

FLORIDA LLCs

THE CHANGING THE CHANGING

HORIZONS HORIZONS?



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FLORIDA LLCs – THE CHANGING HORIZONS

A. Statute recent History

1. FL Statute created in 1982 (over 30 years ago)
2. Changes and “Clean-ups” in ’93, ’97’, Major Revision in ’99, additional Clean-ups on ’02, ’05 and “11 (Olmstead)
3. Rewrite enacted in 2013 (5 years of committee work)
4. NO GRANDFATHERING after January 1, 2015

B. Default Statute – OA controls unless silent, then Statute – Exception for Non-Waivable Provisions

C. Summary of Notable Changes:

1. expands the list of non-waivable default rules which cannot be "trumped" by the operating agreement,
2. modifies rules for the power of members and managers to bind the company,
3. modifies provisions addressing the LLC's management structure (including the elimination of the term "managing member"),
4. modifies default management and voting rules,
5. modifies provisions relating to member dissociation and company dissolution,
6. modifies provisions for judicial dissolution and appointment of receivers and custodians,
7. modifies provisions for service of process on LLCs,
8. modifies provisions for derivative actions and adds express provisions regarding special litigation committees,
9. modifies provisions governing organic transactions like mergers and conversions, and adds provisions to permit interest exchanges and inbound domestications by non-U.S. entities, and
10. 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.

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D. Definitions:

1. Definitions: 79 definitions versus 26
2. “Managing Member” is removed from new Act – Must demonstrate intent to be manager-managed or will be deemed member-managed
3. “Member” does not have to have an Economic Interest – now can be Creditors, Lenders, Vendors, Employees, etc.
4. New broader definitions of “transfer” and new definitions of “transfer” and “transferable interest”
5. New “knowledge” and “Notice” rules - imputed

E. Operating Agreement:

1. Expanded definition now provides for verbal OA or implied from a “record” – any information that can be inscribed - which includes physical or electronically stored (emails and the like).
2. Essential Function of OA –
 - i. Establishes the relationships, duties and activities.
 - ii. Default Statute
 - iii. Non-Waivable Provisions
 - iv. Certain Provisions – “not manifestly unreasonable”
 - v. Defines Court considerations of “not manifestly unreasonable
 - vi. Allows for Penalties against members for non-compliance with OA
3. Non-Waivable Provisions – OA cannot:
 - i. exonerate person (member) from liability bad faith/known violation of law
 - ii. waive judicial dissolution
 - iii. Unreasonably restrict member’s legal action against Company, Member or Manager
 - iv. Unreasonably restrict access to records
 - v. Remove or limit liability for Fiduciary duties
4. Execution of OA not required
5. Conflicts between Articles and OA:
 - i. as to Members, Managers and Transferees the OA controls
 - ii. as to 3rd parties, the Articles control

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F. Liability to 3rd Parties relying on records – Permits 3rd party relying on inaccurate public record to seek damages from Members or Manager (as case may be). OA may relieve a member of liability if it states specifically one or more of the other members shall be responsible for the accuracy of Public Record filings.

G. Authority:

1. Members of member-managed LLC have “statutory apparent authority”.
2. Provides for a “Statement of Authority” (SOA)
 - i. SOA as to Real Property – must be filed AND recorded
 - ii. SOA pertaining to everything else
3. SOA expires in 5 yrs if not terminated or amended to extend.
4. Failure to follow formalities in activities and affairs will not, in and of itself, impose liability on members and managers

H. Becoming a Member: Act provides 4 ways to become a Member:

1. OA provides requirements
2. As the result of merger, interest exchange, conversion or domestication
3. Consent of ALL members
4. In dissolution and no members for 90 days
5. NOTE: may become a member without acquiring an economic interest or making a contribution (springing members and SP LLCs for example)

I. Distributions:

1. Now provides that distribution may not be in any form other than money (exception, fungible goods easily divided prorate)
2. Member of member-managed (and manager of manager-managed) personally liable for improper distribution – may be relieved if OA explicitly provides the member is relieved of authority and responsibility to consent to distributions.
3. If you receive a distribution and know it violates statute, then personally liable.

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J. Management:

1. No more Managing Members
2. If intent is Manager-Managed then must explicitly state in Articles or OA
3. If previously formed and neither the Articles nor OA are clear as to managers, then will be deemed Member-Managed with all members having management authority – unless specifically provided otherwise.
4. Management rights and duties may be delegated, but not responsibility.

K. Voting Rights:

1. Member-Managed - Articles and/or OA may be amended only by unanimous consent and admission of new member, expulsion, dissolution each also require unanimous vote or consent.
2. New separate voting provisions for mergers, conversion and interest exchanges.

L. Derivative Action: the new Act directly addresses improper conduct and expands the list of wrongful acts which preclude indemnification – provisions which cannot be altered by OA

M. Conduct of Members and Managers: New act expressly delineates the scope of duty of loyalty to include:

1. Accounting to LLC
2. Refraining from dealing in position adverse to Company
3. Refraining from competing prior to dissolution
4. New Definitions for “indirect material financial interest”; “fair to the llc”; and “indirectly a party”

N. Records – Access and Dissemination:

1. Unlimited Access to certain records
2. Other records that are “material to the member’s rights and duties under the OA or [the Act]”
3. 10-day response time upon receipt of request
4. Duty to provide information is no longer automatic
5. Duty to provide if know information is required to be disseminated

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O. Transferring Interest:

1. New definitions – “transferable interest” = transferee’s right to distributions
2. Transferor retains all rights and duties of membership unless transfer is to a person who becomes a member

P. Dissociation of a Member:

1. At least 10 new ways to dissociate
2. Notably:
 - i. Dissociation by Willful act (cannot vary this by OA)
 1. May be liable for wrongful dissociation
 - ii. Dissociation by Expulsion
 1. OA can prescribe method
 2. Expulsion by unanimous vote (business cannot be lawfully carried on with expelled member) or member is an entity that is dissolved
 3. Expulsion by Judicial determination – Member’s wrongful acts:
 - a. adversely and materially affecting company;
 - b. willful or persistent breach of OA;
 - c. violates fiduciary duties or statutory stds.; or
 - d. not reasonable to carry on company activities with person as a member

Q. Dissolution:

1. Judicial Dissolution – 3 new basis added = 5 total
 - i. Unlawful activities/purpose
 - ii. Not reasonably practicable to carry on
 - iii. Controlling members/managers acting illegally or fraudulently
 - iv. Assets misappropriated or waste
 - v. Members/managers deadlocked and irreparable injury to Company can result
2. Creditor no longer has right to petition Court for dissolution

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3. New Deadlock Sale provision
 - i. Allows OA deadlock provision to prevail over judicial dissolution for deadlock
4. Except for the existence of a Deadlock provision, the OA cannot vary judicial sale provisions
5. Note: “Election to Purchase Instead of Dissolution” provision allows LLC or members to purchase interest of member seeking Judicial dissolution
6. Allows for appointment of Receiver

R. Winding up:

1. This activity is clearly separated from the Dissolution steps by new Act.
2. OA cannot vary certain aspects of the statutory Winding Up provisions
3. New procedures for dealing with “unknown claims” against the LLC

S. Reinstatement after Administrative Dissolution: Modifies reinstatement procedure

T. Direct Action by Members: Member may bring action against another member, manager or LLC to enforce and protect rights and interest under OA, the Act or arising independent of member relationship. The injury sued upon must be one which the member will suffer, not just the Company.

U. Derivative Action:

1. New prerequisite to action is formal Demand, unless Demand would be futile
2. Response to Demand request must be “suitable action”
3. Suitable action must be taken in reasonable time not to exceed 90 days
4. LLC may set up a “Special Litigation Committee” to address the Demand
5. Act provides for the Burden of Proof – demand enforcing right of Company and lack of reasonable action by members/managers
6. Proceeds of successful derivative action belong to Company; however, member may get reimbursement of Attorney fees.

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V. Foreign LLC's:

1. Florida does not Provide for Series LLC's, however, Foreign Series LLC's, if authorized by their formation State, can register to do business in Florida with each Series filing separately
2. NEW: "A Foreign LLC may not transact business in this state until it obtains a certificate of authority from the department."
3. Act provides nonexclusive list of activities that do not constitute "transacting business"

W. Transformations:

1. Act now adds Interest-Exchanges and Domestications to Mergers and Conversions to list of transformations permitted
2. If merging LLC is Not-for-Profit, Surviving LLC must be Not-for-Profit as well
3. Merger minimum Notice period shortened to 10 days
4. Interest-Exchange = manner of consolidating or affiliating a FL LLC with another entity
5. Domestication = Non-US entity seeks FL LLC status while permitting it to retain its status and existence in the Non-US jurisdiction as well

X. Appraisal Rights: Five new events triggering Appraisal Rights (in addition to Merger and Conversion)

1. Interest Exchange
2. Sale of all or substantially all of the LLC's Assets
3. Amendment to the Articles or OA resulting in reduction in amount LLC will have to repurchase (anti-squeeze out provision)
4. Amendment to Articles or OA which alters or abolishes voting rights
5. Amendment to Articles or OA which alters or abolishes Appraisal Rights