the same approach as the appraisal rights provisions of Florida's other business entity statutes. The New Act adds a number of new or revised definitions to Existing Law, many of which do not by themselves change Existing Law but are required to implement the new RULLCA provisions of Chapter 605.

In connection with Article 10 of the New Act (relating to mergers, interest exchanges, conversions, and domestications), a number of new definitions have been added from RULLCA with respect to each of these transactions and each of the types of plans and articles that are required to be prepared or filed under Article 10, including definitions for "converting entity," domesticated limited liability company," "domesticating entity," "domestication," "governance interest" (meaning a right to receive or obtain information on the books and records of an entity or to vote or consent on an entity's internal affairs), "governor" (meaning the specified person in the definition that governs a particular type of entity such as a director of a corporation and a general partner of a limited or general partnership), "interest" (meaning the specified type of ownership interest with respect to a particular type of entity such as a membership interest in an LLC, a share in a corporation and a partnership interest in a general or limited partnership), "interest exchange," "merging entity," "protected agreement," and "surviving entity." The New Act also provides a definition for "interest holder liability," a totally new concept to Existing Law, which means personal liability imposed on a person solely as a result of being an interest holder in an entity. Further related to Article 10 of the New Act are definitions for "organic law" (an entity's law in its governing jurisdiction), "organic rules" (which include both the "public organic record" (publicly-filed documents such as articles of organization) and "private organic rules" (rules that govern the internal affairs of an entity such as the operating agreement for an LLC and bylaws for a corporation)).

The "authorized representative" definition in Subsection (8) is unique to Florida and is in part a carry-over from Existing Law. It expands the definition in Existing Law by providing that, in addition to being the person authorized to form the LLC, the authorized representative is also the

manager, member, agent or officer (as the case may be) authorized to execute and file records with the Department of State or otherwise act on behalf of the limited liability company under Chapter 608. The definition also clarifies how it relates to a foreign LLC.

The "distribution" definition in Subsection (16) expands Existing Law by specifically referring to transactions between a limited liability company and one of its members, which in the corporate context would be labeled a "redemption." This definition has subparts because LLC ownership interests are conceptually bifurcated into (i) "transferable interests," meaning the economic right to receive distributions, and (ii) governance and information rights. Each or any of these rights may be transferred to or acquired by the LLC in connection with a distribution.

In Subsection (26), the definition of "foreign limited liability company" is from RULLCA and sets forth a more flexible, comparative approach than Existing Law. Under the New Act, if a particular type of foreign entity has key legal characteristics that approximate the essential legal characteristics of a domestic limited liability company, the foreign entity is treated as a foreign limited liability company.

The definition of "jurisdiction of formation" set forth in Subsection (34) is new to Existing Law and clarifies the RULLCA definition by assuring that if an entity changes its initial jurisdiction of formation – e.g., through a conversion or domestication – this definition then applies to the new jurisdiction.

The definition of "majority-in-interest" set forth in Subsection (37) is not in RULLCA but rather is a carryover from Existing Law. It is divided into parts to separately state the default rule that applies to mergers, conversions, and interest exchanges. It is more detailed than RULLCA in that it provides for class or series voting.

RULLCA and the New Act both use the word "manager" as a term of art, whose applicability is confined to manager-managed LLCs. The phrase "manager-managed" is itself a term of art, referring only to an LLC whose articles of organization or operating agreement refers to the LLC as such. These definitions are substantively similar to Existing Law. The New Act, however, discontinues the use of the term "managing member" found in Existing Law because of the confusion that term creates in determining whether a particular LLC is "manager-managed" or "member-managed."

The definition of "member" set forth in Subsection (4) of the New Act is the same as RULLCA and does not require the person with that status to hold an economic interest in the LLC. This is consistent with Existing Law.

The "operating agreement" definition set forth in Subsection (45) expands Existing Law by providing that in addition to written or oral agreements, an operating agreement may be "implied, in a record, or in any combination thereof." It also makes clear that an operating agreement may be made by a single member. This definition must be read in conjunction with Sections 605.0105 through 605.0107, which further describe the operating agreement. The definition is very broad and recognizes a wide scope of authority for the operating agreement: "the matters described in Section 605.0105(1)." Those matters include not only all relations *inter se* the members and the limited liability company, but also all "activities and affairs of the company and the conduct of

those activities and affairs." Moreover, the definition puts no limits on the form of the operating agreement. In this regard, the definition contains the phrase "whether oral, implied, in a record, or in any combination thereof."

The definitions of "sign," "signed" and "signature" in Subsection (61), while not defined in Existing Law, are consistent with Existing Law by permitting manual, facsimile, conformed, and electronic signatures. The New Act further permits execution by tangible or electronic symbols.

The reference to "transfer by operation of law," within the definition of "transfer" set forth in Subsection (65), is significant in connection with Section 605.0502 (Transfer of Transferable Interest). That Section restricts a transferee's rights (absent the consent of the members) and this definition makes those restrictions applicable, for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a member. The restrictions also apply to transfers in the context of a member's bankruptcy, except to the extent that bankruptcy law supersedes the New Act.

As noted above, the New Act defines "transferable interest" in Subsection (66) to mean the right to receive distributions from an LLC. This right begins as part of a member's "interest" but may be separately transferred in whole or in part to a "transferee" (which is not a member). Although the term "transferable interest" is new to Existing Law, the concept is consistent with the rights of an "assignee" under Existing Law.

The definition of "transferee" set forth in Subsection (67) has displaced the term "assignee" as a term of art under RULLCA and the New Act but the intent is for a "transferee" under the New Act to be the same as what is currently deemed an "assignee" under Existing Law.

The definition of "writing" is not in RULLCA but was added because some of the Sections of the New Act that carried over from Existing Law rely on that term, including the provisions in Section 605.0403 governing a member's contribution obligation.

Section 605.0103. KNOWLEDGE; NOTICE. (corresponds to RULLCA Section 103; corresponds to Existing Law Section 608.407(5))

This Section is the same as RULLCA, except for Subsections 605.0103(4)(b)1. and 2. It carries over substantially similar provisions from Existing Law that govern the effect of provisions in articles of organization pertaining to the management structure of an LLC and the grant of authority to or restriction on authority of any persons. As is the case under Existing Law, there is a 90-day "burn in" period if any changes are made to those provisions in the articles.

The ULC did not believe that this Section should contain generally applicable provisions determining when an organization is charged with knowledge or notice because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this act than in other circumstances; and (iv) are the subject of considerable attention in the RESTATEMENT (THIRD) OF AGENCY (2006).

Under RULLCA and the New Act, the power to bind a limited liability company to a third party is primarily a matter of agency law (see Section 605.0301). However, Section 605.0103(1)(b) and Subsection (4)(a) do provide for deemed knowledge in the case of certain filed records on authority or limitations of authority dealing with transfers of real property and as otherwise permitted under laws other than Chapter 605. This expands Section 608.407(6) of Existing Law, which state that these real property records provide for deemed notice, rather than knowledge.

The constructive or deemed notice provided under Section 605.0103(4)(b) is consistent with Existing Law, with respect to disclosure in the articles of organization that an LLC is manager-managed and for grants of or limitations on the authority of members or managers. It adds three new categories of filings not in Existing Law: (i) articles of dissolution; (ii) a statement of termination; and (iii) articles of merger, interest exchange, conversion, or domestication that give constructive notice 90 days after filed in a public record. These will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

Section 605.0104. GOVERNING LAW. (corresponds to RULLCA Section 104; no corresponding provision in Existing Law)

This is the same as RULLCA. The ULC comment states that “internal affairs” include: interpretation and enforcement of the operating agreement, relations among the members as members, relations between the limited liability company and a member as a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members as members.

The operating agreement cannot alter this Section. However, ULC comments to this Section state that an operating agreement may lawfully incorporate by reference the provisions of another state’s LLC statute. This approach does not switch the limited liability company’s governing law to that of another state, but instead incorporates the provisions of the other state’s law into the contract among the members.

Subsection (2) obviously encompasses Section 605.0304 (the liability shield). This Subsection is stated separately from Subsection (1) because it can be argued that the liability of members and managers to third parties is not an internal affair.

Section 605.0105. OPERATING AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS. (corresponds to RULLCA Section 105; corresponds to Existing Law Section 608.423)

The operating agreement is pivotal to a limited liability company because all of the provisions of Chapter 605 are default provisions which can be overridden or trumped by the agreement of the members in their operating agreement, except for the non-waivable provisions identified in Section 605.0105(3). In fact, Section 605.0105 provides that the operating agreement governs relations among the members and the limited liability company, as well as the activities and affairs of the limited liability company. However, the operating agreement has no effect on third parties, including the Department of State and other governmental agencies.

The operating agreement provisions of the New Act appear in Sections 605.0105 through 605.0107. Those Sections must be read together, along with Section 605.0102(45) (the definition of "operating agreement").

Section 605.0106 details the effect of an operating agreement on the limited liability company and on persons becoming members of an LLC. Section 605.0107 details the effect of an operating agreement on third parties.

Section 605.0105 performs six essential functions. Subsection (1) establishes the primacy of the operating agreement in establishing relations *inter se* the limited liability company, its member or members, and any manager. This clarifies but does not change Existing Law. Subsection (2) recognizes the New Act as comprising mostly default rules – i.e., gap fillers for issues on which the operating agreement provides no rule. Subsection (3) lists the mandatory provisions of the New Act (i.e., those provisions that may not be waived). Subsection (4) lists some provisions frequently found in operating agreements, authorizing some provisions unconditionally and other provisions so long as such provisions are "not manifestly unreasonable." Subsection (5) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to determining a claim that a provision of an operating agreement is manifestly unreasonable. Subsection (6) provides that an operating agreement may include specific penalties or other consequences if a member fails to comply with its terms or upon certain events specified in the operating agreement.

A limited liability company is as much a creature of contract as of statute, and due to the broad definition of "operating agreement" under Section 605.0102(45), once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement.

Subsection (2) is one of most important pillars in the New Act. It states that to the extent the operating agreement does not determine a matter within the purview of Subsection (1), the statute will determine the matter. This "gap filler" function of the statute makes it the implicit or notional agreement among the members of the LLC. The statutory "gap fillers" are commonly referred to as "default" provisions (as the questions concerning the relations between the members themselves, and between the members and the company, will "default" to the provisions contained in the statute). This approach is consistent with Existing Law.

Subsection (3) is another pillar of the New Act. It recognizes that certain matters should not be subject to change by the operating agreement (or certain types or degrees of modification), by setting forth what are commonly referred to as the "non-waivable" provisions of the statute. The New Act contains the same list of "non-waivable" provisions as RULLCA, except that the former clarifies that an operating agreement 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. This approach is consistent with Existing Law; however, the New Act contains certain differences as to which provisions are "non-waivable" and as to the extent to which other provisions may be modified or constrained.

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the fiduciary and

other duties of those who manage the organization (e.g., members in a member-managed LLC; managers in a manager-managed LLC). The New Act is based largely on RULLCA, which rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arms-length association. Within that limitation, however, this Section gives substantial power to the members, through their operating agreement, to establish the boundaries and parameters of, including certain rights to modify, the duties of care and loyalty and the obligations of good faith and fair dealing that are automatically imposed under Section 605.04091. The New Act generally carries forward the Existing Law dealing with these duties and obligations, but by adopting the RULLCA constructs dealing with them, better organizes the rules for how they are imposed and clarifies the means by which those duties may be modified and the standard of determining when the modification are appropriate.

Subsection (4) is essentially the same as RULLCA by stating the means by which an operating agreement may modify or redefine certain aspects of the standards for the duty of loyalty and the duty of care. Subsection 4(a)(1), permitting an operating agreement to provide for methods of approving transactions that otherwise would violate the duty of loyalty, is consistent with Existing Law. New to Existing Law are Subsection (4)(a)(2), permitting a limited variance in the determination of whether an LLC is insolvent for purposes of paying distributions, and Subsection (4)(b), permitting an operating agreement to expressly relieve and shift from one member to another member or members a specified responsibility or duty the first member otherwise would have had under the operating agreement.

Subsection (5) makes the determination of whether certain alterations to the standards of duties of loyalty and care, and obligations of good faith and fair dealing, are "manifestly unreasonable." This is a question for a judge, not a jury, and limits the information a complainant may use in asserting a violation of the standard. This is from RULLCA and is not in Existing Law; and the Drafting Committee believes this guidance will be useful to judges in interpreting and applying this standard.

Subsection (6), which recognizes the power of members to voluntarily adopt penalties to deal with defaults of the operating agreement, is based on Existing Law, which currently allows such provisions. The language itself (here and in Section 605.0403(5)) is not in RULLCA, but rather is derived from the ABA Prototype LLC Act and the Delaware LLC Act.

The New Act eliminates several provisions under Existing Law dealing with emergency operating agreements, which are not in RULLCA and the Drafting Committee does not believe are necessary.

Section 605.0106. OPERATING AGREEMENT; EFFECT ON LIMITED LIABILITY COMPANY AND PERSON BECOMING MEMBER; PREFORMATION AGREEMENT; OTHER MATTERS INVOLVING OPERATING AGREEMENT. (corresponds to RULLCA Section 106; no corresponding provision in Existing Law).

Although not controversial, these provisions are not in Existing Law. The first three Subsections of this Section are the essentially the same as RULLCA. They make clear that an LLC is bound by and may enforce the operating agreement, and that a member is deemed to be a party to the agreement whether or not that person actually signs the operating agreement. Subsection (3) makes clear that a preformation arrangement is not an operating agreement, as an

operating agreement can only be among "members," and, under the New Act, the earliest a person can become a member is upon the formation of the limited liability company (see Section 605.0401).

The rest of the Subsections are based primarily on Delaware law provisions, which the Drafting Committee believes are helpful because they recognize or affirm the correctness of certain common practices and help clarify recurring questions about the matters dealt with in those Subsections.

Section 605.0107. OPERATING AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 107; no corresponding provision in Existing Law).

This Section is the same as RULLCA and is not in Existing Law. Subsection (1) permits a non-member to be given veto rights over amendments to the operating agreement. An amendment made in derogation of such a veto right is ineffective, and is not merely a breach of contract. This Subsection although new to Existing Law, recognizes and affirms current practices, as veto or other contractual rights are commonly sought by lenders, managers and other third parties dealing with an LLC or its members.

Subsection (2) deals with the important question of the rights and obligations of a transferee or dissociated member under an operating agreement. The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. Such transferees can include the heirs of members, as well as former (dissociated) owners, who are "locked in" as transferees of their own interests. This Subsection follows the RULLCA approach (and court decisions that it is based upon) by expressly subjecting transferees, including dissociated members, to operating agreement amendments made after the transfer or dissociation, except amendments that increase obligations on such transferees or dissociated members. For example, an amendment might extend the duration of a limited liability company but may not institute a new capital call obligation on transferees or dissociated members.

Subsection (3) provides that that an LLC cannot by way of a record filed with the Department of State include and make effective a provision that would be ineffective under certain provisions of Chapter 605 if such provisions were placed in an operating agreement.

Subsection (4) recognizes the important maxim that a limited liability company is a creature of contract as well as a creature of statute. It will be possible for the operating agreement to be inconsistent with the articles of organization or other public filings pertaining to the limited liability company. For those circumstances, this Subsection provides that the operating agreement is paramount as to members, dissociated members, transferees and managers; whereas the articles or public filings take precedence relative to third persons (other than those previously mentioned) who rely on them.

Section 605.0108. NATURE, PURPOSE, AND DURATION OF LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 108; corresponds to Existing Law Section 608.403 and Subsections 608.441(1)(a) and 608.402(5)).

This Section is the same as RULLCA and makes clear the “separate entity” characteristic that is fundamental to a limited liability company. Although some LLC statutes continue to require a business purpose, the New Act follows the current trend and takes a more expansive approach. The phrase “any lawful purpose, regardless of whether for profit” encompasses even charitable activities and is consistent with the definition of "business" in Existing Law. Subsection (3) deviates from RULLCA and Existing Law by describing the default term of an LLC as "indefinite" (rather than "perpetual"), which the Drafting Committee believes is a more accurate depiction.

Section 605.0109. POWERS. (corresponds to RULLCA Section 109; corresponds to Existing Law Section 608.404)

Contrary to RULLCA, this Section contains a detailed list of specific powers, which is intended to be illustrative (as the phrase “including the power to” was intended to mean). The list of specific powers is based upon Existing Law and a comparison with the comparable lists found in the Florida corporate statute and Delaware law. Although the list is probably not necessary, the Drafting Committee wished to avoid any confusion that might result from eliminating the list that was contained in Existing Law, believing that many users of the current LLC statute have come to rely upon the “avoidance of any doubt” which an illustrative list conveys.

Section 605.0110. LIMITED LIABILITY COMPANY PROPERTY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.425).

This Section is a carryover from Existing Law and is not found in RULLCA. The Drafting Committee retained these provisions from Existing Law, believing that practitioners and courts have come to rely upon the important precepts with respect to LLC property set forth in this Section.

Section 605.0111. RULES OF CONSTRUCTION AND SUPPLEMENTAL PRINCIPLES OF LAW. (corresponds in part to RULLCA Section 111; no corresponding provision in Existing Law)

Subsection (1) is not in Existing Law or RULLCA and is based upon Delaware's limited liability company act. This Subsection makes clear the maxim that an LLC is first and foremost a “creature of contract.”

Subsection (2), which is from RULLCA and consistent with Existing Law (see Section 608.433(9)(b)), makes clear that the statute is supplemented by principles of law and equity from common law, unless the statute displaces those principles.

Section 605.0112. NAME. (corresponds to RULLCA Section 112; corresponds to Existing Law Sections 608.406 and 608.506)

This Section is from Existing Law and is not based on RULLCA.

Subsection (1) continues in force the "distinguishable on the records" test for name availability that applies under Existing Law (and under Florida's other business entity statutes), as well as certain naming prohibitions contained in Existing Law. Consistent with Existing Law, Subsection (1) does not follow RULLCA's allowance of naming an LLC a "limited company" or using the abbreviations "L.C." or "LC."

Subsection (2) makes clear that this Section also applies to foreign LLCs applying for a Certificate of Authority to transact business in Florida and is consistent with Section 608.506 of Existing Law.

Subsection (3) continues the transitional rule under Existing Law for LLC names used prior to July 1, 2007, while Subsection (4) sets forth a new transitional rule for certain abbreviations or designations used in the name of an LLC prior to the effective date of the New Act.

Section 605.0113. REGISTERED AGENT. (corresponds to RULLCA Section 115; corresponds to Existing Law Sections 608.415 and 608.507)

The majority of this Section carries over Existing Law and is not based on RULLCA. This Section applies to both domestic and foreign LLCs and sets forth the requirements relating to maintaining a registered agent and registered office (for that registered agent) in Florida at all times.

Subsection (3), which is from RULLCA, and is new to Existing Law, limits the duties of a registered agent to forwarding process, notice or demand served upon it to the company, as well as to providing notice of the agent's resignation.

Section 605.0114. CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE. (corresponds to RULLCA Section 116; corresponds to Existing Law Sections 608.416 and 608.508)

This Section is also not based on RULLCA, but rather is consistent with Existing Law, providing procedures and specific filing requirements for an LLC to change its registered agent or registered office. It provides for a "statement of change" to be filed with the Department of State to effectuate the change and eliminates the requirement under Existing Law that the filing include a statement that it was authorized by appropriate member vote. Subsection (4) clarifies that the changes may also be made on the LLC's annual report and certain other specified filings.

Section 605.0115. RESIGNATION OF REGISTERED AGENT. (corresponds to RULLCA Section 117; corresponds to Existing Law Sections 608.416(2) and 608.509)

This Section is based primarily on RULLCA and is consistent with Existing Law in allowing resignation by the registered agent. Whether a resignation violates a contract between

the registered agent and the represented company is beyond the scope of the statute. Subsection (4) is new to Existing Law and preserves whatever claims a represented LLC may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this Section were followed.

Subsection (3) follows Existing Law and delays the effectiveness of a statement of resignation for 31 days to allow the notice of the resignation that must be sent by the resigning agent to the company to reach the company. However, the New Act clarifies that the effectiveness of a statement of resignation is accelerated if the company files a statement of change or other record designating a replacement agent prior to the end of the 31 day period.

Section 605.0116. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT. (corresponds to RULLCA Section 118; partially covered in Existing Law Subsections 608.416(3) and 608.508(2))

This Section is from RULLCA and permits a registered agent to directly file a “statement of change” with the Department of State to change the name or address of an LLC's registered agent. Under the express language of Existing Law, this right was technically limited to a change in the address of the registered agent. In contrast, for corporations, Section 607.0502(3) of the FBCA authorizes “bulk” filings by registered agents to reflect both address changes and name changes. In actual practice, under Existing Law, if a particular registered agent elected to reflect its name change on a “bulk” filing basis for those corporations existing under Florida law and those corporations qualified to transact business in Florida for which it was serving in such capacity in reliance on Section 607.0502(3), the Department of State, by way of an informal policy, also actually allowed the registered agent name change filing to extend to those LLCs for whom the registered agent was serving in such a capacity in Florida. In this connection, the Department of State has established a special fee arrangement (i.e., $1,000 plus $1.00 per record) in order to process such a “bulk” filing. As a result, under Existing Law, the “bulk” filing is effectively permitted only if the registered agent is serving in such capacity in Florida for 35 or more business entities. In contrast, although the New Act technically allows such name and/or address filings to be made by the registered agent on an entity by entity basis (without any 35 business entity minimum), the special fee arrangement will still only apply if the 35 business entity minimum is satisfied. Because most companies in the business of serving as registered agent in Florida tend to serve in that capacity for at least 35 entities, it is expected that, in most cases, the “bulk” filing process will be utilized whenever such registered agents change their names or addresses.

Section 605.0117. SERVICE OF PROCESS, NOTICE, OR DEMAND. (corresponds to RULLCA Section 119; corresponds to Existing Law Sections 608.463 and 608.5101)

This Section is intended to supplement the provisions of Chapter 48 of the Florida Statutes, which was also modified (as a part of the bill in which the New Act was adopted) to cover this issue in the same manner. It is not based on RULLCA, but rather incorporates provisions that have been carefully vetted and conceived by the Drafting Committee with the assistance of several judges and commercial litigation attorneys active in The Florida Bar Business Law Section.

Under Existing Law, service of process on an LLC must be effected in the same manner as service is made upon a partnership under Chapter 49 of the Florida Statutes. This has caused considerable confusion, particularly because of the significant differences between "manager-managed" and "member-managed" LLCs, and how those differences impact the application of the principles of agency and constructive notice. Also in play are the reasonable expectations of the third party making service (or giving demand or notice), on the one hand, and the LLC's management (whether members or managers, as applicable), who should be fairly apprised of a judicial action or other matter for which notice or demand is being made, on the other hand.

To help resolve the confusion that exists under Existing Law, Subsections (1) through (3) describe an ordering of the persons upon whom service, notice or demand will be deemed effective, starting with the registered agent. Subsection (2) provides the first alternative if the registered agent does not exist or cannot be served after reasonable diligence, and this alternative recognizes the distinction between manager-managed and member-managed LLCs for this purpose. Subsection (3) permits service, demand or notice to be made upon the Department of State, but only as a last resort.

Section 605.0118. DELIVERY OF RECORD. (corresponds to RULLCA Section 120; no corresponding provision in Existing Law)

This Section is from RULLCA and lists permissible means of delivery of a record, (except for delivery to the Department of State), but does not specify when delivery occurs, leaving that to a factual analysis. Subsection (2) states that delivery to the Department of State is effective only upon actual receipt by the Department of State.

Section 605.0119. WAIVER OF NOTICE. (no corresponding RULLCA provision; corresponds to Existing Law Section 608.455)

This Section follows Existing Law in providing that any notice required to be given to a member or manager may be waived by the member or manager by the signing of a written waiver by such person.

Article 2: Formation; Articles of Organization and Other Filings

Section 605.0201. FORMATION OF LIMITED LIABILITY COMPANY; ARTICLES OF ORGANIZATION. (corresponds to RULLCA Section 201; corresponds to Existing Law Sections 608.405 and 608.407).

This Section is modeled on Section 201 of RULLCA, but for the most part is substantively the same as Existing Law.

Consistent with Existing Law and in contrast with RULLCA, the initial filing will continue to be referenced as "articles of organization" rather than as a "certificate of organization." The Drafting Committee believes that changing the nomenclature might lead to confusion for existing LLCs that previously filed articles of organization. However, this was not viewed by the Drafting Committee as a substantive change.

Consistent with Existing Law, this provision requires there to be at least one member of the LLC in order for the formation of the LLC to be effective; in other words, "shelf" LLCs are not authorized. However, under the New Act, unlike RULLCA, the person who signs the articles of organization is deemed to affirm that the LLC has or will have at least one member as of the time the articles of organization become effective (and the definition of "authorized representative" in the New Act takes this into account). Thus, although the New Act specifies that an LLC is not formed (i.e., does not come into existence) until both (i) the articles become effective and (ii) at least one member has become a member, because of the deemed affirmation, the two conditions will have both been satisfied at the time the articles become effective.

Consistent with Existing Law and RULLCA, the New Act requires only the most "bare bones" of disclosure in the articles of organization. In particular, the New Act does not require the articles to state whether the LLC is member-managed or manager-managed. However, the filing party may include this or any other items in the articles so long as they are not inconsistent with the non-waivable provisions set forth in Section 605.0105(3). For example, although not required, the articles of organization may declare that the LLC is to be "manager-managed" and/or may name one or more managers of a manager-managed LLC or one or more members of a member-managed LLC.

Section 605.0202. AMENDMENT OR RESTATEMENT OF ARTICLES OF ORGANIZATION. (corresponds to RULLCA Section 202; corresponds to Existing Law Section 608.411).

This Section is modeled on Section 202 of RULLCA, but, for the most part, is substantively the same as Existing Law. However, unlike RULLCA, the New Act more clearly sets forth the differences between an amendment and a restatement, and adds a provision, consistent with Existing Law, to more specifically outline the process and requirements for simultaneously amending and restating articles of organization. In an effort to more closely track RULLCA, some of the detailed language present in the comparable Section in Existing Law has not been carried forward because such language was deemed either unnecessary or implicit.

Subsection (5), which tracks RULLCA, is a change from Existing Law. It imposes an obligation directly on the members or managers, as applicable, to correct information in articles of organization that has become inaccurate. A member or manager's failure to meet the obligation exposes the member or manager, as applicable, to potential liabilities to third parties under new Section 605.0205(1)(b).

Section 605.0203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO DEPARTMENT. (corresponds to RULLCA Section 203; corresponds to Existing Law Section 608.408).

This Section is modeled on Section 203 of RULLCA. Section 203 of RULLCA differs from Existing Law by simplifying the signing process. However, the language in the New Act modifies the RULLCA language by adding a special Florida requirement for a registered agent to sign the acceptance of duties statement and also by adding the obligation that an agent, legal

representative or attorney in fact who has the authority to sign a record (and then signs such record) must actually recite in the record that such person has that authority.

Section 605.0204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER. (corresponds to RULLCA Section 204; no corresponding provision in Existing Law).

This Section essentially tracks the language of Section 204 of RULLCA. Although courts in Florida may already have the powers set forth in this Section, the Section expressly sets forth such powers and provides the court with flexibility to issue an order directing the record to be signed or to issue an order that the record can be filed by the Department of State unsigned. This Section also makes clear that the court may order a person with control over a record that has already been signed to deliver the record to the Department of State for filing.

Section 605.0205. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD. (corresponds to RULLCA Section 205; corresponds to Existing Law Subsections 608.408(3) and (4)).

This Section essentially tracks the language of Section 205 of RULLCA. The Section addresses liability to third parties for inaccurate information in a filed record and acknowledges that an operating agreement can have the effect of relieving and shifting from certain specified members to other specified members the liability to third parties for inaccurate information in filed records. Existing Law expressly states that execution of a certificate filed with the Department of State is an affirmation of accuracy under penalties of perjury. Section 605.0205(3) of the New Act clarifies this Existing Law provision by making it clear that the affirmation under penalties of perjury applies to any and all records authorized or required to be filed with the Department of State under the New Act.

Section 605.0206. FILING REQUIREMENTS. (corresponds to RULLCA Section 206; corresponds to Existing Law Section 608.4081).

This Section does not track the language of RULLCA, but instead borrows in part from Florida's limited partnership statute (Section 620.1206), borrows in part from Existing Law (608.4081) and, in part, uses its own language. However, for the most part, substantively, this Section is consistent with Existing Law and RULLCA. Language has been added to make it clear, as has been the practice, that the Department of State can prescribe electronic format as the medium of filing, can use electronic transmissions for notice and may require filers to provide email addresses.

Section 605.0207. EFFECTIVE DATE AND TIME. (corresponds to RULLCA Section 207; corresponds to Existing Law Section 608.409).

This Section does not track the language of RULLCA nor does it track Existing Law. This Section borrows in large part from Florida's limited partnership statute (Section 620.1206), but expands the language to deal with presumptions as to the effective time of filing when no effective time is specifically stated and as to the effective date of filing when no effective date is specifically stated. However, for the most part, substantively, this Section is consistent with Existing Law. Unlike RULLCA, but consistent with Existing Law, the New Act provides that articles of organization may specify a prior effective date no more than five days prior to filing.

Section 605.0208. WITHDRAWAL OF FILED RECORD BEFORE EFFECTIVENESS. (corresponds to RULLCA Section 208; no corresponding provision in Existing Law).

This Section is new to Florida law and tracks the language of Section 208 of RULLCA. However, to avoid confusion with other terminology in the New Act, this Section uses the term "withdrawal statement" rather than "statement of withdrawal." This Section addresses the ability to withdraw records, but only if such records have not yet taken effect. If the record has taken effect, it may not be withdrawn, but it may be corrected under Section 605.0209 if the requirements of that Section are satisfied.

Section 605.0209. CORRECTING FILED RECORD. (corresponds to RULLCA Section 209; corresponds in part to Existing Law Section 608.4115).

Under Existing Law, the concept of correction applies only to the correction of articles of organization and limits the period of correction to 30 business days after filing. This Section tracks Section 209 of RULLCA, expanding the ability to correct any and all filed records and containing no time limitation on when a correction can be filed. Although the general rule applicable under the New Act is that a correction relates back to the date of the filed record that is being corrected, the correction does not have such relation back effect with respect to those who relied upon the uncorrected filed record and were adversely affected by the correction.

Section 605.0210. DUTY OF DEPARTMENT TO FILE; REVIEW OF REFUSAL TO FILE; TRANSMISSION OF INFORMATION BY DEPARTMENT. (corresponds in part to RULLCA Section 210; corresponds in part to Existing Law Section 608.4082).

This Section tracks Section 608.4082 of Existing Law in part and Section 210 of RULLCA in part, but substantively is the same as Existing Law. Borrowing from RULLCA, this Section adds a procedure to petition a court to compel filing of a record and provides for the methods by which a record may be delivered to a person by the Department of State.

Section 605.0211. CERTIFICATE OF STATUS. (corresponds to RULLCA Section 211; no corresponding provision in Existing Law).

This Section tracks in large part Section 211 of RULLCA, except that instead of using the terminology "Certificate of Good Standing" and "Certificate of Registration," the New Act uses the Florida terminology of "Certificate of Status." The New Act sets forth in detail what is to be stated in a Certificate of Status for a Florida limited liability company and what is to be stated in a Certificate of Status for a foreign limited liability company that has a Certificate of Authority to transact business in the State of Florida. Consistent with Existing Law, this Section expressly states that a Certificate of Status is conclusive evidence that a Florida limited liability company exists or that a foreign limited liability company is authorized to transact business in Florida, as applicable.

Section 605.0212. ANNUAL REPORT FOR DEPARTMENT. (corresponds in part to RULLCA Section 212; corresponds in part to Existing Law Section 608.4511).

This Section combines language from Section 212 of RULLCA and Section 608.4511 of Existing Law, in an effort to correct and tighten the provisions of Existing Law. However, for

the most part, this Section is substantively the same as Existing Law. Language has been added to confirm the current practice which allows multiple annual reports to be filed in a single year, with the first such report being considered the annual report for the year and subsequent annual reports filed in that year being considered amended reports. Special new provisions have been added to impose a requirement that annual reports must be current for the then current year in order for a party existing under Florida law or having a Certificate of Authority to transact business in Florida, to engage in a merger or conversion under Chapter 605. These new provisions are designed to close a perceived loophole under current law.

Section 605.0213. FEES OF THE DEPARTMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.452).

This Section largely tracks Section 608.452 of Existing Law and does not increase any of the current filing fees. However, because certain new filings are authorized under the New Act, the filing fees for these new filings will be picked up by and thus fall under the "any other" category for filing any other limited liability company document. There is no comparable Section in RULLCA.

Section 605.0214. POWERS OF DEPARTMENT. (no corresponding provision in RULLCA; no corresponding provision in Existing Law).

This Section mirrors Section 607.0130 of the Florida Business Corporation Act (the "FBCA") and expressly sets forth the power of the Department of State to administer the Chapter and perform its duties, which is implicit under Existing Law. There is no comparable Section in RULLCA.

Section 605.0215. CERTIFICATES TO BE RECEIVED IN EVIDENCE AND EVIDENTIARY EFFECT OF COPY OF FILED DOCUMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.702).

This Section combines language from Section 608.702 of Existing Law and Section 607.0127 of the FBCA, but does not change the substance of Existing Law relative to the subject matter of this Section. There is no comparable Section in RULLCA.

Section 605.0216. STATEMENT OF DISSOCIATION OR RESIGNATION. (no corresponding provision in RULLCA; no corresponding provision in Existing Law).

This Section is new and has been added to formally recognize a practice that historically has been permitted by the Department of State. There is no comparable Section in RULLCA. A person who desires to notify the public that he, she or it is no longer a member or a manager of a limited liability company is expressly authorized by this Section to file with the Department of State a statement of dissociation (relative to a member) or a statement of resignation (relative to a manager).

Article 3: Relations of Members and Managers to Persons Dealing with Limited Liability Company

There are two Sections in the New Act which address agency. The first is Section 605.0301 which describes the Power to Bind the limited liability company, and the second is Section 605.04074 which describes the Agency Rights of Members and Managers. These two Sections should be read in tandem to fully understand who has the power to act for and bind a Florida limited liability company.

Section 605.0301. POWER TO BIND LIMITED LIABILITY COMPANY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4235).

The New Act departs from RULLCA in connection with the agency power of members and managers, and does so to remain consistent with Existing Law, as well as the law in most states. Since the dawn of creation of LLCs, a member in an LLC has always had apparent agency authority to act for and bind the company. This concept is known as "statutory apparent authority," and is a codification of common law at least as far back as Florida's partnership law. It was part of the 1914 Uniform Partnership Act (Section 9). RULLCA commentary to Section 301 notes that RULLCA Section 301 is a radical departure from prior ULLCA, RUPA, RULPA, and almost every state LLC statute.

RULLCA's reason for departure derives from the member/manager status of an LLC. Under most state LLC acts, including Existing Law, in a member-managed LLC, all members have statutory apparent authority; while in a manager-managed LLC, only managers have statutory apparent authority. Yet, Florida, like most states, does NOT require the LLC to put the world on notice in any public record as to whether it is member-managed or manager-managed. That can be seen as a "problem" for third parties who do not know who has authority to act for the LLC.

This "problem" of not disclosing its management structure in a public record can be dealt with in two ways: 1) requiring that manager-managed LLCs disclose that they are indeed manager-managed in a public record, or 2) adopting the RULLCA solution of simply eliminating statutory apparent authority by statute.

The articles of organization are public record, of course, but Florida, like most states does not require a manager-managed LLC to disclose in its articles that it is manager-managed. Furthermore, the operating agreement is not a public record. Consequently, third parties dealing with LLCs have learned that they must ask for a copy of the operating agreement, or a resolution confirming the person(s) with authority, or the LLC must file a statement of authority to provide a record of who has authority. Further, to keep the record clear, many manager-managed LLCs in Florida do note that status in their articles of organization to notify third parties and many third parties look for that record in dealing with a manager-managed LLC.

The New Act follows Existing Law, with Section 605.0301 confirming that there are four ways someone has the power to bind the LLC: if the Person (1) is an agent of the company, (2) has the authority to do so under the articles of organization or the operating agreement,

(3) has the authority pursuant to a statement of authority, or (4) has the status as an agent under a law other than Chapter 605.

Section 605.04074 provides that all members of a member-managed LLC are agents of the LLC, and that each has the power to act for and bind the LLC. In a manager-managed LLC, the members lose their authority to manage because the managers are the agents of the LLC. The action taken by the person with agency authority must be one which is apparently in the ordinary course of the company's activities and affairs, or if not apparently in the ordinary course, if it was authorized by the appropriate vote of the members (in a member-managed LLC), or by the managers (in a manager-managed LLC).

The default rule in Florida, under Existing Law, is that every Florida LLC is member-managed, UNLESS provided otherwise in its articles of organization or operating agreement. See Existing Law Section 608.422 (Management of the limited liability company). The New Act continues Existing Law in this regard.

The flexibility inherent in LLC structures and management does not fit neatly into a system which requires public disclosure of the management structure. Moreover, to impose such a public disclosure obligation would put Florida out of the mainstream and thus, in the view of the Drafting Committee, at a competitive disadvantage with other states.

Additionally, any person, whether a member, manager, officer, employee, or anyone else, may be granted authority to act for the LLC, if the LLC files a statement of authority under Section 605.0302 designating one or more persons as also having authority to act for, and bind, the LLC.

Section 605.0302. STATEMENT OF AUTHORITY. (corresponds to RULLCA Section 302; no corresponding provision in Existing Law).

This Section is new to Existing Law and tracks in large part Section 302 of RULLCA, except that the requirement to set forth the address of the registered agent in a statement of authority is replaced in the New Act with a requirement to set forth the company's principal mailing address. This Section is derived from and builds upon Section 303 of the Uniform Partnership Act, which Section 620.8303 used as its model. This provision creates an important safeguard for limited liability companies that want to limit the apparent authority of one or more members, managers or other persons or one or more persons holding specified positions.

The Section is divided into statements that pertain to the power to transfer interests in the LLC's real property and statements pertaining to other matters. The different statements are required to be filed in different places, as specified in the Section, and have different effects in terms of upon whom they are binding.

This Section expressly provides that its rules do not operate viz a viz members. For members dealing with each other, the operating agreement (or the default rules of the statute if the operating agreement is silent) is controlling.

Section 605.0303. STATEMENT OF DENIAL. (corresponds to RULLCA Section 303; no corresponding provision in Existing Law).

This Section tracks Section 303 of RULLCA. This Section allows a person who has been granted authority in a statement of authority to deny the grant of authority by subsequently filing a statement of denial.

Section 605.0304. LIABILITY OF MEMBERS AND MANAGERS. (corresponds to RULLCA Section 304; corresponds to Existing Law Sections 608.4227 and 608.701).

This Section tracks Section 304 of RULLCA, and has much of the same effect as Section 608.4227 of Existing Law. This Section shields members and managers against the debts, obligations and liabilities of the limited liability company, but does not provide any shield against such person's own conduct or a contractual obligation expressly assumed by such person (such as a written guarantee of indebtedness). This Section also pertains to the equitable doctrine of "piercing the veil," and presumably the case law in the corporate context can be expected to be applied in interpreting that portion of this Section, as it does currently under Existing Law.

Article 4: Relations of Members to each other and to Limited Liability Company

Section 605.0401. BECOMING A MEMBER. (corresponds to RULLCA Section 401; corresponds to Existing Law Sections 608.402(21), 608.4232 and 608.433).

This provision is modeled on Section 401 of RULLCA. References to the "organizer" under RULLCA have been changed to the "authorized representative" consistent with Existing Law and to correspond with similar changes included in the definitions in Section 608.102 of the New Act.

Unlike Existing Law, under Section 605.0401(4) of the New Act, a person can become a non-economic member of a limited liability company without a transferable interest (i.e., without any right to distributions) or any obligation to contribute capital.

The default rule under the New Act requires all of the members to consent to the admission of a new member after the LLC has been formed, while under Existing Law the required consent under the default rule is a majority-in-interest of the members unless the new member is an assignee (a person that has been assigned an interest in an LLC) that is becoming a member, which under the default rule of Existing Law requires unanimous consent.

Section 605.0402. FORM OF CONTRIBUTION. (corresponds to RULLCA Section 402; corresponds to Existing Law Section 608.4211(1)).

This provision is modeled on Section 402 of RULLCA.

Section 605.0402 of the New Act is consistent with 608.4211(1) of Existing Law but it expands the description of permissible types of contributions.

Section 605.0403. LIABILITY FOR CONTRIBUTIONS. (corresponds to RULLCA Section 403; corresponds to Existing Law Subsections 608.4211(2)-(5)).

Section 605.0403(1) of the New Act, which requires a promise to make a contribution to be in writing, derives from Section 608.4211(2) of Existing Law, and is not in RULLCA.

Section 605.0403(5) is from 608.4211(5) of Existing Law and permits the operating agreement to provide specified penalties for or consequences of a member's failure to make a capital contribution for which the member is obligated. Although not expressly a part of RULLCA, this provision is consistent with the broad provisions of RULLCA, including Section 105, stating that the operating agreement governs the relationship among the members and between the members and the LLC, except as provided in the non-waivable provisions of Section 605.0105(3).

Section 605.0404. SHARING OF DISTRIBUTIONS BEFORE DISSOLUTION AND PROFITS AND LOSSES. (corresponds to RULLCA Section 404; corresponds in part to Existing Law Sections 608.426(1) and 608.4261).

Subsection (1) is based on RULLCA Section 404 and the second sentence of Section 608.426(1) of Existing Law. It generally continues the existing default rule in Florida for LLCs and limited partnerships that distributions are made in accordance with the value of the members' capital contributions. It changes Section 608.426 of Existing Law by ignoring the value of any capital contributions that, at the time of the particular distribution, have previously been returned. Removing the existing requirement of subtracting returned capital contributions makes the standard the same for LLCs in Florida as is currently in place for limited partnerships in Florida (see Section 620.1503(2) for limited partnerships; but see Section 620.8401 with respect to general partnerships). It does not follow RULLCA, which provides that distributions must be equal shares among members.

Subsection (2) of the New Act clarifies Existing Law by providing that no member has a right to distributions prior to the LLC's dissolution unless the LLC decides to make the distribution.

Subsection (3) of the New Act is new to Existing Law (with the exception of Section 608.427(3) of Existing Law dealing solely with distributions to withdrawn members). It provides that a person does not have a right to distributions in kind and that to make distributions in kind, each part of the asset is fungible with each other part and each person receives a percentage of the asset distributed equal to that person's share of distributions.

Subsection (4) of the New Act is new to Existing Law and clarifies that a member or transferee that becomes entitled to a distribution has the status and remedies of a creditor with respect to the distribution.

Subsection (5) of the New Act is not in RULLCA and comes from Section 608.4261 of Existing Law. However, it changes the default rule under Existing Law in that although it allocates profits and losses based on the value of contributions, consistent with Existing Law, it does not, in making the calculation, subtract any contributions that have been returned. This

default approach corresponds to the method of allocating distributions in Section 605.0404(1) of the New Act.

Section 605.0405. LIMITATIONS ON DISTRIBUTIONS. (corresponds to RULLCA Section 405; corresponds to Existing Law Subsection 608.426(1) and (2)).

Section 605.0405 (except for Subsection (5)) is based on and consistent with RULLCA Section 405.

Subsection (1) is consistent with Existing Law in prohibiting distributions that would render the LLC insolvent. The New Act, however, provides the two methods to be used in the determination of insolvency. Subsection (2) of the New Act is consistent with Existing Law, except that the New Act eliminates the requirement of identifying distributions that are based on financial statements or a fair valuation of assets. Section 605.0405(3) of the New Act is new to Existing Law and provides specified time frames for measuring whether various types of distributions meet the requirements of Section 605.0405(1).

Subsection (4) is new to Existing Law and clarifies that debts owed by a LLC to a member as a result of a permitted distribution put the member in parity with other unsecured creditors of the LLC, unless expressly subordinated by agreement.

Subsection (6) is new to Existing Law and provides that in measuring the impact of distributions made in connection with an LLC's winding up, claims that are discharged under Sections 605.0710-605.0713 of the New Act are ignored.

Section 605.0406. LIABILITY FOR IMPROPER DISTRIBUTIONS. (corresponds to RULLCA Section 406; corresponds to Existing Law Subsections 608.426(3) and (5) and Section 608.428).

Section 605.0406 of the New Act is based on Section 406 of RULLCA.

Subsection (1) is consistent with Existing Law, except it clarifies that personal liability under this Section is imposed on a member in a member-managed LLC or a manager of a manager-managed LLC that consents to a distribution that violates Section 605.0405 of the New Act.

Subsection (2) is new to Existing Law. It provides that in a member-managed LLC, if the operating agreement expressly relieves a member of the authority and duty to consent to distributions and imposes that authority and obligation on another member or members, the relieved member will have no liability under Subsection 605.0406(1).

Subsection (3), which imposes direct liability to the LLC by a member that receives a distribution that the member knows violates Subsection 605.0406(1) clarifies a potential conflict under Existing Law. Subsection 608.428(1)) of Existing Law does not require a showing that the member knew of the violation in order to impose direct liability on the member to the LLC. However, under Existing Law, a knowledge condition is found in Subsection 608.426(4)(b), which provides for the right of a manager or managing member who is held liable for an improper distribution to seek and obtain contribution from a member that received an unlawful

distribution, but only to the extent that member knew that the distribution was unlawful and presumably only to extent the distribution exceeded what could properly have been distributed.

Subsection (5) requires that an action seeking recovery of improper distributions (whether from a manager or member approving the improper distribution or from a member who received the improper distribution) must be commenced within two years after the improper distribution. This compares to what is a differentiated limitations period under Existing Law, where Section 608.426(5) dealing with actions against members or managers who authorize the improper distribution contains the same two year limitations period as in the New Act, but where Section 608.428(1) dealing with actions against members who receive improper distributions provides that such actions must be commenced within three years after the improper distribution.

Section 605.0407. MANAGEMENT OF LIMITED LIABILITY COMPANY. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.422).

This statutory structure does not follow either RULLCA or Existing Law. Differences relating to the management of LLCs between the New Act and RULLCA result in a number of provisions required under the New Act that are not in RULLCA. Accordingly, for organizational purposes, the management provisions of the New Act (which are in Section 403 of RULLCA and Section 608.422 of Existing Law) have been allocated among New Act Sections 605.0407 through 605.04074.

Section 605.04071 changes Existing Law by eliminating the concept of a "managing member." This change was made to eliminate the confusion and disparate interpretations under Existing Law as to the ramifications that having a managing member has on the nature of the management structure of the LLC. The term "managing member" is fairly unique to Florida and is not used in RULLCA, the ABA Prototype Model Limited Liability Act or state LLC statutes in any of the more prominent states. Subsection (1) (b) was added to clarify that existing LLCs that are managed by a managing member are deemed to be member-managed rather than manager-managed.

The following provisions of the New Act are from RULLCA and are new to Existing Law. Subsection (4) provides that, absent an agreement, a member in a member-managed LLC is not entitled to compensation for its services, except for reasonable compensation for services to wind up the LLC. Subsection (5) provides that a member that advances funds to an LLC is entitled to reimbursement. Subsection (6) provides that the management provisions in Sections 605.04071-605.04074 apply in the event of dissolution of the LLC, except that a person that wrongfully causes the dissolution cannot participate in management as either a member or manager.

The New Act authorizes a private agreement (the operating agreement) to establish an LLC's status as a manager-managed limited liability company, in addition to the right to so authorize in the public document (articles of organization). This is a carryover from Existing Law, which states that an LLC may (but is not required to) identify whether it is "manager-managed" in its articles of organization.

As in Existing Law, a limited liability company that does not effectively designate itself a

"manager-managed limited liability company" under the New Act will operate, subject to any contrary provisions in its operating agreement, under statutory rules governing a "member-managed limited liability company."

Section 605.04071. DELEGATION OF RIGHTS AND POWERS TO MANAGE. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.4236).

This Section is carried over from Existing Law and provides members and managers with the right to delegate their rights and powers to manage the limited liability company, including the right to delegate to agents, boards of managers, managing members or directors, officers and assistant officers, and employees. Although RULLCA Section 608.109(8) provides that the LLC has power to appoint officers, directors and agents, RULLCA does not provide for the delegation of rights or powers by members or managers.

Section 605.04072. SELECTION AND TERMS OF MANAGERS IN A MANAGER-MANAGED LLC. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Section 608.422).

Section 605.04072 of the New Act is consistent with Existing Law and deviates from RULLCA by providing that managers are chosen or removed by members holding a majority of the then-current interest in the profits of the LLC. RULLCA provides for the appointment and removal of managers by a simple majority of the members (i.e., on a per capita basis).

The following provisions are in RULLCA and are new to Existing Law. Subsection (5) provides that a member that is also a manager ceases to be a manager if the person is dissociated as a member. Similarly, Subsection (6) provides that if a member that is also a manager ceases to be a manager, the person is not dissociated as a member. Subsection (7) provides that a person's ceasing to be a manager does not eliminate any liability to the LLC or to the members that was incurred while the person was a manager.

Section 605.04073. VOTING RIGHTS OF MEMBERS AND MANAGERS. (corresponds to Section 407 of RULLCA; corresponds to Existing Law Sections 608.422 and 608.4231).

The following provisions of the New Act are consistent with Existing Law and different than RULLCA. Subsection (1)(b) provides that for a member-managed LLC, each member votes in accordance with its then-current percentage of the profits interest of the LLC. RULLCA provides that each member has an equal vote. Subsection (1)(c) of the New Act provides the general rule that in a member-managed LLC all decisions (whether in the ordinary course or not) require the consent by members holding a majority of the then-current interests in the profits of the LLC. The default rule under RULLCA for member-managed LLCs is that (i) the vote by a simple majority of members is required for actions in the ordinary course of the LLC's activities and affairs; and (ii) the unanimous vote of the members is required for actions outside of the ordinary course of the LLC's activities and affairs.

Subsection (1)(d) is consistent with RULLCA and provides that in a member-managed LLC, the unanimous vote of the members is required to amend the operating agreement or the

articles of organization. This is a change to Existing Law, as Section 608.423(3) of Existing Law does not expressly address amendment to the operating agreement and therefore, under Existing Law, the general rule applies, requiring the vote or consent by members holding a majority of the then-current interests in the profits of the LLC.

Subsection (2)(d) of the New Act is new to Existing Law and provides that for manager-managed LLCs, except as otherwise provided, a majority-in-interest of the members must approve any action outside of the ordinary course of the LLC's activities and affairs. This varies from RULLCA, which requires this vote to be unanimous.

Under the New Act, Subsection 2(b) provides that, in a manager-managed LLC, actions in the ordinary course of an LLC's activities and affairs are decided by the affirmative vote of a majority of the managers. This is consistent with Section 608.4231(6) of Existing Law.

The following provisions of the New Act are consistent with Existing Law and are not in RULLCA. Subsection (3) adds to Existing Law that if either of the exceptions under Subsection (5)(b) of the New Act applies, a transferring member that transfers all of its transferable interest continues to vote as a member based on the percentage of profits interest that the transferring member would have had but for the transfer. Subsection (4), consistent with Subsection (8) of Section 608.4231(3)(a) of Existing Law, requires that notice of an action by written consent of the members be sent within 10 days to all members who did not consent. Subsection (5) of the New Act is consistent with Subsection (6) of Section 608.4231 of Existing Law and provides that managers may act by unanimous written consent or by proxy vote. The Section eliminates the requirement under Existing Law to provide notice of any non-unanimous manager written consent actions within 10 days to all managers that did not consent to the action because, under the default rule in Subsection (2), managers only can act by unanimous written consent.

Section 605.04073(6) of the New Act is neither in RULLCA nor Existing Law but is consistent with Florida corporate law and is believed by the Drafting Committee to be consistent with Existing Law. It provides that meetings of members or managers may be held telephonically.

The New Act eliminates the following provisions under Existing Law, none of which is in RULLCA:

- Section 608.4231(4), which prohibits amending the articles of organization or the operating agreement to provide for a vote of less than a majority-in-interest.

- Section 608.4231(5), which provides that notwithstanding anything to the contrary in the articles of organization or the operating agreement, members have the right to vote on dissolutions and mergers.

- Section 608.4231(7), which expressly permits the articles of organization or the operating agreement to provide for the mechanics of voting. This was viewed as superfluous, because, under Sections 605.0105 and 605.0201(3)(e) of the New Act, the operating agreement and the articles of organization, respectively, can include any provision that is not expressly prohibited by the New Act.

Section 605.04074. AGENCY RIGHTS OF MEMBERS AND MANAGERS. (contrast with Section 407 of RULLCA; corresponds to Existing Law Section 608.4235)

The default rule for agency rights of members and managers follows Existing Law. That is, in a member-managed LLC, all members are automatically agents of the company. However, in a manager-managed LLC, all managers are agents of the company and members are not automatically agents of the company.

Acts of an agent bind the company, so long as the act was in the name of the company and was apparently for carrying on the ordinary course of the company's activities and affairs. There is an exception which provides that the general rule will not apply if the agent did not have actual authority to act in the particular matter, and the person with whom the agent was dealing knew, or had notice, that the agent lacked authority.

An act of an agent which is not for apparently carrying on in the ordinary course of the company's activities and affairs, binds the company only if the act was authorized by the appropriate vote of the members.

Section 605.0408. REIMBURSEMENT, INDEMNIFICATION, ADVANCEMENT AND INSURANCE. (corresponds to RULLCA Section 408; corresponds to Existing Law Section 608.4229).

This Section is modeled on Section 408 of RULLCA, but deviates by making reimbursements under Subsection (1) and indemnification under Subsection (2) discretionary rather than mandatory. Discretionary indemnification is consistent with Section 608.4229(1) of Existing Law.

Subsection (1) is not in Existing Law and provides that an LLC may reimburse a member of a member-managed LLC or a manager of a manager-managed LLC for payments made by the member or manager on behalf of the LLC, provided the member or manager complied with the statutory standards of conduct for members and managers.

Subsection (2) varies from Existing Law in that it expands the categories for which indemnification of a current or former member or manager is prohibited by including in such group any violation of Sections 605.04071-605.04074 (relating to management of the LLC) and any violation of Section 605.04091 (standards of conduct for members and managers). Existing Law limited the prohibition of indemnification and advancement of expenses to violations of criminal law, a transaction in which the person seeking indemnification received an improper personal benefit and liability in connection with improper distributions (which also is specifically prohibited under Section 608.0403(2) of the New Act).

Subsection (3) provides for advancement of expenses, including attorney's fees, incurred by a current or former member or manager of an LLC if the person agrees to repay the advancement if it is subsequently determined that the person in not entitled to indemnification under the New Act. Unlike the corresponding provisions in the FBCA, Existing Law does not require a promise to repay the advancement. Although Sections 608.4229(1) and 608.4229(3) of Existing Law deal with indemnification and advancement of expenses, respectively, of members or managers "or any person," Subsections (1) and (3) of the New Act only addresses

indemnification and advancement of expenses, respectively, of current or former members and managers.

Subsection (4) is not in Existing Law and permits an LLC to obtain insurance against liability suffered by a member or manager even if (i) under Section 605.0105(3)(g) the payment by the LLC would prohibited; or (ii) the operating agreement is not permitted to provide indemnification for the conduct under Section 605.0105(3)(p) of the New Act. This is consistent with actual practice under Existing Law.

Section 605.04091. STANDARDS OF CONDUCT FOR MEMBERS AND MANAGERS. (corresponds to portions of RULLCA Section 409; corresponds to Existing Law Section 608.4225).

This Section is modeled in part after Section 409 of RULLCA but has been revised to be consistent with Existing Law and significantly departs from RULLCA as follows. RULLCA presents an "un-cabined" approach by providing that the duties of care and loyalty include but are not limited to certain specified and defined obligations. The New Act, consistent with Existing Law, departs from RULLCA's "un-cabined" approach and instead limits the definition of the duties of care and loyalty to only those obligations stated in Sections 608.4091(2) and 608.4091(3), respectively.

Subsection (1) changes Existing Law by using the term "fiduciary" to describe the duties of care and loyalty. This varies from RULLCA, which identifies the duty of loyalty as a "fiduciary" duty but does not use the term "fiduciary" relative to the duty of care.

Subsection (2) is from RULLCA, but limits the duty of loyalty to certain specified duties that are substantively consistent with the definition of the duty of loyalty under Existing Law. Subsection (2)(b) reflects the safe harbor provisions of Section 605.04092 discussed below, which safe harbor provisions are not in RULLCA and which, if met, result in no violation of the duty of loyalty.

Although Subsection (3) also follows the language from RULLCA, that Subsection actually sets forth a duty of care standard that was essentially already in Existing Law in Section 608.4225. However, the New Act adopted the RULLCA wording exactly, adding the words "*willful or*" so as to read "*The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.*" The duty of care standard that appears in the New Act is largely the same as in Existing Law and matches the duty of care standard in RULLCA. It is interesting to note, from an historical perspective, that the duty of care standard which appears in the 2011 version of RULLCA and on which the New Act is based actually reflects a significant change from the 2006 version of RULLCA which provided for an "ordinary care/business judgment rule" duty of care standard.

In slight contrast to the language in Existing Law, but following RULLCA's lead, the language in Subsection (3) includes additional language clarifying Existing Law by providing that the duty of care also arises in connection with conducting or winding up of the activities and affairs of the LLC. The Drafting Committee does not believe this is a substantive change from

Existing Law, but chose to include the additional language as a clarification to eliminate any potential for confusion in this regard.

The New Act varies from both RULLCA and Existing Law by changing the references to "intentional misconduct" to instead reference "willful or intentional misconduct." This change was made throughout Chapter 605 to reflect the various inconsistent interpretations by the courts of the definitions of willful misconduct vs. intentional misconduct and to make sure that serious misconduct is covered, whether it is called intentional misconduct or willful misconduct.

The following provisions of Section 605.04091 of the New Act vary from RULLCA and are consistent with Existing Law in the following respects:

- Subsection (4) eliminates the adjective "contractual" before the term "obligation of good faith and fair dealing."

- Subsection (5) applies both to members in a member-managed LLC as well as to managers in a manager-managed LLC.

- Subsection (6) comes from Section 608.4225(2) of Existing Law.

- Subsection (7) comes from Section 608.4225(4) of Existing Law and clarifies that that a member or manager that has knowledge that makes reliance unwarranted under Section 605.04091(6) of the New Act will not be considered to be acting in good faith.

- Subsection (8) comes from Section 608.4225(3) of Existing Law and provides that a member or manager may rely on factors deemed relevant, including those listed in this Section.

- Subsection (9) applies to the person winding up the LLC acting as the legal representative of the last surviving member.

The New Act eliminates Section 608.4225(5) of Existing Law, which is also not in RULLCA. The eliminated provision of Existing Law provides that a manager or member that complies with the applicable Section of Existing Law in connection with the performance of its, his or her duties with respect to the LLC will have no liability with respect to such actions. The Drafting Committee, consistent with RULLCA, does not believe that this needs to be expressly stated.

Section 605.04092. CONFLICT OF INTEREST TRANSACTIONS. (corresponds to RULLCA Subsections 409(f) and (g); corresponds to Existing Law Section 608.4226).

This Section expands Sections 409(f) and 409(g) of RULLCA (which have been omitted from Section 605.4091 as a result of the inclusion of Section 605.04092 of the New Act. In general, Section 605.04092 of the New Act represents a reorganization, expansion in coverage and clarification of the concepts set forth in Section 608.4226 of Existing Law, which provides a safe harbor for approving a transaction between an LLC and a member or manager that has a direct or indirect financial or other interest in or is a direct or indirect party to the transaction

(sometimes referred to below as an "interested transaction"), which if met removes liability to the interested member or manager.

Subsection (1) is new to and clarifies Existing Law by providing definitions of (i) when a manager or member is "indirectly" a party to a transaction; (ii) when a manager or member has an "indirect material financial interest"; and (iii) when a transaction is "fair to the LLC."

Subsection (3) eliminates an ambiguity in Existing Law by providing that, in all events, to receive the liability protection of this Section, a transaction in which a manager or member has an interest or to which a manager or member is a party must be fair to the LLC. In contrast, Section 608.4226(1) of Existing Law provides that the Section is applicable if:

(i) approved by the disinterested managers, provided they have knowledge or disclosure of the relationship or interest;

(ii) approved by the members entitled to vote, provided they have knowledge or disclosure of the relationship or interest; **or**

(iii) the transaction is fair and reasonable.

The use of the term "or" under Existing Law suggests that an interested transaction can be approved under this Section without meeting the fairness requirement. Cases in other jurisdictions, however, superimpose the fairness requirement to all interested transactions, and the New Act follows this approach.

Subsection (3) is new to Existing Law and provides that if a transaction is fair to the LLC, no equitable relief, damages or sanctions can be imposed as a result of a member or manager having a direct or indirect material financial interest or directly or indirectly being a party to the transaction. Existing Law limits the benefits of the Section to the transaction not being void and voidable, which is also provided in Section 605.04092(2) of the New Act.

Subsection (4) is new to Existing Law and provides for the burden of proving fairness or lack of fairness of the interested transaction to shift depending upon whether or not the transaction was approved by a majority of (i) the disinterested managers, in a manager-managed LLC or (ii) the members in an member-managed LLC, or in a manager-managed LLC where the managers cannot or have not approved the transaction in accordance with clause (i), provided that with respect to either clause (i) or (ii), the material facts of the transaction were known by or disclosed to the approving managers or members. Subsection (4) of the New Act further provides that the condition of approval by a majority of disinterested managers described in clause (i) or (ii) cannot be met if there is only one manager or member approving the transaction, which is similar to Section 608.4226(2) of Existing Law. If neither clause (i) nor (ii) applies, liability protection is still available under the New Act if the transaction is fair to the LLC, however, the New Act provides that the person defending the validity of the transaction has the burden of proving the fairness of the transaction to the LLC.

Subsection (6) of the New Act is new to Existing Law and clarifies that a person challenging an interested transaction is not prohibited from proving that a purported disinterested manager or member who approved the transaction was not, in fact, disinterested.

Section 605.04093. LIMITATION OF LIABILITY OF MANAGERS AND MEMBERS. (no corresponding RULLCA provision; corresponds to Existing Law Section 608.4228).

This Section is taken almost verbatim from Existing Law (we no longer use the term "managing-member" in the New Act, so that is the difference), and continues to statutorily provide that a manager in a manager-managed company, and a member in a member-managed company, are not liable personally for damages to the company or its members or to any third person, for their decisions or failure to act, unless: (a) they breached their duties, and (b) their failure to act or the breach of their duties (i) was a violation of criminal law, (ii) was a transaction where they derived an improper personal benefit, (iii) resulted in an improper distribution, (iv) was in conscious disregard of the best interests of the company, (v) constituted willful misconduct, or (vi) was reckless, or committed in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. "Recklessness" is defined as acting or failing to act in conscious disregard of a risk known, or so obvious that it should have been known, to the manager(s) or member(s) in control of the company. Another subsection, (3), addresses whether a manager or member in management is deemed to have derived an improper personal benefit, and allows for such a transaction to be authorized by the members. The section also makes it clear that the circumstances set forth in subsection (3) of this section are not exclusive and do not preclude the existence of other circumstances in which a manager will be deemed not to have derived an improper benefit.

Section 605.0410. RECORDS TO BE KEPT; RIGHTS OF MEMBER, MANAGER, AND PERSON DISSOCIATED TO INFORMATION. (corresponds to RULLCA Section 410; corresponds to Existing Law Subsection 608.4101(1)).

This Section is modeled on Section 410 of RULLCA. Subsection (1) is from Existing Law, and provides a list of specific records that are required to be maintained by the LLC. However, the New Act deletes the requirement of the LLC maintaining a record stating any events that result in the dissolution and winding up of the LLC.

The following provisions of Section 605.0410 of the New Act are from RULLCA and are new to or change Existing Law:

- Unlike Existing Law, the New Act provides different rights for members with respect to records depending upon whether the LLC is member-managed or manager-managed. For example, Subsection (2)(a) adds to Existing Law a condition of materiality in order for a member in a member-managed LLC to inspect and copy records.

- Subsection (2)(c) provides that for member-managed LLCs, a member that knows any of the information required to be furnished to members by the LLC under Section 605.0410(2) also has a duty to furnish that information. Similarly, Subsection (3)(a) provides that each manager that knows any information required to be furnished to members by the LLC under Subsection (2) also has a duty to furnish that information.

- Subsection (2)(b), which provides that an LLC is not required to furnish information to a member that the LLC reasonably believes is already known by the member. It also

changes, consistent with RULLCA, the standard in Existing Law for obtaining the information from "reasonably required for" to being "material to" the proper exercise of the member's rights and duties with respect to the LLC.

- Subsection (3)(a) provides that for manager-managed LLCs, managers have the same rights to information that members have under Section 605.0410 (2).

- Subsection (3)(b) provides that for manager-managed LLCs, members have the right to inspect and copy, in addition to the items set forth in Subsection (1), all information regarding the LLC that is "just and reasonable" provided that (i) the purpose for the information is reasonably related to the member's interest as a member; (ii) the member makes a demand in a record that describes in reasonable detail the requested information; and (iii) the information requested is directly connected to the member’s purpose.

- Subsection (3)(c) provides that if a member in a manager-managed LLC makes a demand for information the LLC must, within 10 days after the demand, provide (i) a description of the information that the LLC will provide and the time and place where the information will be provided; and (ii) if applicable, the reasons that the LLC declines to provide any of the requested information.

- Subsection (3)(d) provides that in a manager-managed LLC, the LLC must provide to each member, without demand, all information that is known to the company and is material to each consent or withholding of consent of a matter that the member has the right to exercise.

- Subsection (4) provides that on 10 days' demand by a person dissociated as a member (or by a deceased member's legal representative pursuant to Section 608.5041), the LLC will provide access to the information that the person was entitled to as a member, provided that (i) the information relates to the period in which the person was a member; (ii) the information is sought in good faith, and (iii) the person meets the same requirements as applicable to a member under Subsection (3)(b).

- Subsection (5) provides that the LLC must respond to a demand under Subsection (4) in the same manner as required under Section 605.0410(3)(c) (i.e., within 10 days providing what information will be provided and when and where; and giving the reasons why any requested information is not given).

- Subsection (6) provides that for all information demanded under Section 605.0410, the LLC may charge labor and material for copying costs. This is a change to Section 608.4101(2) of Existing Law, which only provides for such charges for members that are given access to records under that Section.

- Subsection (7) provides that a member or dissociated member may exercise rights under this Section through an agent, or in the case of an individual under legal disability, a legal representative and that any restriction on access to information in the operating agreement or under Subsection (10) applies to both the member as well as the agent or legal representative. Section 608.4101 of Existing Law is not consistent in that it provides that an agent or legal representative may act on behalf of a member and does not expressly provide that permissible limitations to access to records or information apply equally to agents and legal representatives.

- Subsection (8) clarifies that a transferee does not inure to the rights of a member under Section 605.0410.

- Subsection (9) provides that Section 605.0504 (the Section describing the power of a legal representative) applies if a member dies.

- Subsection (10) provides that, in addition to imposing restrictions in the operating agreement, and except for the right to the records in Section 605.0410 (1), an LLC may in the ordinary course impose reasonable restrictions on obtaining and using information under this Section. It expands Section 608.4101(4) of Existing Law, which only applies to manager-managed LLCs. In addition, Section 605.0410(10) of the New Act, which is not in Existing Law, provides that the burden of proving the reasonableness of a restriction under this Section is on the LLC.

Section 605.0411. COURT-ORDERED INSPECTION. (no corresponding provision in RULLCA; corresponds to Existing Law Subsection 608.4101(6))

This provision is not in RULLCA and expands Existing Law.

Subsection (1) clarifies Section 608.4101(6) of Existing Law by describing the location of the appropriate circuit court for enforcement of a right to information under Section 605.0410 of the New Act. It further clarifies that the court may order inspection and copying of the requested records at the LLC's expense.

The following subsections of the New Act are new to Existing Law. Section 605.0411(2) provides that if the court orders inspection or copying of records, it shall also require the LLC to pay the costs incurred by the person seeking enforcement, unless the LLC shows that it refused the request in good faith and believed it had a reasonable basis for the refusal. Section 605.0411(3) provides that a court that orders inspection or copying may impose reasonable restrictions on the use or distribution of the information by the person demanding them.

Article 5: Transferrable Interests and Rights of Transferees and Creditors

Section 605.0501. NATURE OF TRANSFERABLE INTEREST. (corresponds to RULLCA Section 501; corresponds to Existing Law Section 608.431).

This provision is modeled from RULLCA Section 501.

Section 605.0501, consistent with other provisions in the New Act, deviates from Existing Law by using the term "transferable interest," which the New Act generally defines as the right of a person to distributions. This is distinguished from a member's "interest," meaning the entire membership interest (the transferable interest plus all other rights of a member, such as rights to vote, manage, records and information). In general, this Section of the New Act provides for transfers of transferable interests and the ability to create certificates of transferable interests, while Existing Law provides for the transfers of membership interests and the ability to create, if authorized by the operating agreement, certificates of membership interests. Section 605.0501 of the New Act provides that a transferable interest is personal property, while Section 608.431 of Existing Law provides the same for a member's interest.

Section 605.0502. TRANSFER OF TRANSFERABLE INTEREST. (corresponds to RULLCA Section 502; corresponds to Existing Law Section 608.432).

This Section is based on RULLCA Section 502.

Subsection (1) provides that the transfer of a member's transferable interest (i) is permitted; (ii) does not, by itself, cause the transferring member to become dissociated or the LLC to dissolve or wind up; and (iii) does not entitle the transferee to either exercise any management rights or have access to the LLC's records or information, except as provided in Subsection (3). The substantive effect of this Section generally is consistent with Section 608.432 of Existing Law.

Subsection (2) is consistent with Existing Law and provides that a transferee of a transferable interest has the right to receive the distributions that the transferring member would have been entitled but for the transfer. This Section, however, deletes the provision under Existing Law that the transferee also has the right to share in profits and losses and to receive allocations of income, gain, loss, deduction and credit or similar items to which the transferring member otherwise would have received and, if not otherwise addressed in the operating agreement, leaving the tax effect of such transfer and allocations to the Internal Revenue Code and the accounting effect of such transfer and allocations to the governing accounting principles.

The following provisions of Section 605.0502 are from RULLCA and are either entirely new to, or change comparable provisions of, Existing Law:

- Subsection (3) provides that in a dissolution or winding up of an LLC, the transferee of a transferable interest has the right to an accounting only with respect to the LLC's transactions that occur after the date of dissolution.

- Subsection (4) provides that a transferable interest may be certificated. It changes Section 608.432(3) of Existing Law, which provides for a certificated membership interest (as opposed to a certificated transferable interest) only if certification of a member's interest is provided for in the articles of organization or the operating agreement of the LLC.

- Subsection (5) clarifies Existing Law and provides that an LLC is not required to give any rights to the transferee of a transferable interest unless and until it knows or has notice of the transfer.

- Subsection (6) provides that a transfer of a transferable interest that is in violation of a provision in the operating agreement is not effective against a person that has knowledge or notice of the operating agreement provision.

- Subsection (7) provides that, except as provided in Section 605.0602(5)(b), a member that transfers its transferable interest retains (a) all rights as a member, except for the rights to distributions associated with the transferable interest, and (b) all duties and obligations of a member. Nevertheless, because of the referenced exception, a member becomes dissociated as a member if that member transfers 100% of that member's transferable interest (other than pursuant to a transfer for security or pursuant to a charging order under 605.0503 of the New Act that has not yet been foreclosed). This Section is consistent with, but provides additional detail to and clarifies, Section 608.432(2)(c) of Existing Law.

- Subsection (8) provides that a transferee that becomes a member is liable for the obligations of the transferring member under Sections 605.0403 (liability for a promised contribution) and 605.0406(3) (liability for receiving an unlawful distribution) to the extent that the transferee knows about the obligations of the transferring member at the time the transferee becomes a member. This Section is largely consistent with 608.433(2) of Existing Law, which provides that an assignee (i.e., transferee) who becomes a member is liable for the obligations of that assignee's assignor to make and return contributions as provided in Section 608.4211 and wrongful distributions as provided in Section 608.428. However, under Existing Law, that assignee is not obligated for liabilities which are unknown to that assignee at the time the assignee became a member and which could not be ascertained from the articles of organization or the operating agreement.

Section 605.0503. CHARGING ORDER. (corresponds to RULLCA Section 503; corresponds to Existing Law Subsections Section 608.433(4)-(9)).

This Section is modeled after and largely parallels the exact language of Subsections (4)-(9) of Section 608.433 of Existing Law. In light of the controversial decision of the Florida Supreme Court in *Olmstead v. Federal Trade Commission*, 44 So.3d 76 (Fla. 2010) and the highly negotiated compromises among various constituents that led to the enactment in 2011 of the Olmstead Patch (Subsections (4)-(9) of 608.433), the Drafting Committee decided not to make any substantive changes to this Section in the New Act.

Although the language in Section 605.0503 differs from the language in Section 503 of RULLCA, it is generally consistent from a substantive perspective with that Section as well.

Section 605.0504. POWER OF LEGAL REPRESENTATIVE. (corresponds to RULLCA Section 504; corresponds to Existing Law Section 608.434).

This Section is substantially the same as Existing Law Section 608.434 and identifies the detailed rights of a legal representative. However, "legal representative" is defined more broadly in Section 605.0102(34) of the New Act than in Existing Law.

Article 6: Dissociation

Section 605.0601. POWER TO DISSOCIATE AS MEMBER; WRONGFUL DISSOCIATION. (corresponds to RULLCA Section 601; corresponds to Existing Law Section 608.427).

This Section is based on RULLCA Section 601. The following provisions of Section 605.0601 of the New Act are from RULLCA and change Existing Law:

Section 605.0601(1) provides that a member may dissociate at any time, rightfully or wrongfully, by withdrawing by "express will," except that a wrongful dissociation, although still effective, has liability consequences as set forth in Section 605.0601(3). Under Existing Law a member does not have the right, unless permitted by the articles of organization or operating agreement, to withdraw or resign prior to dissolution and winding up.

Section 605.0601(2) sets forth a concept new to Existing Law of a wrongful dissociation. A wrongful dissociation under the New Act means (a) a dissociation in violation of the operating agreement; or (b) if, before the LLC is wound up, the person (i) withdraws by express will, (ii) is expelled by judicial order; (iii) is dissociated under Section 605.0602(8); or (iv) is dissociated as a result of the person's willful dissolution or termination, if the person is not a trust (other than a business trust), an estate or an individual.

Section 605.0601(3) provides that a member that wrongfully dissociates is liable for damages the dissociation causes to the LLC and the other members, in addition to any other liability the dissociating member may have to the LLC or the members.

Section 605.0601(4) is an addition to the RULLCA language and carries forward language from Section 608.427(1) confirming that the articles of organization or the operating agreement may include an express provision that makes a limited liability company interest non-assignable prior to dissolution and winding up of the limited liability company.

Section 605.0602. EVENTS CAUSING DISSOCIATION. (corresponds to RULLCA Section 602; corresponds to Existing Law Section 608.4237).

This Section is modeled after RULLCA Section 602 and sets forth the events that cause a person's dissociation as a member.

Section 605.0602(1) of the New Act is from RULLCA and is new to Existing Law. It provides that a person dissociates as a member by express will at the time the LLC has notice of the member's intent to withdraw, unless the notice makes the withdrawal effective as of a later date. As discussed above in Section 608.601 of the New Act, a person has no right to withdraw as a member under Existing Law. In addition to an "express will" dissociation, Sections 605.0602(2)-605.0602(15) of the New Act provide 14 separate causes of dissociation that are new to Existing Law, other than the bankruptcy or insolvency of a member (which are generally the same in both the New Act and Existing Law).

The New Act does not adopt Section 608.4237(2) of Existing Law, pursuant to which a person ceases to be a member 120 days after any of the specified proceedings has not been dismissed, or if a trustee, receiver, or liquidator of the member or its assets is not vacated or stayed, within 90 days after either the appointment or the expiration of the stay.

Section 605.0603. EFFECT OF DISSOCIATION. (corresponds to RULLCA Section 603; corresponds to Existing Law Section 608.427).

This Section is based on Section 603 of RULLCA.

Section 605.0603 of the New Act, which is from RULLCA, provides that if a person is dissociated, (i) the person loses the right to participate in the LLC's management, which is not consistent with Existing Law; and (ii) if the LLC is member-managed, the person has no further duties or liability for breaches of the standards of care for members under Section 605.04091 of the New Act with respect to matters and events that take place after the dissociation. This provision is new to Existing Law.

Section 605.0603 further generally provides that any transferable interest that the person had immediately prior to dissociation continues to be owned by the person as a transferee. The New Act eliminates the provision in Section 608.427(2) of Existing Law that a withdrawing member in 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.

Article 7: Dissolution and Winding Up

(RULLCA Article 7; New Act Sections 605.0701 - 605.0717)

The Drafting Committee decided to supplement RULLCA's dissolution provisions with some of Florida's Existing Law dissolution provisions. New Act Sections 605.0701 through Section 605.0717 describe the events causing dissolution, winding up of the LLC, consequences of the dissolution of the LLC, as well as grounds and procedures for judicial and administrative dissolution, appointment of receivers and custodians, reinstatement after administrative dissolution, and procedures for dealing with known and unknown claims against the LLC during dissolution.

Section 605.0701. EVENTS CAUSING DISSOLUTION. (corresponds to RULLCA Section 701; corresponds to Existing Law Section 608.441).

The Drafting Committee generally followed RULLCA 701 in stating the five events which cause dissolution.

Section 605.0701 provides for five default events causing dissolution, which are very similar to the events causing dissolution under Existing Law Section 608.441, although the language used in RULLCA was adopted by the Drafting Committee in the New Act in the interest of maintaining uniformity.

1. Upon the occurrence of an event described in the operating agreement.

2. Upon the consent of all members.

3. Upon the passage of 90 days without a member, unless certain circumstances apply.

4. Upon the entry of a decree of judicial dissolution pursuant to 605.0705.

5. Upon the filing of a statement of administrative dissolution by the Department of State.

The Drafting Committee deviated from RULLCA 701 by not addressing the grounds for judicial dissolution in 605.0701, but rather moved the grounds for judicial dissolution into a separate Section (605.0702). Existing Law specified the grounds for judicial dissolution in a separate Section (608.449), and the Drafting Committee believes that practitioners would be more comfortable looking at the grounds for judicial dissolution in a separate Section of the New Act.

Section 605.0702. GROUNDS FOR JUDICIAL DISSOLUTION. (corresponds to RULLCA Subsection 701(a)(4); corresponds to Existing Law Sections 608.441(3) and 608.449).

The Drafting Committee determined that Existing Law was useful in this regard, and should be continued, so it looked to Sections 608.441(3) and 608.449 as well as RULLCA 701(a)(4), and provided grounds for judicial dissolution by order of a circuit court. Note that the operating agreement cannot vary the grounds for judicial dissolution specified in Subsection 605.0702(2) (see Subsection 605.0105(3)(j)).

The grounds for judicial dissolution in Section 605.0702(2) of the New Act are also in RULLCA 701(a)(4), with the exception of the New Act not adopting the "oppression" of members as a ground for judicial dissolution. The Drafting Committee carefully considered oppression as a basis for judicial dissolution. Although there was strong sentiment in favor of adopting the RULLCA oppression provision from a number of Drafting Committee members, the majority decided otherwise. Oppression, as a basis for judicial dissolution, is not in Existing Law, and no other Florida business entity statute permits oppression as a basis for judicial dissolution. Therefore, the Drafting Committee concluded that the oppression issue should be deferred until a "harmonization" effort is undertaken by the Business Law Section of The Florida

Bar to more carefully consider whether oppression should be adopted as a basis for seeking judicial dissolution in the corporation, LLC, and partnership statutes simultaneously.

The New Act grounds for judicial dissolution are:

1. In a proceeding brought by the Department of Legal Affairs if it is established that the articles of organization were obtained through fraud, or where the LLC has exceeded or abused its authority; or if special proceedings are brought based on other causes as provided in any other law of Florida.

2. In a proceeding brought by a member or manager if it is established that the company's activities are unlawful, or persons in control of the company are acting illegally or fraudulently, or if it is not reasonably practicable to carry on the activities of the LLC in accordance with its operating agreement, if the assets are being misappropriated or wasted causing injury to the LLC or its members, or the managers or members are deadlocked and irreparable injury is threatened or being suffered.

3. In a proceeding brought by the LLC to have its voluntary dissolution continued under court supervision.

One of the changes from Existing Law was the elimination of Existing Law Section 608.449(3) which permitted a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the LLC was insolvent, or where the LLC admitted that the creditor's claim was due and owing and the LLC was insolvent. The reason for removing that basis for judicial dissolution was twofold: first, it was not in RULLCA and second, the rights of creditors to bring actions to dissolve the LLC because the LLC was insolvent were not found in most other LLC Acts examined by the Drafting Committee, including the Delaware LLC Act.

Another non-uniform change added by the Drafting Committee in Section 605.0702(2) provides for what happens in instances in which the operating agreement contains a "deadlock sale provision." If the operating agreement at issue contains a “deadlock sale provision,” the new language in this added non-uniform change sets forth a process that can be initiated in the event of a deadlock among the managers or members in control of the company where the members are unable to break the deadlock and irreparable injury to the company is being threatened or is occurring. Rather than judicial dissolution, the “deadlock sale provision” in the operating agreement will control, if exercised, including a sale of membership interests or governance changes, in order to break the deadlock. This new language was deemed necessary to protect the right of the parties to contract away deadlocks without resorting to judicial intervention or dissolution of the company.

Section 605.0703. PROCEDURE FOR JUDICIAL DISSOLUTION; ALTERNATIVE REMEDIES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4491)

The New Act addresses the proper venue for judicial dissolution proceedings and the proper parties to a judicial dissolution proceeding; and also provides for alternative remedies to dissolution, including injunctions, appointment of receivers and custodians with broad or limited

powers and duties, as well as any other remedy the court deems appropriate upon a showing of good cause, including any equitable remedy.

The New Act also makes it clear that all of the provisions of Existing Law Section 57.105 (Attorney's fee; sanctions for raising unsupported claims or defenses) apply in any case brought seeking judicial dissolution.

Section 605.0704. RECEIVERSHIP OR CUSTODIANSHIP. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4492)

This Section provides for the appointment of a receiver or custodian by the court in a judicial proceeding brought to dissolve the LLC, and permits the appointment of ancillary receivers or custodians to administer the assets and business of the LLC. This provision is taken from Existing Law Section 608.4492.

Section 605.0705. DECREE OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4493)

Section 605.0705 provides for the circuit court to issue a decree of dissolution specifying the date of dissolution after a hearing, which decree must be filed by the Department of State. The court can direct and supervise the winding up of the company, and may require creditors to file with the clerk of the court or a receiver if one is appointed, their claims against the company. RULLCA does not have a separate Section dealing with decrees of dissolution, but does make reference to a court order of dissolution in RULLCA Section 701 (4). The Drafting Committee believes that Existing Law Section 608.4493, upon which Section 605.0705 is based, provides more guidance for practitioners and courts.

Section 605.0706. ELECTION TO PURCHASE INSTEAD OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Florida Business Corporation Act Section 607.1436)

Under this new provision, which comes from the FBCA, in an action initiated by a member seeking judicial dissolution, the LLC may elect, or if the LLC fails to elect, one or more of its members may elect, within 90 days of the filing of the complaint (or at such later time as the court may allow in its discretion), to buy out the membership interest of the petitioning member, at the "fair value" of the member's interest. Procedures are put in place under the New Act to address this election to purchase, and to determine the fair value of the membership interest in the event the parties cannot agree upon the fair value, as well as procedures for the court to order actions in furtherance of the purchase election. This provision also allows the court to provide for the payment of the fair value in installments over time with interest.

Section 605.0707. ARTICLES OF DISSOLUTION; FILING OF ARTICLES OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Sections 608.445 and 608.446)

New Act Section 605.0707 derives primarily from Existing Law Section 608.445. There is not a comprehensive provision in RULLCA dealing with the articles of dissolution as these are unique to the requirements of the Departments of State in the various states.

The New Act requirements for filing articles of dissolution are substantially the same as Existing Law, with one major difference - in the New Act, the Drafting Committee combined Existing Law Sections 608.445 (Articles) and 608.446 (Filing) into one section. The requirements for the minimum content in the articles of dissolution remain similar to Existing Law with just a few changes to style and language. The filing requirements with the Department of State are essentially the same as Existing Law, and the consequence of the filing is affirmatively stated as causing the LLC to cease doing business and to begin winding up its activities and affairs.

The filing of the articles of dissolution begins the process of dissolution, which requires winding up, and ultimately, once winding up is completed, the "termination" of the existence of the LLC with the permissive filing of a statement of termination.

Dissolution does not change applicable law for determining actual and apparent authority, unless the court intervenes and appoints a receiver, trustee, or some legal representative of the members or the company to conduct the winding up and termination of the LLC.

There is no stated time requirement for dissolution, as the circumstances of each LLC dissolution will be unique, with some companies requiring a much longer time to wind up their activities and affairs.

Section 605.0708. REVOCATION OF ARTICLES OF DISSOLUTION. (corresponds to RULLCA Section 703; corresponds to Existing Law Section 608.4411).

This provision derives primarily from RULLCA 703, but also includes aspects of Existing Law Section 608.4411, except that the Drafting Committee elected to use the Existing Law term "revocation" rather than RULLCA's use of the term "rescinding" in the title to the provision. This Section permits an LLC to revoke its previously filed articles of dissolution (so long as it has not yet filed an effective "statement of termination" as described in New Act 605.0709), at any time prior to 120 days after the effective date of its articles of dissolution. If properly filed, the LLC may resume its activities and affairs as if the articles of dissolution had never been filed. However, the last subsection of this Section 605.0708 provides protection for third parties who acted in reliance on the initially filed articles of dissolution and were adversely affected.

Section 605.0709. WINDING UP (corresponds to RULLCA Section 702; no corresponding provision in Existing Law)

This provision is taken almost verbatim from RULLCA Section 702. Existing Law does not have a comprehensive winding up provision. The Drafting Committee believes the organization and substance of the RULLCA provision will be useful for practitioners.

New Act Section 605.0709 provides rules for winding up the LLC's activities and affairs, providing for payment of its debts, and sale of its assets, as well as bringing or defending actions and proceedings, and distributing assets to its members.

Under Section 605.0709, a member, manager, or legal representative may conduct the winding up, and may seek judicial supervision of the process or the appointment of one or more persons to wind up the company's activities and affairs.

Section 605.0709 permits a creditor, upon establishing good cause and under specified circumstances, to initiate an action for judicial appointment of a trustee or receiver to wind up the affairs of the company.

Section 605.0710. DISPOSITION OF ASSETS IN WINDING UP. (corresponds to RULLCA Section 707; corresponds to Existing Law Section 608.444)

The New Act adopts the RULLCA Section 707 language, and provides that in winding up its affairs, the company "shall" apply its assets to discharge its liabilities to creditors, including members that are creditors.

Subsection 605.0710(1) provides non-member creditors of the LLC with a cause of action if the assets of the company are not used to pay creditors. Under Section 605.0105(3)(p) of the New Act, the operating agreement "may not restrict the rights under the [LLC Act] of a person other than a manager or member."

Under Subsection 605.0710(2), any surplus after paying creditors "must" be distributed in the following order (these are default rules which may be overridden in the operating agreement): first, to return unreturned contributions of members and transferees; and second, , to the extent there is surplus available, in the manner in which they shared distributions prior to dissolution. All distributions to creditors must be paid in money.

Existing Law Section 608.444 has a similar distribution waterfall, but the language in RULLCA was deemed preferable to Existing Law by the Drafting Committee.

Section 605.0711. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 704; corresponds to Existing Law Section 608.4421)

Existing Law deals with known and unknown claims in one section, Section 608.4421, which provides a non-mandatory method of settling claims, and a three year statute of limitations for claims, as well as a safe harbor to limit the liability of members for claims against the company.

The New Act adopts the RULLCA format for dealing with known and unknown claims against an LLC in dissolution, breaking them into two Sections ("known" claims in Section 605.0711 and "other" claims in Section 605.0712). The New Act provisions provide detailed claims procedures. Again, these are non-mandatory and the New Act uses the word "may" in describing the procedures for "disposing" of known claims against the LLC. The New Act also provides a mechanism for disposing of conditional, contingent and unmatured claims, and the procedure for applying to the circuit court to address the amount and form of any necessary security. It permits the appointment of a guardian ad litem to represent known claimants, and the payment of expenses and fees of the guardian ad litem; and if the procedures are followed, the New Act creates a safe harbor to limit liability of the members.

The New Act continues to make members liable up to the amount of any distributions they received from the LLC in dissolution, for amounts which should have been paid or set aside for creditors. The New Act also continues the three year statute of limitations (from the effective date of dissolution) for proceedings seeking payment of known claims to recover amounts distributed to members or transferees in dissolution.

These "known claim" provisions in both Existing Law and RULLCA derive primarily from the Revised Model Business Corporation Act ("RMBCA"), Section 14.06.

Section 605.0712. OTHER CLAIMS AGAINST A DISSOLVED LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 705; no corresponding provision in Existing Law)

The New Act provides detailed procedures, again permissive and not mandatory, to resolve payment of unknown claims by giving "notice" either (i) through the Department of State or (ii) through publication "at least once" in a newspaper of general circulation in the county in which the LLC's principal office in Florida is located, that the LLC is dissolving, and providing potential claimants with information about how to present claims. This is a change from the current Florida corporate law, Section 607.1407(2), which, when the newspaper publication option is chosen, requires newspaper publication to run once a week for two consecutive weeks. The New Act reduced the newspaper publication minimum requirement to "at least once," rather than twice. The Drafting Committee adopted the publication provisions in RULLCA because a single newspaper publication is also in the RMBCA, so the Drafting Committee believes that the trend is to a single publication requirement.

For LLCs which follow the procedures described in this Section, there is a four year statute of limitations for proceedings by creditors to enforce unknown claims. However, there is also a provision which provides that the four year statute "shall not be deemed to extend any otherwise applicable statute of limitations."

The New Act continues to impose liability on members and transferees who receive distributions in dissolution, to the extent of the distributions, for unknown claims against the company which should have been paid or resolved by the company.

These "other claim" provisions in the New Act derive primarily from RMBCA Section 14.07. The addition to the RMBCA rules which has been added to the New Act is the provision in Subsection 605.0712(3)(b), which extends potential liability for distributions received in dissolution to transferees (which includes those persons who have received distributions under a charging order, because the beneficiary of a charging order is deemed a "transferee" under RULLCA and the New Act).

Section 605.0713. COURT PROCEEDINGS. (corresponds to RULLCA Section 706; corresponds to Existing Law Section 608.4421)

This provision is taken almost verbatim from RULLCA Section 706, which derives primarily from RMBCA Section 14.08. Existing Law has a court proceedings provision that is triggered after a limited liability company has delivered written notice of dissolution to all known claimants. RULLCA Section 706 and the New Act provide that court proceedings are

available after a limited liability company has given notice through filing a notice of dissolution with the Department of State or published the notice of dissolution in accordance with Section 605.0712 of the New Act.

The New Act allows a limited liability company to file an application in the appropriate circuit court to determine the amount and form of security required to pay for contingent and unknown claims, or claims that are reasonably expected to arise after dissolution.

Section 605.0714. ADMINISTRATIVE DISSOLUTION. (corresponds primarily to RULLCA Section 708; corresponds in part to Existing Law Sections 608.448 and 608.4481)

The New Act derives primarily from RULLCA Section 708 but also includes aspects consistent with current Existing Law Sections 608.448 and 608.4481.

The New Act removes the six-month requirement found in RULLCA for the Department of State to commence an action for administrative dissolution when a limited liability company is late on the payment of any fee, tax, interest or penalty.

The New Act provides for dissolution if the annual report is not filed by 5:00 pm on the third Friday of September, consistent with Existing Law, and triggers automatic dissolution for failure to file an annual report on the fourth Friday in September of each year.

The New Act removes the 60-day waiting period found in RULLCA for an administrative dissolution action to be brought if the limited liability company does not have a registered agent in Florida. The New Act also allows for the commencement of an administrative dissolution proceeding if the limited liability company does not file a statement of change within 30 days after a change has occurred in the name or address of the registered agent, unless the agent files a statement of change or the change was made in an application for reinstatement.

The New Act allows the Department of State to serve notice of its intent to dissolve a limited liability company by electronic transmission if an electronic mail address was previously provided by the limited liability company. This provision is not found in RULLCA Section 708, but is consistent with Existing Law. The New Act also extends this electronic notification provision to the issuance of the notice of administrative dissolution, consistent with Existing Law.

Section 605.0715. REINSTATEMENT. (corresponds to RULLCA Section 709; corresponds to Existing Law Section 608.4482)

The New Act provides that an LLC which is administratively dissolved under 605.0714, may apply to the Department of State for reinstatement at any time after the effective date of dissolution, on forms provided by the Department of State and upon payment of all fees required by the Department of State.

Under the New Act, if the Department of State determines that all required information has been provided and all required fees have been paid, the Department of State "shall" reinstate the LLC. Reinstatement relates back and is effective as of the date of the administrative

dissolution. The rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had notice of the reinstatement are not affected.

Section 605.0716. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT. (corresponds to RULLCA Section 710; corresponds to Existing Law Section 608.4483)

The New Act provision derives primarily from RULLCA Section 710. The New Act supplements RULLCA Section 710 by providing that if the Department of State denies reinstatement following administrative dissolution, the LLC must petition the circuit court in the applicable county (as defined in Section 605.0711(15)) within 30 days after service of the notice of denial by the Department of State.

The petition seeking judicial review of the denial of reinstatement must be served on the Department of State with a copy of the notice of dissolution, application for reinstatement and notice of denial.

The Section allows the court to reinstate the dissolved limited liability company or take any other action that the court considers appropriate. This is consistent with Existing Law.

Section 605.0717. EFFECT OF DISSOLUTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4431)

The New Act follows Existing Law and provides that dissolution does not (i) transfer title to company assets, (ii) prevent the company from bringing or defending proceedings in its name, (iii) abate or suspend any pending proceeding, or (iv) terminate the authority of the registered agent.

The name of a dissolved LLC is not available for use by a new entity until 120 days after the effective date of the dissolution, or the filing of a statement of termination, if earlier. There is an exception to this rule for LLCs which have been administratively dissolved, where the name will not be available to another LLC until one full year after the effective date of dissolution, unless the LLC provides an affidavit to the Department of State permitting immediate assumption or use of the name by another LLC.

Article 8: Actions by Members
(RULLCA ARTICLE 8;; EXISTING LAW Section 608.601; NEW ACT SECTIONS 605.0801 through 605.0806)

In Sections 605.0801-605.0805of the New Act, the Drafting Committee brought over the corresponding RULLCA Sections 801-806 almost verbatim, with the exception of RULLCA Section 804 ("Pleading"), which addresses pleading requirements in derivative actions. The Drafting Committee believes that pleading requirements are the province of the courts and that the LLC act need not specify minimum pleading requirements for a derivative action. Accordingly, RULLCA Section 804 was not included in the New Act.

Existing Florida law on derivative actions was based primarily on Florida corporation law (Section 607.07401), and is generally addressed in Existing Law in Section 608.601 (Member's

derivative actions), which also addresses the appointment of one or more independent persons to serve as a special litigation committee, as well as the awarding of reasonable expenses and attorney's fees.

Section 605.0801. DIRECT ACTION BY MEMBER. (corresponds to RULLCA Section 801; no corresponding provision in Existing Law)

This provision follows RULLCA Section 801. Existing Law does not have a comprehensive direct action by member provision. The Drafting Committee believes that adopting the organization and substance of the RULLCA provision would be useful for practitioners, and that the uniformity would allow for resort to other RULLCA-based state case law and commentary.

New Act Section 605.0801 provides that a member may maintain a direct action against another member, manager, or the limited liability company to enforce the member's rights and protect the member's interests. A member maintaining a direct action under this Section must plead an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

Section 605.0802. DERIVATIVE ACTION. (corresponds to RULLCA Section 802; corresponds to Existing Law Section 608.601)

This provision derives primarily from RULLCA Section 802. Existing Law has a derivative action provision, that requires as a prerequisite to a derivative action (i) the plaintiff to make a demand on the managing members of a member-managed company or the managers of a manager-managed company and (ii) that the demand was refused or ignored.

The New Act allows a member to maintain a derivative action to enforce a right of the limited liability company in two instances: (i) when an action is not instituted after a demand on the other members of a member-managed company or the managers of a manager-managed company "within a reasonable time," not to exceed 90 days, or (ii) without demand, if demand would be futile or irreparable injury would result to the company by waiting for the members or managers to bring the action. RULLCA does not contain the 90-day outside time limit, but rather relies solely on the concept of "a reasonable time" for the company to bring the suit. RULLCA also does not contain an irreparable injury requirement, but the Drafting Committee believes that this requirement is necessary to provide some level of protection for the limited liability company from frivolous derivative actions.

The Drafting Committee believes adding the outside time limit to bring the suit no later than 90 days after demand will, absent extraordinary circumstances, adequately protect the demanding members' interest in getting the suit filed as quickly as possible, while leaving the company more than adequate time to assess the validity of the request for the action to be brought.

The addition of "demand futility" is a change from Existing Law Section 608.601, which requires "universal demand" before a derivative action may be filed by a member. The Drafting Committee was split on this issue. However, the majority believed that the RULLCA formulation of permitting a derivative action to be commenced by a member based on demand

futility, is more appropriate for the many closely held LLCs in Florida. Many, if not most, of the derivative actions in Florida are brought by minority owners of LLC interests against majority owners who also happen to be in control of the LLC. In those instances, it is often going to be the case that the member or manager in control will refuse or ignore the demand for the company to bring the action, thereby further delaying the opportunity to seek redress in the courts.

Section 605.0803. PROPER PLAINTIFF. (corresponds to RULLCA Section 803; corresponds to Existing Law Section 608.601)

The RULLCA provisions on proper plaintiff adopted under the New Act are consistent with prevailing law involving unincorporated entities as well as corporation law.

This provision derives primarily from RULLCA Section 803. Existing Law has a proper plaintiff provision that only requires a person who was a member of the limited liability company when the transaction complained of occurred, unless the person became a member by operation of law from one who was a member at that time.

The New Act removes the requirement from the RULLCA that a plaintiff must remain a member of the limited liability company while the action continues. Instead, the New Act only requires that a plaintiff is a member at the time an action is first commenced, and either: (i) was a member when the conduct giving rise to the action occurred; or (ii) whose status as a member devolved on the plaintiff by operation of law or pursuant to the terms of the operating agreement, from a person that was a member at the time of the conduct.

Section 605.0804. SPECIAL LITIGATION COMMITTEE (corresponds to RULLCA Section 805; corresponds to Existing Law Section 608.601)

This provision derives primarily from RULLCA Section 805 but also includes aspects of Existing Law Section 608.601 by adding independence standards to a number of the provisions contained in the New Act. Under the New Act, a special litigation committee may only be appointed by the consent of members or managers that are not parties to the proceeding and that are otherwise disinterested. In addition, in a member-managed company the appointing members must then hold a majority of the then-current percentage or other interest in the profits of the company owned by all members who are not named in the proceeding and are otherwise disinterested and independent. The New Act also allows a court to appoint a panel of disinterested and independent persons to constitute the special litigation committee.

The New Act requires at the outset that all special litigation committee members be disinterested and independent, and act in good faith and with reasonable care. It provides the court with the authority to evaluate the independence and actions of the special litigation committee at the end of the investigation by the special litigation committee.

The Drafting Committee believes that requiring a special litigation committee member to be independent and disinterested also gives a court the ability to evaluate each committee member as disinterested and independent at the outset of an investigation. It also avoids any unnecessary delays that are inherent in waiting until the end of a special litigation committee investigation when the committee has ineligible participants.

The New Act added to RULLCA Section 805(d), by including a catch-all provision that allows the special litigation committee to recommend that a proceeding continue in any manner that it determines to be appropriate, as opposed to requiring the committee to dictate who controls the proceeding, or its settlement or dismissal.

The New Act also deviates from RULLCA in permitting the court discretion to adopt, reject, or modify the determination of the special litigation committee. RULLCA provides that the court "shall enforce" the determination of the special litigation committee if the court finds that the special litigation committee was "disinterested, independent, and acted in good faith and with reasonable care"

Section 605.0805. PROCEEDS AND EXPENSES. (corresponds to RULLCA Section 806; corresponds to Existing Law Section 608.601)

This provision is taken almost verbatim from RULLCA Section 806, but is also largely consistent with aspects of Existing Law Section 608.601.

The New Act provides that all proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, are the property of the limited liability company. However, the New Act allows for a court to award reasonable expenses that include reasonable attorney fees and costs to the plaintiff in a derivative action from the recovery of the limited liability company.

Section 605.0806. VOLUNTARY DISMISSAL OR SETTLEMENT; NOTICE. (corresponds in part to RULLCA Section 806(c); corresponds to Existing Law Subsection 608.601(4))

Subsection (1) of this provision is taken almost verbatim from RULLCA Section 806(c), but is also largely consistent with the first sentence of subsection (4) of Existing Law Section 608.601. Subsection (2) of this Section in not part of RULLCA; it is taken almost verbatim from the second and third sentences of subsection (4) of Existing Law Section 608.601.

The New Act continues Existing Law by requiring the court's approval to voluntarily dismiss or settle a derivative action in order to prevent collusion and by requiring the court to direct that notice of a proposed dismissal or settlement be given to members that would be substantially affected by such dismissal or settlement.

Article 9: Foreign Limited Liability Companies

New Act Sections 605.0901 through 605.0913 deal with foreign LLCs registering to do business in Florida. The New Act provisions do not follow RULLCA terminology or the format of the RULLCA provisions, primarily because Existing Law has different nomenclature and such nomenclature continues to be followed in the New Act. For example, RULLCA uses the term "registration to do" business throughout its Article 9, while Existing Law has used "authority to transact" business in the state, and has required that foreign LLCs obtain a "Certificate of Authority" to transact business in the state. This terminology also matches the terminology used in Chapter 607 and Chapter 620. The Drafting Committee and the Department of State were

concerned that a change to "registration" terminology could create confusion, so the existing nomenclature was continued in the New Act.

Section 605.0901. GOVERNING LAW (corresponds to RULLCA Section 901; corresponds to Existing Law Subsection 608.505(3))

Subsection (1) provides that for a foreign LLC, the law of its jurisdiction of existence governs its internal affairs and the liability of its members and managers for the debts, obligations and other liabilities of the LLC.

Subsection (2) provides that a Certificate of Authority to transact business in Florida may not be denied to a foreign LLC solely because of a difference between the laws of its jurisdiction of existence and Florida law.

Subsection (3) confirms that foreign LLCs can have only the powers to engage in activities in the state that domestic LLCs may exercise. As such, a foreign LLC may not engage in any activity or business, or exercise any power, in Florida, that a domestic LLC cannot engage in or exercise.

The major substantive difference between RULLCA Section 901 and New Act Section 605.0901 is that RULLCA includes a reference to the liability of foreign Series LLCs being governed by the law of their jurisdiction of existence, whereas the New Act remains silent as to Series LLC liability.

Section 605.0902. APPLICATION FOR CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Sections 902 and 903; corresponds to Existing Law Section 608.503)

The New Act provides that a foreign LLC may not transact business in the state until it obtains a Certificate of Authority. This provision substantially follows Existing Law, including the requirement that the foreign LLC apply to the Department of State on forms prescribed by the Department of State.

Consistent with the Department of State's position under Existing Law, Subsection (3) of the New Act includes a provision dealing with foreign series LLCs and expressly allows the Department of State to continue to require that each "series" or "cell" of a foreign series LLC make a separate application for a Certificate of Authority and " make such other filings as may be required for purposes of complying with the requirements of this Chapter as if each such series or cell were a separate foreign LLC." This provides the Department of State with latitude to address filing fees, name issues, and other matters which are implicated by foreign series LLCs transacting business in this state.

Section 605.0903. EFFECT OF A CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Section 902; corresponds to Existing Law Section 608.505)

This Section provides that upon payment of the applicable fees and compliance with the applicable filing requirements, the Department of State shall authorize a foreign LLC to transact business in the state. Once filed, a Certificate of Authority authorizes the foreign LLC to

conduct business in the state, subject, however, to the right of the Department of State to revoke or suspend the Certificate.

Section 605.0904. EFFECT OF FAILURE TO HAVE A CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 902; corresponds to Existing Law Section 608.513)

This Section of the New Act substantively follows Existing Law Section 608.513, but has a slightly different title. RULLCA gave this topic short shrift as part of its provision dealing with registration in Section 902. The Drafting Committee believes the more detailed aspects of Existing Law on this matter will be helpful to practitioners and courts and therefore should be retained.

This Section provides that a foreign LLC conducting business in Florida without a Certificate of Authority may not maintain an action or proceeding in Florida until it obtains a Certificate of Authority. Further, a successor to a foreign LLC is similarly precluded from maintaining an action or proceeding in Florida, until it obtains a Certificate of Authority.

A court may stay a proceeding commenced by a foreign LLC, or its successor or assignee until the party obtains a Certificate of Authority.

The failure to have a Certificate of Authority does not impair the validity or act of the foreign LLC or prevent the foreign LLC from defending an action or proceeding in the state.

A foreign LLC that conducts business without a Certificate of Authority is deemed to appoint the Department of State as its agent for service of process. It is also liable to the state for the fees that would have been due for the period of time it transacted business without a Certificate of Authority. In addition to being liable for all payments due for the period it was transacting business, it is liable for civil penalties for each year it conducted business without a Certificate of Authority.

Section 605.0905. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS (corresponds to RULLCA Section 905; corresponds to Existing Law Section 608.501)

The New Act follows Existing Law in providing a list of activities which do not constitute "transacting business" in this state, and thus may be engaged in without obtaining a Certificate of Authority.

The New Act also follows Existing Law in providing that the enumerated list of activities is not "exhaustive" and follows Existing Law in providing that the Section does not apply in determining whether the contacts or activities may subject that foreign LLC to service of process, taxation, or regulation under a Florida law other than Chapter 605.

Section 605.0906. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY COMPANY. (corresponds to RULLCA Section 906; corresponds to Existing Law Section 608.506)

This Section conforms in substance to Existing Law as well as to RULLCA, but does not track the RULLCA language precisely.

It provides that a foreign LLC must file its Certificate of Authority using its actual name, unless the foreign LLC's name is not available for use in Florida (because it is not distinguishable upon the records of the Department of State from a name already in use). In that case, it may use an alternative name but that alternative name must be cross-referenced to the actual name of the foreign LLC in the records of the Department of State. If the actual name later becomes available in Florida, or the foreign LLC changes its name, the records again must be cross-referenced through a filing with the Department of State.

A foreign LLC must use a name that complies with the statute in order to transact its business in Florida. If a foreign LLC uses a name that is not available in Florida, it may not transact business in the state until its name complies with the statute and the business files an amended Certificate of Authority.

Section 605.0907. AMENDMENT TO CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 904; corresponds to Existing Law Section 608.504).

This Section incorporates RULLCA Section 904 requirements, but expands on them to provide timing requirements and to add cross references to the content requirements for the information required to be provided in the original application for a Certificate of Authority.

This Section provides that a foreign LLC must deliver an amendment to its Certificate of Authority to the Department of State to reflect any change to its name, principal office and mailing address (unless that change is made in the Annual Report filing), the name and street address of its registered agent (unless that change is made in the Annual Report filing), or if there is a change of the name, title or capacity, or address of the person authorized to manage the foreign limited liability company from what appears in the original application for a Certificate of Authority.

The filing of the amendment must be made within 30 days after the occurrence of the change, signed by an authorized representative and must set forth the information that this Section requires to be specified.

The New Act also permits the foreign LLC to use an amendment to add, remove or change the name, title, capacity, or address of any person who has authority to manage the foreign LLC.

Section 605.0908. REVOCATION OF CERTIFICATE OF AUTHORITY (corresponds to RULLCA Section 910; corresponds to Existing Law Sections 608.512 and 608.513)

This Section of the New Act follows Existing Law in nomenclature ("revocation of Certificate of Authority"), rather than RULLCA's use of "termination of registration." but much

of the substance is comparable, providing grounds for revocation, and a process for the revocation, of a Certificate of Authority by the Department of State.

The New Act provides that the Department of State may revoke the Certificate of Authority if it determines (a) the Annual Report is not timely filed, (b) fees are unpaid, (c) the foreign LLC fails to appoint or maintain a registered agent, (d) the foreign LLC fails to file a statement of change timely, (e) the foreign LLC fails to amend its Certificate of Authority as required, (f) the foreign LLC loses its status or is no longer "active" on the records of its home jurisdiction, (g) the foreign LLC's period of duration has expired, (h) an agent of the foreign LLC files a false document with the Department of State, or (i) the foreign LLC fails to answer truthfully and fully interrogatories propounded by the Department of State.

Once one of the grounds for revocation has been determined by the Department of State, the Department of State must send a notice of intent to revoke, allowing the foreign LLC to correct each ground for revocation to the reasonable satisfaction of the Department of State. If the grounds for revocation are not corrected, the Department of State shall revoke the Certificate of Authority and issue a notice of revocation in a record.

Section 605.0909. REINSTATEMENT FOLLOWING REVOCATION OF CERTIFICATE OF AUTHORITY. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.5135)

The New Act follows the substance of Existing Law in permitting the reinstatement of a Certificate of Authority for a foreign LLC whose Certificate of Authority has been revoked by the Department of State.

To be reinstated, the foreign LLC must file an application for reinstatement with the necessary information required and pay the required fees to the Department of State, any time after revocation.

If reinstated, the reinstatement relates back and takes effect as of the effective date of the revocation of authority.

The name of a foreign LLC whose authority has been revoked is not available for assumption by another business entity until one full year after the effective date of the revocation, unless the LLC provides an affidavit making its name available for assumption or use by another entity at an earlier time.

Section 605.0910. WITHDRAWAL AND CANCELLATION OF CERTIFICATE OF AUTHORITY. (corresponds to RULLCA Section 911; corresponds to Existing Law Section 608.511)

This provision follows the substance of Existing Law as well as RULLCA, both of which permit a foreign LLC to "withdraw," but which use different nomenclature. Existing Law Section 608.511 provides that a foreign LLC "may ***not*** withdraw from this state" until it obtains a certificate of withdrawal from the Department of State. RULLCA Section 911 provides that a "registered foreign LLC may withdraw its registration by delivering a statement to the Department of State…".

The New Act provides that a foreign LLC may "withdraw and cancel its certificate of authority by delivering to the Department of State a "notice of withdrawal of certificate of authority."

Under the New Act, the Certificate of Authority is cancelled when the notice of withdrawal becomes effective. The notice of withdrawal must be signed by an authorized representative and must provide the information required in the Section including the foreign LLC's name, the date the foreign LLC was authorized to transact business in Florida, and a statement that the foreign LLC is withdrawing its Certificate of Authority.

Section 605.0911. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC FILING ENTITY. (corresponds to RULLCA Section 907; no corresponding provision in Existing Law)

This provision derives entirely from RULLCA Section 907. It provides for a deemed withdrawal of a certificate of authority previously issued to a foreign LLC upon that entity's conversion to a domestic filing entity. Once the entity is a domestic Florida entity it will not require a certificate of authority to transact business, so this Section treats the prior registration as withdrawn automatically upon the conversion.

Section 605.0912. WITHDRAWAL ON DISSOLUTION, MERGER OR CONVERSION TO NONFILING ENTITY. (corresponds to RULLCA Section 908; no comparable provision in Existing Law)

This provision derives from RULLCA Section 908 with a minor addition of the merger as a basis for the withdrawal of the certificate of authority. It provides for the filing of a statement of withdrawal of a certificate of authority previously issued to a foreign LLC upon that entity's dissolution or merger into, or conversion to, a domestic nonfiling entity. Once the entity is a domestic Florida entity it will not require a certificate of authority to transact business, so the provision requires the filing of a statement of withdrawal for the purpose of removing the entity from the record of registered foreign entities.

Section 605.0913. ACTION BY DEPARTMENT OF LEGAL AFFAIRS. (corresponds to RULLCA Section 912; corresponds to Existing Law Section 608.512)

This provision follows RULLCA Section 912 and Existing Law and explicitly authorizes the Department of Legal Affairs to maintain an action to enjoin a foreign LLC from transacting business in Florida if it is in violation of Chapter 605. The authority for this kind of injunctive action has been part of corporate law for more than a century, and has been carried over to unincorporated business entities.

Article 10: Mergers, Interest Exchanges, Conversions and Domestications

Article 10 of RULLCA deals comprehensively with both same-type and cross-type mergers and interest exchanges, and with interest exchanges, conversions, and domestications. Each Section of the New Act includes the Sections that cover the same issues with respect to mergers, interest exchanges, conversions, and domestications, but specific to that issue (so that all of the statutory provisions with respect to a merger, an interest exchange, a conversion or a domestication are together in one place). In that regard, the Sections that cover mergers under the New Act are Sections 605.1021-605.1026, the Sections that cover interest exchanges are Sections 605.1031-605.1036, the Sections that cover conversions are Sections 605.1041-605.1046, and the Sections that cover domestications are Sections 605.1051-605.1056.

The topics with respect to each type of transaction are broken down as follows:

(a) Authorization of the merger (s. 605.1021), interest exchange (s. 605.1031), conversion (s. 605.1041) or domestication (s. 605.1051 transaction;

(b) Plan of merger (s. 605.1022), interest exchange (s. 605.1032), conversion (s. 608.1042) or domestication (s. 605.1052);

(c) Approval of merger (s. 605.1023), interest exchange (s. 605.1033), conversion (s. 608.1043) or domestication (s. 605.1053);

(d) Abandonment or amendment of plan of merger (s. 605.1024), interest exchange (s. 608.1034), conversion (s. 605.1044) or domestication (s. 605.1054);

(e) Articles of merger (s. 605.1025), interest exchange (s. 605.1035), conversion (s. 608.1045) or domestication (s. 605.1055); and

(f) Effect of merger (s. 605.1026), interest exchange (s. 605.1036), conversion (s. 608.1046) or domestication (s. 605.1056).

In large measure, the provisions contained in the New Act for each type of entity are very similar, except for the variations resulting from the difference in the types of transactions, as well as the Florida specific changes described below.

Finally, RULLCA Article 10, Section 1001 added additional definitions for use in Article 10. These additional definitions have been integrated into Section 605.102 of the New Act.

I. <u>General Provisions.</u> (RULLCA Article 10, Part I; New Act Sections 605.1001-605.1006).

The provisions in Sections 605.1001-605.1005 are not currently included in Existing Law, but provide a framework of necessary provisions that apply to mergers, interest exchanges, conversions and domestications. Section 605.1006, dealing with appraisal rights, expands current Florida law by adding additional grounds under which appraisal rights will be granted.

Section 605.1001. RELATIONSHIP OF THE PROVISIONS OF ss 605.1001-605.1072TO OTHER LAWS. (corresponds to RULLCA Section 1002; no corresponding provision in Existing Law).

This Section preserves existing regulatory laws in Florida in general ways. Laws that may apply other than this New Act include, for example, various uniform fraudulent transfer and fraudulent conveyance acts, state insolvency statutes, federal bankruptcy law, and Articles 8 and 9 of the UCC. This new Section also makes sure that the merger, interest exchange, conversion, or domestication provisions of the New Act cannot be used to circumvent the requirements of current state "anti-takeover" statutes which may apply.

Section 605.1002. CHARITABLE AND DONATIVE PROVISIONS. (corresponds to RULLCA Section 1003; no corresponding provision in Existing Law).

This Section is new and is based on Sections 1003(b) and (c) of RULLCA.

> Subsection (1). Since the New Act, like the Existing Law, applies to nonprofit entities, this provision prevents such entities from using the provisions in the New Act to avoid restrictions on the use of property held for charitable purposes for other than the use permitted without order of an appropriate court specifying the disposition of the property.
>
> Subsection (2). This Subsection clarifies the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. This provision applies only to mergers, since in interest exchanges, conversions and domestication transactions, the entity to which the bequest was made continues in existence.

The Drafting Committee did not adopt Section 1003(a) of RULLCA, which requires, in situations where a governmental entity would have had to be given notice of a merger or would have had the right to approve the same rights in the circumstances of an interest exchange, a conversion or a domestication transaction. The Drafting Committee believes that it is better to allow regulatory authorities to determine whether those types of transaction require prior notice or approval and not to make a presumption that if a merger required prior notice or approval such notice or approval should be required for other types of transactions involving limited liability companies.

Section 605.1003. STATUS OF FILINGS. (no corresponding provision in RULLCA Section; no corresponding provision in Existing Law).

This provision is based on an earlier version of RULLCA (which has since been revised to delete this provision), and provides that filings under the New Act will be part of the public record if the law in the entity's jurisdiction of organization requires such filings to be part of the public record.

Section 605.1004. NONEXCLUSIVITY. (corresponds to RULLCA Section 1004; no corresponding provision in Existing Law).

This provision is based on Section 1004 of RULLCA, and allows a transaction that has the same result as one of the transactions governed by the New Act, but that is properly completed under another law, to be exempt from the New Act. The Drafting Committee does not believe this to be a change to Existing Law, but rather an expression of Existing Law on this issue.

Section 605.1005. REFERENCE TO EXTERNAL FACTS. (corresponds to RULLCA 1005; no corresponding provision in Existing Law).

This provision is based on Section 1005 of RULLCA, which, following the RMBCA, allows reference in a plan of merger, interest exchange, conversion or domestication to refer to facts ascertainable outside the plan if the manner in which the facts will operate under the plan is specified in the plan. The Drafting Committee believes this to be a statement of existing law on the subject and added this provision to make clear that reference in a plan to facts found elsewhere is permissible.

Section 605.1006. APPRAISAL RIGHTS. (contrast with RULLCA Section 1006; corresponds to Existing Law Section 608.4352)

This Section sets forth seven events that will trigger appraisal rights. It also allows members to add to this list of appraisal rights events, by including one or more provisions to that effect in the LLC's articles of organization or operating agreement. Subsections (1) (a) and (b) track the language of Existing Law, with no substantive changes, and provide for appraisal rights in the case of a merger or conversion, respectively. These Subsections differ from RULLCA, Section 1006(a), in that they apply only to members with a right to vote to approve the merger or conversion. This right to vote as a condition to receiving appraisal rights is consistent with Existing Law.

RULLCA Section 1006 provides for appraisal rights in cases of domestication. The New Act does not. This is appropriate, given that the New Act is limited to in-bound domestications by non-United States entities.

Subsections (1) (c)-(h) are new provisions not in Existing Law.

Subsection (1) (c) is based on RULLCA Section 1006(a) and provides for appraisal rights in the case of an interest exchange. Consistent with the Subsections dealing with appraisal rights in the case of mergers and conversions, the right to appraisal triggered by the consummation of an interest exchange extends only to members with the right to vote on the interest exchange. There is a second condition: appraisal rights extend only to an interest holder whose interest is exchanged in the interest exchange. This Subsection is consistent with the appraisal right provisions under Section 607.0132(b) of the FBCA.

Subsection (1)(d) provides for appraisal rights in the case of the sale of substantially all of the assets of a limited liability company. Again, this right is limited to members with the right to vote upon the sale. It is not applicable to sales pursuant to a court order or to sales in which

the consideration is for cash and it is pursuant to a plan in which the cash is to be distributed within a year. This Subsection is analogous to the appraisal right provisions under Section 607.1302(c) of the FBCA, in connection with the "disposition of assets pursuant to Section 607.1202." This is not one of the events that trigger appraisal rights under RULLCA.

Subsection (1)(g): Altering or abolishing of appraisal rights. This Subsection provides a member with appraisal rights in cases in which the organic rules are amended so as to alter or abolish appraisal rights under this Section. This is not one of the events that trigger appraisal rights under RULLCA (of course, since the default rule under RULLCA Article 10 is unanimous approval of the merger, interest exchange, conversion or domestication by all members of the company, appraisal rights would not be necessary under RULLCA).

Subsection (1) (h) is consistent with RULLCA Section 1006(1). It allows members to include a provision in their organic rules setting forth additional events or transactions that will trigger appraisal rights.

Subsection (2) allows an LLC, in its articles of organization or operating agreement, to modify, restrict, or eliminate appraisal rights, as long as such actions are approved by each member affected by the modification, restriction, or elimination. A member who approves an express waiver of appraisal rights in the organic rules will be deemed to have waived its appraisal rights. This Subsection is consistent with Existing Law Section 605.4352 (4).

Subsection (3) is new, but is merely informational in nature. It states that Section 605.1061-605.1072 set forth the procedures for carrying out the appraisal process. As noted below, these Sections are largely based on Existing Law and lay out the rubric for appraisal rights to be applied.

Subsection (4), containing limitations on appraisal rights, tracks the language of Existing Law (Section 608.4352(2)) with no substantive changes. RULLCA does not include these carve-outs, which are meant to limit appraisal rights proceedings to LLCs that are not publicly traded and listed on an exchange.

II. <u>Mergers</u> (RULLCA Sections 1021 through 1026; New Act Sections 605.1021 through 605.1026)

Section 605.1021 EFFECT OF MERGER. (corresponds to RULLCA Section 1021; corresponds to Existing Law Subsection 608.438(2)).

Sections (1) and (2) of the New Act are based on Sections 1021 (a) and (b) of RULLCA. This Section of the New Act broadly authorizes the combination of one or more limited liability companies with one or into one or more other domestic or foreign entities. While the wording of this Section is somewhat different than Section 608.438(2) of Existing Law, the substance of this provision of the New Act was considered by the Drafting Committee to effectively be the same as the corresponding Section of Existing Law.

Subsection (2), consistent with Section 608.438(2)(d) of Existing Law, continues to require that for a foreign entity to be a party to a merger with a domestic limited liability

company, such merger must be permissible under the laws of the foreign entity's jurisdiction of formation.

Subsection (3), which provides that in the case of a merger involving a limited liability company which is a not-for-profit company, the surviving limited liability company or other entity must also be a not-for-profit entity, is consistent with the requirements of Existing Law (Section 617.1102 of Florida's Not For Profit Corporation Act).

Section 605.1022. PLAN OF MERGER. (corresponds to RULLCA Section 1022; corresponds to Existing Law Subsection 608.438(3)).

This Section follows Section 1022 of RULLCA. While the wording is somewhat different than Existing Law, the substance of this provision of the New Act is believed by the Drafting Committee to be effectively the same as Existing Law.

The only item not included from RULLCA is Subsection (e) which allows the filing of a plan of merger in lieu of articles of merger if the plan has all of the information required to be included in articles of merger under Section 605.1025 of the New Act, since handling these types of filings was believed to be administratively difficult for the Department of State and the Drafting Committee did not believe that the burden of having to expressly file a document with the Department entitled "Articles of Merger" to effect a merger (in addition to creating a plan of merger as required by Section 605.1022 of the New Act) is particularly onerous or difficult.

Section 605.1023. APPROVAL OF MERGER. (corresponds to RULLCA Section 1023; corresponds to Section 608.4381).

This provision includes several important changes to RULLCA and to Existing Law.

RULLCA Section 1023(1) provides that the default vote for approval of a merger is unanimity among the members. Under the New Act, the default rule for approval of a merger is the vote of a majority-in-interest of the members. This provision of the New Act is consistent with Existing Law (Section 608.4381(1)).

An ambiguity contained in the Existing Law has been eliminated in the New Act in that under the New Act, only members entitled to vote under the constituent documents of the LLC (i.e., the articles of organization and the operating agreement) have a right to vote on a merger. Under Section 608.4231 of Existing Law, it provides that:

> "Notwithstanding any provision to the contrary in the articles of organization or operating agreement, members shall have the right to vote on….a merger of the limited liability company as provided in s. 608.4381."

Read literally, this provision gives all members of a limited liability company a vote on a merger, whether or not such members have voting rights under the constituent documents of the limited liability company. Such a right to vote on a merger given to non-voting shareholders is consistent with the FBCA. At the same time, this provision is not one of the non-waivable provisions under Existing Law, so arguably under Existing Law this provision could be modified in the constituent documents of the limited liability company.

Some Florida lawyers have historically taken the position that as a result of this provision, all members receive a vote on a merger, whether or not such members have voting rights under the constituent documents of the limited liability company. Other Florida lawyers have taken the position that since this is not a non-waivable provision, it can be changed in the LLC's constituent documents. The Drafting Committee believes that in light of strong emphasis on contract rights that underpins the New Act, the correct default position is to allow the parties to decide who gets to vote on a merger, and therefore the New Act does not give non-voting members a vote on a merger unless such a vote is expressly provided in the constituent documents of the limited liability company. As a result, unless the constitutional documents of the LLC provide otherwise, non-voting members of a LLC will not have appraisal rights in a merger (which under Section 605.1106(1)(a) are only available to members who have a right to vote on the merger).

Subsection (1)(b) of the New Act follows Section 1023(a)(2) of RULLCA. It requires that anyone who will have "interest holder liability" (generally personal liability) as a result of the merger has to expressly approve the merger, unless the constituent documents already provide for such liability or the member has previously consented to take on such liability (see the broad definition of interest holder liability in Section 605.102(31) of the New Act). This provision is consistent with Section 608.4381(2) of Existing Law.

Subsections (2) and (3) of this Section of the New Act follow RULLCA. They are consistent with Existing Law, which requires that other domestic and foreign entities that are parties to a merger with a domestic limited liability company approve the merger in accordance with the requirements of the laws in the jurisdiction of formation applicable to such entities.

Subsection (4) is consistent with Section 608.4381(3) of Existing Law, except that the minimum notice period has been shortened (from 30 days to 10 days) to make it consistent with the notice requirements for a merger under the FBCA. Further, Subsections (5) and (6) dealing with the form of the notice and when such notification is deemed to be given, are consistent with Sections 608.4381(4) and (5) of Existing Law. Neither of these provisions is in RULLCA.

Further, under Section 605.1023(5)(b) of the New Act, the full plan of merger must be delivered to those members who have a right to vote on the plan. Under Existing Law (Section 608.4381(4)(b)), a summary of the plan could have been provided. However, the Drafting Committee believes that members who have a right to vote on the plan of merger have the right to review the entire plan.

Section 605.1024. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER. (corresponds to RULLCA Section 1024; corresponds to Existing Law Subsections 608.4381(6) and (7)).

This Section is based on and substantially follows the wording of Section 1024 of RULLCA. It is substantively the same as Subsections 608.4381(6) and (7) of the Existing Law.

Subsection (3) and (4), dealing with abandonment of a plan before its effective time, are substantively the same as Existing Law. Existing Law does not expressly provide for the filing of a statement of abandonment if the merger has not yet become effective but articles of merger

have already been filed. Notwithstanding the foregoing, the Department of State has been allowing such filings to be made and the addition of Subsection (4) to the New Act confirms the propriety of the current policy of the Department of State with respect to how the Department of State currently handles the abandonment of a merger prior to its becoming effective but after the articles of merger have been filed.

Section 605.1025. ARTICLES OF MERGER. (corresponds to RULLCA Section 1025; corresponds to Existing Law Section 608.4382).

Much of Section 605.1025 of the New Act follows RULLCA Section 1025. It is also substantively similar, except as set forth below, to Section 608.4382 of Existing Law. There are a few exceptions to RULLCA to be noted:

- Subsection (2) of Section 605.1025(1)(c) of the New Act requires that the articles of merger recite that the merger has been approved: (i) by each domestic merging entity that is a limited liability company, (ii) by each other merging entity in accordance with the laws of its jurisdiction of formation, and (iii) by each member who, as a result of the merger, will have interest holder liability under Section 605.1023(1)(b) and whose approval is required under that Section. The first two clauses of this Subsection are from RULLCA Section 1025(b)(3) and are consistent with Existing Law. Clause (iii) is not in RULLCA, but is consistent with Section 608.4382(1)(b) of Existing Law.

- Subsection (2)(h) of Section 605.1025 of the New Act, providing that the articles of merger must include a statement about the payment of appraisal rights that may be available, is not in RULLCA, but is in Section 608.4382(1)(g)(3) of Existing Law.

- Subsection (5) of Section 605.1025 of the New Act, providing that a copy of the articles of merger, certified by the Department of State, may be filed in the official records of any county in the state in which any party to the merger holds an interest in real estate. This Subsection is not in RULLCA, but is in Section 608.4382(2) of Existing Law and is considered important by the real estate bar in Florida for purposes of record title to real property in Florida.

- Subsection (6) of Section 605.1025 of the New Act, allowing a limited liability company not to have to file articles of merger if the limited liability company that is a party to the merger is named as a merging entity or surviving entity in articles of merger filed under Florida's other entity statutes (where such articles of merger substantially comply with this Section), is consistent with both RULLCA and Section 608.4382(3) of Existing Law.

- The effective date provisions of the merger statute contained in Section 605.1025(2)(i) of the New Act graft into the concept of a delayed effective date the provisions of Section 605.0207 of the New Act, which provide that a delayed effective date is subject to the 90-day limitation that is included in Section 605.0207.

Section 605.1026. EFFECT OF MERGER. (corresponds to RULLCA Section 1026; corresponds to Existing Law Section 608.4383).

This Section of the New Act is substantially derived from RULLCA Section 1026. While the wording is different from Section 608.4383 of Existing Law dealing with the effect of a merger, the New Act is believed by the Drafting Committee to be substantively the same as Existing Law on these issues and to contain clarifications as to the effects of a merger that, in the view of the Drafting Committee, make useful clarifications which make the New Act positively more descriptive as to such matters.

III. <u>Interest Exchange</u> (corresponds to RULLCA Sections 1031-1036; New Act Sections 605.1031 through 605.1036).

The New Act adds the concept of an interest exchange to the panoply of available options for the amalgamation of entities. The concept of an interest exchange is new to limited liability companies, but has been a part of corporate law for many years and is included in the provisions of the FBCA. In an interest exchange, the separate existence of the acquired entity is not affected and the acquiring entity acquires all of the interest of one or more classes of the interests 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).

In large measure, the interest exchange provisions of the New Act parallel the merger provisions of the New Act and substantially follow RULLCA. There are, however, a few special aspects of the interest exchange provisions as more specifically described in the discussion below of Sections 605.1031 through 605.1036.

Section 605.1031. INTEREST EXCHANGE AUTHORIZED. (corresponds to RULLCA Section 1031; no corresponding provision in Existing Law).

A domestic limited liability company may acquire all of one or more classes or series of another domestic or foreign entity, or rights to acquire one or more classes or series of any such interest, in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing. A foreign entity may be the acquiring or the acquired entity in an interest exchange if the interest exchange is authorized by the organic law of the foreign entity.

Subsection (3) of Section 605.1031 is based on RULLCA Section 1031(c), but is not included in the FBCA dealing with interest exchanges. This provision, which deals with what are defined as "protected agreements," contemplates that if a protected agreement contains a provision that applies to a merger of a domestic limited liability company, but does not refer to an interest exchange, then such provision shall apply to an interest exchange in which the domestic limited liability company is the acquired entity as if an interest exchange were a merger until such provision is amended after January 1, 2014 (the effective date of the New Act). A "protected agreement" means: (a) a record evidencing indebtedness and any related agreement in effect on January 1, 2014; (b) an agreement that is binding on an entity on January 1, 2014; (c)

the organic rules of an entity in effect on January 1, 2014; or (d) an agreement that is binding on any of the governors or interest holders of an entity on January 1, 2014.

This Subsection deals with the rights of parties to protective agreements when an interest exchange takes place. Because the concept of an interest exchange is new to LLC's, a person contracting with or loaning money to, a domestic limited liability company, who drafted and negotiated special rights relating to the transaction before the enactment of this New Act should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. The same concerns exist with regard to relevant provisions of an operating agreement.

Accordingly, this Subsection provides a transition rule to protect such rights. The transition rule continues to apply until the provisions of the protected agreement giving rise to such special rights are first amended after January 1, 2014 (the effective date of the New Act).

Section 605.1032. PLAN OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1032; no corresponding provision in Existing Law).

This section sets forth the requirements for the plan of interest exchange. The contents of the plan of interest exchange are similar to the content of a plan of merger. The plan of interest exchange must be in a record and approved as subsequently provided in Section 605.1033.

The plan must provide for the terms and conditions of the interest exchange and may provide any other provision which the parties wish to include. If one of the entities involved is a foreign entity the plan must comply with the foreign entity's organic law.

Section 605.1033. APPROVAL OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1033; no corresponding provision in Existing Law).

A plan of interest exchange is not effective unless it has been approved as provided in this section. The approval must be in a record and must comply with the entity's organic law. The section provides rules for approval by the members and for notification, in writing, in connection with approval of the interest exchange.

Similar to the merger provisions of the New Act, the default rule under the New Act is the required approval by a majority-in-interest of the voting members of the to-be-acquired limited liability company. This is different than RULLCA Section 1023, which has a unanimity requirement as its default rule (unless the constituent documents of the entity provide otherwise or provide for a lesser vote on a merger, in which case the lesser required vote on a merger will also apply to an interest exchange).

Consistent with the voting requirements for interest exchanges under the FBCA, unless required by the law of the jurisdiction of formation, the constituent documents of the acquiring entity or the transaction documents relating to the particular interest exchange, the holders of interests in the acquiring entity are not entitled to vote on the interest exchange transaction.

Section 605.1034. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1034; no corresponding provision in Existing Law).

A plan of interest exchange may be amended or abandoned only with the consent of each party to the plan, unless otherwise provided in the plan. The amendment must be adopted in the same manner as the plan was approved. A plan may be abandoned in the same manner as the plan was approved. The Section also provides for filing requirements in connection with amendment or abandonment of the plan of interest exchange.

Section 605.1035. ARTICLES OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1035; no corresponding provision in Existing Law).

Once a plan of interest exchange has been approved, articles of interest exchange must be signed by each party to the interest exchange and delivered to the Department of State for filing. This provision further describes what must be contained in the articles of interest exchange.

Section 605.1036. EFFECT OF INTEREST EXCHANGE. (corresponds to RULLCA Section 1036; no corresponding provision in Existing Law).

When an interest exchange is effective, the interests that are the subject of the exchange cease to exist or are converted or exchanged, as provided in the plan of interest exchange. In contrast to a merger, an interest exchange does not affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired entity or render the acquiring entity liable for the liabilities of the acquired entity. Thus, Section 605.1036 of the New Act is substantially simpler than Section 605.1026 relating to mergers of limited liability companies.

IV. Conversions (corresponds to RULLCA Sections 1041-1046; New Act Sections 605.1041 through 605.1046)

These provisions allow an entity to change into a different type of entity or, in the case of a limited liability company, to remain a limited liability company but to change its jurisdiction of formation. The New Act, unlike RULLCA, allows conversions of limited liability companies. RULLCA uses the concept of domestication for the purpose of changing the jurisdiction of formation of a limited liability company. However, as more particularly described below, the Drafting Committee believes that the concept of domestication should be more limited than contemplated by RULLCA (limited solely to in-bound domestication of foreign (non-U.S.) entities who wish to domesticate in Florida) and so the concept of a conversion of a limited liability company, which is in Existing Law, was retained in the New Act.

Section 605.1041. CONVERSION AUTHORIZED. (corresponds to RULLCA Section 1041; corresponds to Existing Law Section 608.439).

Except as noted below, Subsections (1) and (2) of Section 605.1041 of the New Act are based on Subsections 1041(a) and (b) of RULLCA. The exception is, as noted above, that provisions have been included in this Section of the New Act to allow conversions of limited liability companies into limited liability companies in a different jurisdiction of formation. While the wording of this Section of the New Act is somewhat different than the Existing Law,

the substance of this provision of the New Act is believed by the Drafting Committee to be effectively the same as Existing Law.

Subsections (2) and (3), consistent with Existing Law, require that for a foreign entity or a different type of domestic entity, to convert, such conversion must be permissible under the laws of such entity's jurisdiction of formation.

Subsection (4) of Section 605.1041 of the New Act is based on RULLCA Section 1041(c). Similar to the same provision dealing with interest exchanges, this provision deals with "protected agreements," and contemplates that if a protected agreement contains a provision that applies to a merger of a domestic limited liability company, but does not refer to a conversion, then such provision shall apply to a conversion of a limited liability company as if the transaction was a merger until such provision is amended after January 1, 2014 (the effective date of the New Act). This Subsection provides a transition rule to protect rights in protected agreements until the provisions of the protected agreement giving rise to such special rights are first amended after the effective date of the New Act.

Section 605.1042. PLAN OF CONVERSION. (corresponds to RULLCA Section 1042; corresponds to Existing Law Section 608.4401).

This Section follows Section 1042 of RULLCA. While the wording is somewhat different than Existing Law, the substance of this provision of the New Act is believed by the Drafting Committee to be effectively the same as Existing Law.

Section 605.1043. APPROVAL OF CONVERSION. (corresponds to RULLCA Section 1043; corresponds to Existing Law Section 608.4402).

This Section includes several important changes to RULLCA and to Existing Law.

Subsection (1)(b) of the New Act follows Section 1043(a)(2) of RULLCA. It requires that anyone who will have "interest holder liability" (generally personal liability) as a result of the conversion has to expressly approve the conversion, unless the constituent documents already provide for such liability or the member has previously consented to take on such liability. This provision is consistent with Section 608.4402(2) of Existing Law.

Subsections (2) and (3) of the New Act are consistent with Existing Law, which requires that other domestic and foreign entities that are party to a conversion approve the conversion in accordance with the requirements of the laws in the jurisdiction of formation applicable to such entity.

Subsection (4) is consistent with Section 608.4402(3) of Existing Law, except that the minimum notice period has been shortened (from 30 days to 10 days) to make it consistent with the FBCA. Further, Subsections (5), (6) and (7) dealing with the form of the notice and when such notification is deemed to be given, are consistent with Sections 608.4402(4) and (5) of Existing Law. None of these provisions is in RULLCA.

Section 605.1044. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION. (corresponds to RULLCA Section 1044; corresponds to Existing Law Section 608.4401).

This Section is based on and substantially follows the wording of Section 1044 of RULLCA and is similar to the provisions in the New Act dealing with mergers and interest exchanges. Further, while it is worded differently than Section 608.4401(6) of Existing Law, it is not substantively different in the view of the Drafting Committee.

Subsections (1) and (2), dealing with abandonment of a plan before its effective time, are substantively the same as Existing Law. Notwithstanding the foregoing, Existing Law does not expressly provide for the filing of a statement of abandonment if the conversion has not become effective but articles of conversion have already been filed. However, the Department of State has been allowing such filings to be made and, as a result, the addition of Subsection (3) in the New Act affirms the current policy of the Department of State with respect to the abandonment of a conversion prior to its becoming effective but after the articles of conversion have been filed.

Section 605.1045. ARTICLES OF CONVERSION. (corresponds to RULLCA Section 1045; corresponds to Existing Law Section 608.4403).

Much of Section 605.1045 of the New Act follows RULLCA Section 1045. It is also substantively similar, except as set forth below, to Section 608.4403 of Existing Law. Similar to the provisions regarding mergers, there are a few exceptions to be noted:

- Section 605.1045(2)(c) of the New Act requires that the articles of conversion recite that the conversion has been approved: (i) by each domestic limited liability company, (ii) if such entity is another type of entity or a foreign limited liability company, by such entity in accordance with the laws of its jurisdiction of formation and (iii) by each member who, as a result of the conversion, will have interest holder liability under Section 605.1043(1)(b) and whose approval is required under that Section. The second clause of this Subsection is from RULLCA Section 1045(b)(3) and is consistent with Existing Law. Clause (i) is not in RULLCA because RULLCA does not permit limited liability companies to utilize the conversion process, and clause (iii) is not in RULLCA, but is substantively consistent with Section 608.4403(b) of Existing Law.

- Subsection (1)(g) of Section 605.1045 of the New Act, providing that the articles of conversion must include a statement about the payment of appraisal rights that may be available, is not in RULLCA, but is in Section 608.4403(1)(f) of Existing Law.

- Subsection (5) of 605.1045, providing that a copy of the articles of conversion, certified by the Department of State, may be filed in the official records of any county in the state in which any party to the merger holds an interest in real estate, is not in RULLCA, but is in Section 608.44401(2) of Existing Law and is considered important by the real estate bar in Florida for purposes of record title to real property in Florida.

- The effective date provisions of the conversion statute contained in Section 605.1045(1)(h) and (4) graft into the concept of a delayed effective date the provisions of

Section 605.0207 of the New Act, which provide that a delayed effective date is subject to the 90-day limitation that is included in Section 605.0207.

Section 605.1046. EFFECT OF CONVERSION. (corresponds to RULLCA Section 1046; corresponds to Existing Law Section 608.4404).

This Section of the New Act is substantially derived from RULLCA Section 1046. While the wording is different from Section 608.4404 of Existing Law dealing with the effect of a conversion, it is substantively the same and contains clarifications as to the effect of a conversion that, in the view of the Drafting Committee, make the New Act positively more descriptive as to such matters.

This Section of the New Act states the legal effect of a conversion. The converted entity remains the owner of all of its property and remains subject to all of its debts. However, it is the same entity following conversion, other than that the converting entity is no longer governed by the laws of its former jurisdiction of formation, but rather by the laws of the jurisdiction of formation of the converted entity.

V. Domestications (corresponds to RULLCA Sections 1051 through 1056; no corresponding provisions in Existing Law; New Act Sections 605.1051 through 605.1056).

Section 605.1051. DOMESTICATION AUTHORIZED. (corresponds to RULLCA Section 1051; no corresponding provision in Existing Law).

The New Act, for the first time, allows domestications of non-U.S. entities who wish to become domestic limited liability companies in Florida. A domestication differs from a conversion in that it allows the domesticating entity to retain its status and existence in the non-U.S. jurisdiction in which it currently exists.

Unlike RULLCA, which only allows domestications by limited liability companies, the New Act allows all non-U.S. entities (whatever their type) to become a domestic limited liability company in Florida. In order to be permissible under the New Act, the domestication must be permissible under the law of the entity's jurisdiction of formation.

In the view of the Drafting Committee, the concept of domestication (which is also contained in the Delaware Limited Liability Company Act) to allow non-U.S. entities to domesticate in this State is of benefit to such entities (many of whom for various reasons need to retain their status in their original country of formation, but find it easier to operate in the U.S. through a domestic entity), and therefore is good for business in this state.

Section 605.1052. PLAN OF DOMESTICATION. (corresponds to RULLCA Section 1052; no corresponding provision in Existing Law).

The plan of domestication must be in a record and contain the information required under the Statute. In addition to the required information, a plan of domestication may contain any other provisions not prohibited by law.

Section 605.1053. APPROVAL OF DOMESTICATION. (corresponds to RULLCA Section 1053; no corresponding provision in Existing Law).

The plan of domestication must be approved by the members of the entity in accordance with the laws of its jurisdiction of formation and, similar to mergers, interest exchanges and conversions, by any member who will have "interest holder liability" for debts of the domesticating entity after the domestication (see the discussion above on "interest holder liability").

Section 605.1054. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION. (corresponds to RULLCA Section 1054; no corresponding provision in Existing Law).

A plan of domestication may be amended in the same manner as the plan was originally approved, and may contain any terms or conditions affecting the plan of domestication. Unless prohibited by the plan, a domesticating entity may abandon the plan in the same manner in which the plan was approved.

Section 605.1055. ARTICLES OF DOMESTICATION. (corresponds to RULLCA Section 1055; no corresponding provision in Existing Law).

Articles of domestication must be filed with the Department of State and include the information required in the New Act. The articles of domestication must satisfy the requirements of Florida law and be executed by an authorized representative and a registered agent in Florida.

Section 605.1056. EFFECT OF DOMESTICATION. (corresponds to RULLCA Section 1056; no corresponding provision in Existing Law).

When a domestication becomes effective, the domestication does not discharge any interest holder liability. A person has whatever rights and liabilities which they had prior to the domestication. The foreign entity that is domesticated may be served with process in Florida. A domestication does not require the foreign entity to wind up its affairs and does not constitute or cause dissolution of the foreign entity.

VI. Appraisal Rights. (New Act Sections 605.1061 through 605.1072). Also see New Act Section 605.1006, which sets forth when appraisal rights are available.

Section 605.1061. APPRAISAL RIGHTS; DEFINITIONS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4351).

The definitions in this Section largely track those in Existing Law. RULLCA does not use all of the definitions included in this Section.

Subsection (1) "Accrued interest" tracks the language of Existing Law (Section 608.4351(6) "Interest"), with no substantive changes.

Subsection (2) "Affiliate" tracks the language of Existing Law (Section 608.4351(1))

Subsection (3) “Appraisal Event” tracks the language of Existing Law (Section 608.4351(2))

Subsection (4) “Beneficial member” tracks the language of Existing Law (Section 608.4351(3))

Subsection (5) “Fair Value” tracks the language of Existing Law (Section 608.4351(5)), except for Subsection (5)(c) which provides that the valuation will not take into account “discounting for lack of marketability or minority status” for all LLCs. Existing Law, on the other hand, imposes this carve out only for LLCs with “10 or fewer members,” but that anomaly is not followed in the New Act because there were special interests at play when that limitation inserted into Existing Law and it is not consistent with the general national trend.

Subsection (6) "Limited liability company" tracks the language of Existing Law (Section 608.4351(7)). The term “Converted entity” referred to in this Subsection is defined in Section 605.0102(12), as the “converting entity as it continues its existence after the conversion”. In Existing Law it is defined in Section 608.4351(4), as “the other business entity into which a domestic limited company converts.” The definition has been changed in order to better specify the actual effect of a conversion, in which, as a default, the converting entity is the same entity after the conversion.

Subsection (7) "Member" tracks the language of Existing Law (Section 608.4351(10)).

Subsection (8) "Membership interest" tracks the language of Existing Law (Section 608.4351(11)).

Subsection (9) "Record member" tracks the language of Existing Law (Section 608.4351(8)).

Subsection (10) "Senior executives" essential tracks the language of Existing Law (Section 608.4351(9)), except that it explicitly includes within the New Act definition a “member in a member-managed” LLC.

The term “Surviving entity” is defined in Section 605.0102(63), as the “entity that continues in existence after or is created by a merger.” In Existing Law it is defined in Section 608.4351(4) as “the other business entity into which a domestic limited liability company is merged.” The difference in language between the New Act and Existing Law is meant to clarify that under Florida law there are no explicit statutory provisions to effect a consolidation. In a merger, one entity merges into another, which becomes the surviving entity. In a consolidation, two entities merge into a wholly new entity. A merger in which a new entity is created and is the surviving entity, into which two or more entities merge, is functionally equivalent to a consolidation.

Section 605.1062. ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4353).

This Section tracks the language of Existing Law. RULLCA does not deal with this issue.

Section 605.1063. NOTICE OF APPRAISAL RIGHTS. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4354).

Subsections (1) and (2) are consistent with Existing Law. They set forth the general procedure for providing notice regarding appraisal rights in cases in which the appraisal event is to be voted on at a members' meeting, including providing notice as to which members are entitled to vote and providing members with copies of the relevant statutory provisions.

Subsection (3)(a) deals with the notice and statutory provision delivery requirement in cases in which the appraisal event is to be approved other than in a members' meeting. It is largely consistent with Existing Law. Subsection (3)(b) is new. It is meant to assure that non-consenting and nonvoting members (still in the case of approval without a meeting) are provided notice and receive copies of the relevant statutory provisions.

Subsection (4)(a) is essentially the same as Existing Law Section 608.4356(2)(c)(1). However, it provides that if the required financial statements are not reasonably available, an LLC can instead provide members with reasonably equivalent financial information. Subsection (4)(b), which is new, also provides for the delivery of the latest available interim financial statements.

Subsection (5) is new. It allows a member to waive, in writing, the right to receive the financial information described in Subsection (4). A member can waive this requirement before or after the appraisal event.

Section 605.1064. NOTICE OF INTENT TO DEMAND PAYMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4355).

This Section sets forth the procedures that a member must follow to provide notice of its intent to assert its appraisal rights. It is essentially the same as Existing Law, except that, in Subsection (2), it provides more specific guidance as to the procedures to be followed when the appraisal event is approved other than at a members' meeting.

Section 605.1065. APPRAISAL NOTICE AND FORM. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4356).

This Section is essentially the same as Existing Law, except for the differences mentioned in the discussion of Section 605.1063

Section 605.1066. PERFECTION OF RIGHTS; RIGHT TO WITHDRAW. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4357)

This Section is essentially the same as Existing Law.

Section 605.1067. MEMBER'S ACCEPTANCE OF LIMITED LIABILITY COMPANY'S OFFER. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43575).

This Section is essentially the same as Existing Law.

Section 605.1068. PROCEDURES IF MEMBER IS DISSATISFIED WITH OFFER. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4358).

This Section is essentially the same as Existing Law.

Section 605.1069. COURT ACTION. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43585).

This Section is essentially the same as Existing Law.

Section 605.1070. COURT COSTS AND ATTORNEY FEES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4359).

This Section is essentially the same as Existing Law.

Section 605.1071. LIMITATION ON LIMITED LIABILITY COMPANY PAYMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.43595).

This Section is essentially the same as Existing Law.

Section 605.1072. OTHER REMEDIES LIMITED. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.4352(3)).

This Section is substantially similar to Existing Law. However, Subsection (1) provides a more detailed listing of the types of actions/remedies that are not available to a member after the appraisal event has been approved by the members. Subsection (2) sets forth three exceptions to Subsection (1). Subsection (2)(a) is essentially the same as Existing Law. Subsection (2)(b) is the same as Existing Law, except that in addition to fraud and misrepresentation, it covers material omissions. Subsection 2(c) is new. It provides an exception to Subsection (1), in cases involving interested transactions, unless the appraisal event transaction has been approved in the same manner provided for in Section 605.04092 ("Conflict of interest transactions").

Article 11: Miscellaneous Provisions

Section 605.1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. (corresponds to RULLCA Section 1101; no corresponding provision in Existing Law).

This Section, in large part, tracks Section 1101 of RULLCA, with some clean-up of language. The purpose is to help encourage the application and interpretation of the New Act in a manner that recognizes that much of the language in the New Act is based on a uniform act.

Section 605.1102. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. (corresponds to RULLCA Section 1102; no corresponding provision in Existing Law).

This Section, in large part, tracks Section 1102 of RULLCA, except to make clear that certain provisions of Florida law which expressly address issues associated with electronic signatures are not being modified, limited or superseded by this Section.

Section 605.1103. TAX EXEMPTION ON INCOME OF CERTAIN LIMITED LIABILITY COMPANIES. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.471).

This Section tracks Section 608.471 of Existing Law, with no substantive changes. There is no comparable Section in RULLCA.

Section 605.1104. INTERROGATORIES BY DEPARTMENT; OTHER POWERS OF DEPARTMENT. (no corresponding provision in RULLCA; corresponds to Existing Law Section 608.703).

This Section tracks Section 608.703 of Existing Law, with no substantive changes. There is no comparable Section in RULLCA.

Section 605.1105. RESERVATION OF POWER TO AMEND OR REPEAL. (corresponds to RULLCA Section 121; corresponds to Existing Law Section 608.704).

This Section tracks Section 608.704 of Existing Law, with no substantive changes. There is no comparable Section in RULLCA.

Section 605.1106. SAVINGS CLAUSE. (corresponds in part to RULLCA Section 1103; corresponds to Existing Law Section 608.705).

This Section tracks Section 608.705 of Existing Law, with no substantive changes. The comparable Section in RULLCA (Section 1103) is much narrower in scope.

Section 605.1107. SEVERABILITY CLAUSE. (corresponds to RULLCA Section 1104; no corresponding provision in Existing Law).

This Section tracks Section 1104 of RULLCA, but largely restates the general law otherwise applicable in the State of Florida.

Section 605.1108. APPLICATION TO LIMITED LIABILITY COMPANY FORMED UNDER THE FLORIDA LIMITED LIABILITY COMPANY ACT. (corresponds to RULLCA Section 110; no corresponding provision in Existing Law).

This Section follows the approach in Section 620.2204 of Florida's limited partnership statute. The Section allows for a phase in of the applicability of the New Act to limited liability companies existing as of January 1, 2014, in order to give existing limited liability companies an opportunity to evaluate the provisions of the New Act and, as deemed necessary, to amend articles of organization and/or operating agreements or to take other action prior to the January 1, 2015, the date as of which the New Act will govern all Florida limited liability companies (including LLCs existing on January 1, 2014). There is no comparable Section in RULLCA.

Florida limited liability companies formed on or after January 1, 2014 will be governed by the New Act. Any Florida limited liability company existing as of January 1, 2014 may become an early adopter by electing in its operating agreement to be subject to the New Act beginning at any time on or after January 1, 2014 and prior to January 1, 2015.

EXHIBIT A

The Florida Bar Florida Revised LLC Act Drafting Committee Members

Executive Committee:
Louis T. M. Conti, Chair (*Holland & Knight, Tampa*)
Gregory Marks, Reporter (*Shumaker, Loop & Kendrick, Sarasota*)
Steven D. Lear, Recording Secretary (*Bilzin Sumberg Baena Price & Alexrod, Miami*)
Philip B. Schwartz (*Akerman Senterfitt, Miami*)
Brenda L. Tadlock (*Division Director, Division of Corporations)*
Gary Teblum (*Trenam Kemker, Tampa*)
Manuel Utset (*Professor, Florida State University College of Law, Tallahassee*)

National Advisors:
Daniel Kleinberger (*Co-Reporter RULLCA*) *Professor, William Mitchell College of Law, St. Paul, MN*
Carter G. Bishop (*Co-Reporter RULLCA*) *Professor, Suffolk University Law School, Washington, DC*
Robert Keatinge (ABA Advisor to ULC on RULLCA, *Holland & Hart, Denver, CO*)

Academic Advisors:
Stuart Cohn (*Professor, University of Florida, Levin College of Law, Gainesville*)
Manuel Utset (*Professor, Florida State University College of Law, Tallahassee*)

Department of State Representative:
Brenda L. Tadlock, *Division Director, Division of Corporations*

Legislative Observer:
Brittany M. Juliachs, *Senate Committee on Commerce and Tourism*

Representatives from the Business Law Section:
Alan Aronson (*Akerman Senterfitt, Miami*)
James Barrett (*Baker & McKenzie, Miami*)
Robert Barron (*Berger Singerman, Ft. Lauderdale*)
Robert Brighton (*Shutts & Bowen, Ft. Lauderdale*)
Louis T. M. Conti (*Holland & Knight, Tampa*)
Rick Gross (*Carlton Fields, Miami*)
Alan Howard (*Milam Howard, Jacksonville*)
Steven D. Lear (*Bilzin Sumberg Baena Price & Axelrod, Miami*)
Mark Nichols (*Polenberg Cooper, Ft. Lauderdale*)
William C. Phillippi (*Lubell & Rosen, Ft. Lauderdale*)
Jon Polenberg (*Polenberg Cooper, Ft. Lauderdale*)
Andrew E. Schwartz (*Akerman Senterfitt, Miami*)
Philip B. Schwartz (*Akerman Senterfitt, Miami*)
Gary Teblum (*Trenam Kemker, Tampa*)

<u>Representatives for the Tax Section</u>:
Richie Comiter (*Comiter & Singer, Palm Beach Gardens*)
Dominic Lioce (*Nason Yeager, West Palm Beach*)
Gregory Marks (*Shumaker, Loop & Kendrick, Sarasota*)
Sydney Traum (*Sydney Traum, PA, Coral Gables*)
Thomas Wells (*Thomas Wells, PA, Coral Gables*)
Guy Whitesman (*Henderson Franklin, Ft. Myers*)

<u>Representatives from Real Property Probate and Trust Law Section</u>:
Burt Bruton (*Greenberg Traurig, Miami*)
William Lane (*Holland & Knight, Tampa*)
Brian Sparks (*Hill Ward Henderson, Tampa*)