

**Florida Business Entities; What’s Important to Know  
When Working with Entities in  
Real Estate Transactions**

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**LLC ARTICLE – FLORIDA’S REVISED LLC ACT** ..... **20-27**

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## **More LLC Attributes**

- Can elect tax treatment
- Statement of Authority and Statement of Denial
- Non-member veto power
- Can back-date by up to 5 days

## **A Few Distinctions**

- Operating agreement superior to articles of organization
- Operating agreement may be implied
- Protection from reverse piercing for multi-member LLC

## **Brief History**

- As early as 1982, but seldom used
- FL had imposed a corporate tax on LLCs
- In 1998 corporate tax eliminated
- Soon thereafter, became entity of choice

*Have option to "check the box"  
for tax election*

## **Brief History**

- New Statute, F.S. Chapter 605
- Became fully effective January 1, 2015
- Minor amendments thereafter

An LLC is a  
***HYBRID***  
 between a corporation and a  
 partnership

## Comparisons to Corporations

ITEM	CORPORATION	LIMITED LIABILITY COMPANY
<b>Document to Form Entity</b>	Articles of Incorporation	Articles of Organization
<b>Governing Documents</b>	Bylaws/ Shareholders Agreement	Operating Agreement
<b>Owners (Ownership)</b>	Shareholder(s) (shares, capital, stock)	Member(s) (participation interest)
<b>Authorized Parties- (Apparent Authority)</b>	Director(s); President, VP, Treasurer, Secretary, Chief Executive Officer, Chief Financial Officer; (or any other party duly authorized)	Member(s) or Manager(s) but not both; (or any other party duly authorized)

# Statement of Authority



## STATEMENT OF AUTHORITY

Pursuant to section 605.0302(1), Florida Statutes, this limited liability company submits the following statement of authority:

**FIRST:** The name of the limited liability company is: \_\_\_\_\_

**SECOND:** The Florida Document Number of the limited liability company is: \_\_\_\_\_

**THIRD:** The street address of the limited liability company's principal office is:  
 \_\_\_\_\_  
 \_\_\_\_\_

The mailing address of the limited liability company's principal office is:  
 \_\_\_\_\_  
 \_\_\_\_\_

**FOURTH:** This statement of authority grants or sets limitations of authority on all persons having the status or position of a person in a company, whether as a member, transferee, manager, officer or otherwise or to a specific person on the following:

1. May execute an instrument transferring real property held in the name of the company.
  - a. Granted to: \_\_\_\_\_
  - b. No authority granted to: \_\_\_\_\_
2. May enter into other transactions on behalf of, or otherwise act for or bind, the company.
  - a. Granted to: \_\_\_\_\_
  - b. No authority granted to: \_\_\_\_\_

\_\_\_\_\_  
 Signature of authorized representative

\_\_\_\_\_  
 Typed or printed name of signature

Filing Fee: \$25.00  
 Certified Copy: \$30.00 (optional)

CR2E138 (2/14)

# Proper Terminology

Manager Managed  
 or  
 Member Managed

**NOT** – Managing Member-  
 Confusing and eliminated in the  
 Revised Act.

## Manager Managed v Member Managed

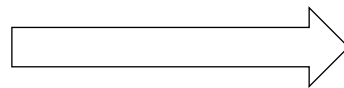
- A Member of a Manager Managed LLC has **NO** authority to act for a Manager Managed LLC.
- Similarly, the revised LLC Act does **NOT** empower a Manager with any powers to act for a Member Managed LLC.

**Terms are NOT  
interchangeable**



## Statute of Frauds

- Real Estate Contract = **Yes**
- LLC Operating Agreement = **See Next Slide for Answer**



## LLC Operating Agreement



- Statute of Frauds does **not** apply.
- The Operating Agreement does **not** need to be identified as an "Operating Agreement."
- May be "oral, implied, in a record, or any combination thereof."
- "Record" includes emails, course of dealing, usage of trade, or implied terms.
- The most important part of an LLC –

Should be as **clear** and **comprehensive** as possible.

## INTERGRATION CLAUSE

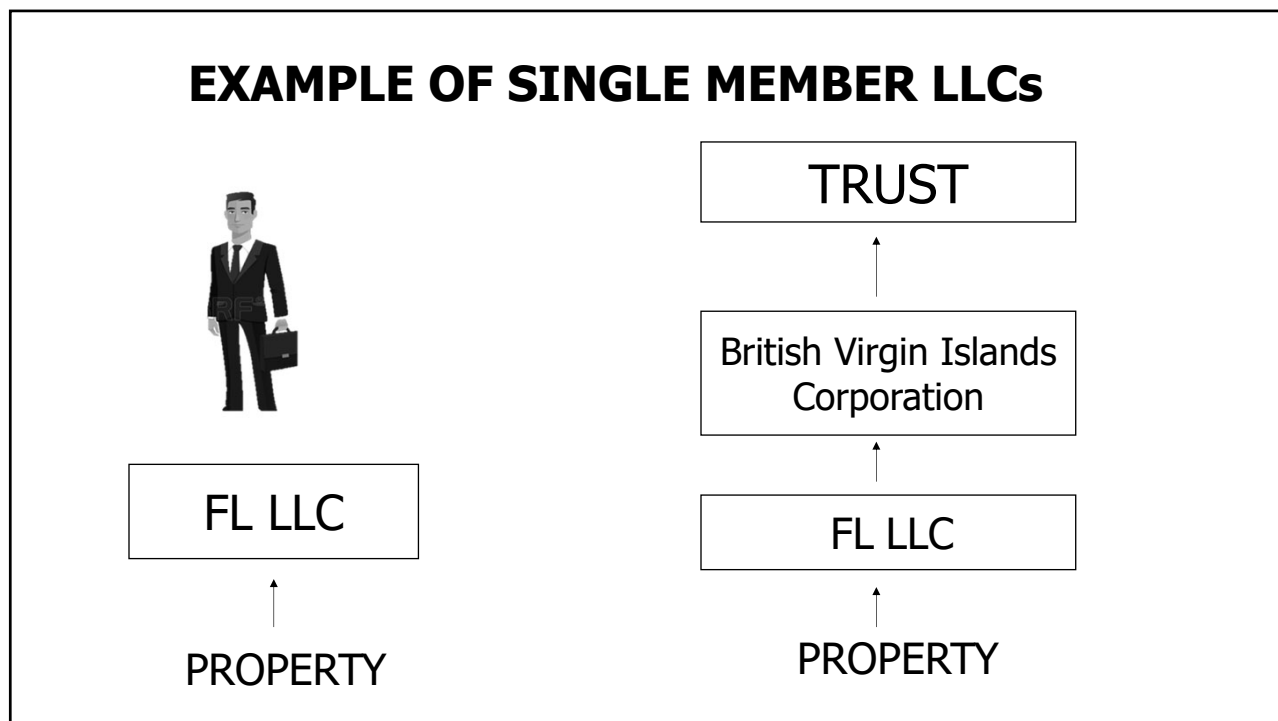
### **Entire Agreement**

This Agreement together with all exhibits hereto contains the entire agreement and supersedes all prior agreements, oral or written, with respect to the subject matter hereof. This Agreement may be changed only by an agreement in writing signed by the party against whom any waiver, change, amendment, modification, or discharge is sought.

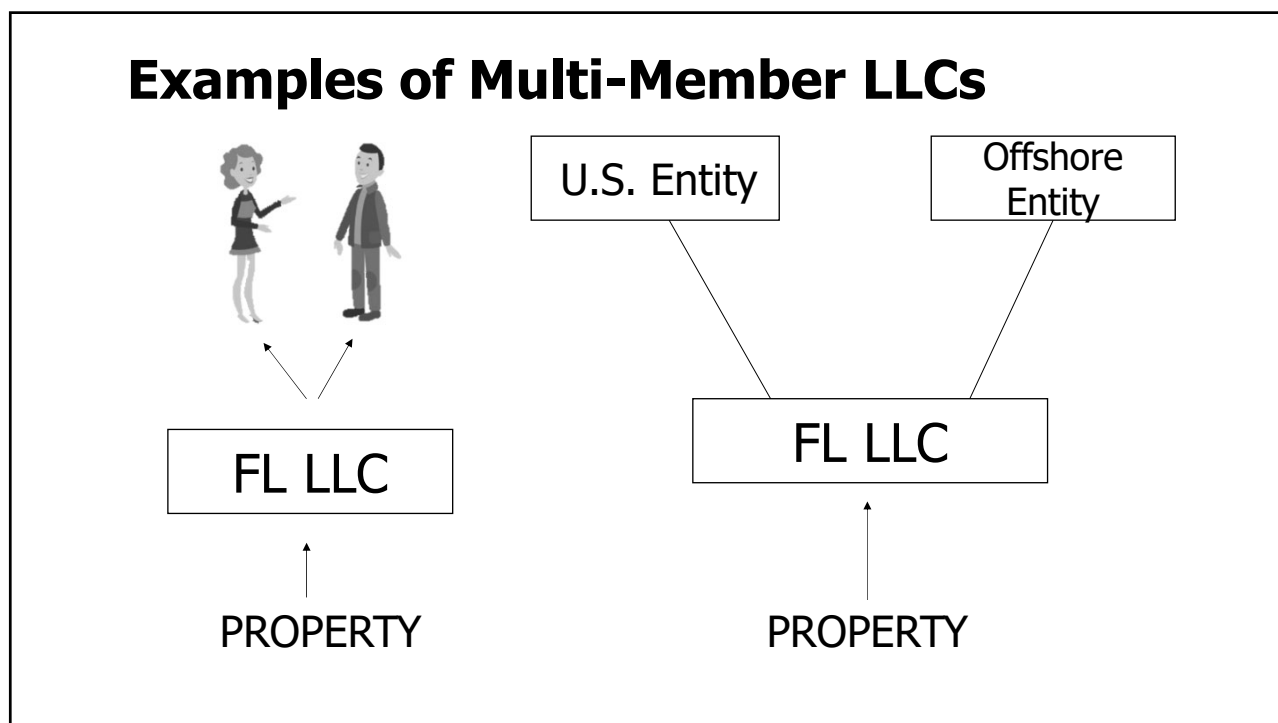




## EXAMPLE OF SINGLE MEMBER LLCs

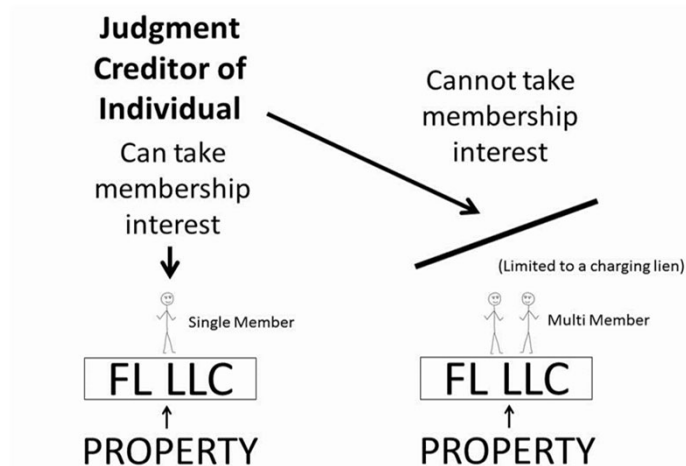


## Examples of Multi-Member LLCs



## "CHARGING ORDERS"

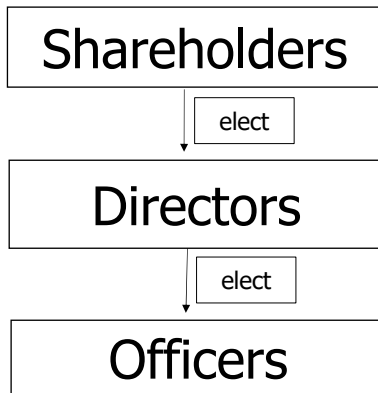
### Asset Protection Considerations / Difference between Single Member & Multi Member LLC in the Case of a "Reverse Piercing"



## How are LLCs taxed

- Default classifications for single member and multi member
- Can elect different tax treatment
- IRS Form 8832 "check the box"

## Corporations



Articles of Incorporation control for any conflict with By-Laws or the resolutions.

Articles + By Laws + Shareholders Agreement in the aggregate is comparable to Operating Agreement

## Authority

- Transaction in the Ordinary Course of Business
  - Review Bylaws – Usually Corporate Officers
  - If unsure whether ordinary course, treat as outside the ordinary course
- Outside Ordinary Course of Business
  - Governing Body = Board of Directors
  - Owners = Shareholders

## 2023 Florida Statutes

- 607.1201 Disposition of assets not requiring shareholder approval.—Unless the articles of incorporation otherwise provide, no approval by shareholders is required to:(1) Sell, lease, exchange, or otherwise dispose of any or all of the corporation’s assets in the usual and regular course of business;
- (2) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), create a security interest in, or otherwise encumber any or all of the corporation’s assets, regardless of whether in the usual and regular course of business;
- (3) Transfer any or all of the corporation’s assets to one or more domestic or foreign corporations or other entities all of the shares or interests of which are owned by the corporation; or
- (4) Distribute assets pro rata to the holders of one or more classes or series of the corporation’s shares, except to the extent that the distribution is part of a dissolution of the corporation under ss. [607.1401-607.14401](#).
- History.—s. 116, ch. 89-154; s. 159, ch. 2019-90.

## 2023 Florida Statutes

- 607.1202 Shareholder approval of certain dispositions.—
- (1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without good will), otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation’s board of directors, but only if the board of directors proposes and its shareholders approve the proposed transaction.
- (2)(a) To obtain the approval of the shareholders under subsection (1), the board of directors must first adopt a resolution approving the disposition, and thereafter, the disposition must also be approved by the corporation’s shareholders.
- (b) In submitting the disposition to the shareholders for approval, the board of directors must recommend the proposed transaction to the shareholders of record unless:
  - 1. The board of directors makes a determination that because of conflict of interest or other special circumstances it should not make such a recommendation; or
  - 2. Section 607.0826 applies.
- (c) If either subparagraph (b)1. or subparagraph (b)2. applies, the board of directors shall inform the shareholders of the basis for its so proceeding without such recommendation.
- (3) The board of directors may set conditions for approval of the disposition or the effectiveness of the disposition.

## 2023 Florida Statutes

- (4) If the disposition is required to be approved by the shareholders under subsection (1) and if the approval is to be given at the meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the disposition and shall contain a description of the disposition and the consideration to be received by the corporation. Furthermore, the notice shall contain a clear and concise statement that, if the transaction is effected, shareholders dissenting therefrom are or may be entitled, if they comply with the provisions of this chapter regarding appraisal rights, to be paid the fair value of their shares and such notice must be accompanied by a copy of ss. 607.1301-607.1340.
- (5) Unless this chapter, the articles of incorporation, or the board of directors acting pursuant to subsection (3) requires a greater vote or a greater quorum, the approval of the disposition shall require the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of all the votes entitled to be cast on the disposition.
- (6) After a disposition has been approved by the shareholders under this chapter, and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.
- (7) A disposition of assets in the course of dissolution is governed by ss. 607.1401-607.14401 and not by this section.
- (8) For purposes of this section, the assets of a direct or indirect consolidated subsidiary shall be deemed to be the assets of the parent corporation.
- (9) For purposes of this section, the term "shareholder" includes a beneficial shareholder and a voting trust beneficial owner.
- History.—s. 117, ch. 89-154; s. 153, ch. 90-179; s. 20, ch. 2003-283; s. 160, ch. 2019-90; s. 40, ch. 2020-32.

## 2023 Florida Statutes

### 692.01 Conveyances executed by corporations.

Any corporation may execute instruments conveying, mortgaging, or affecting any interest in lands by instruments sealed with the common or corporate seal and signed in its name by its president or any vice president or chief executive officer. Assignments, satisfactions, or partial releases of mortgages and acquittances for debts may be similarly executed by any corporate officer. No corporate resolution need be recorded to evidence the authority of the person executing the deed, mortgage, or other instrument for the corporation, and an instrument so executed is valid whether or not the officer signing for the corporation was authorized to do so by the board of directors, in the absence of fraud in the transaction by the person receiving it. In cases of fraud, subsequent transactions with good faith purchasers for value and without notice of the fraud shall be valid and binding on the corporation.

History.—RS 1955; GS 2459; s. 1, ch. 6183, 1911; RGS 3799; CGL 5672; s. 1, ch. 71-10; s. 1, ch. 79-290; s. 3, ch. 2008-35.

## 2023 Florida Statutes

692.02 Validation of conveyances.

Conveyances by corporations of lands in this state, heretofore executed, which have been sealed with the common or corporate seal of such corporation and signed in its name by a vice president or the chief executive officer thereof, shall be as valid and effective and shall bear the same presumptions as if signed in the name of such corporation by its president.

History.—s. 2, ch. 6183, 1911; RGS 3800; CGL 5673.

## Partnerships - Authority

- Transactions in the Ordinary Course of Business
  - Look to Partnership Agreement
  - Generally, any individual Partner (but preference for all)
- Outside Ordinary Course of Business
  - All Partners
- Affecting the Entity Existence
  - All Partners

## General Partnerships- Apparent Authority

- **620.8301 Partner agent of partnership.—**

Subject to the effect of a statement of partnership authority under s. 620.8303:

- (1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course of partnership business or business of the kind carried on by the partnership, in the geographic area in which the partnership operates, binds the partnership unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.
- (2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by all of the other partners or is authorized by the terms of a written partnership agreement.

History.—s. 13, ch. 95-242.

## Limited Partnerships- Apparent Authority

- **620.1402 General partner agent of limited partnership.—**

- Each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under s. 620.1103(4) that the general partner lacked authority.
- (2) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership only if the act was approved by the other partners as provided in s. 620.1406.

History.—s. 17, ch. 2005-267.

## FinCEN Reporting for Entities

- New Geographic Targeting Order (GTO) is effective **October 19, 2023 and expires April 18, 2024.**
- Requirements apply to title insurers and title agents for residential purchases of \$300,000.00 or more without obtaining an institutional mortgage in the Florida counties of Miami-Dade, Broward, Palm Beach, Hillsborough, Pasco, Pinellas, Manatee, Sarasota, Charlotte, Lee, or Collier.
- The GTP requires title issuing agents to collect and report information about the persons involved in certain residential real estate transactions ("Covered Transactions")
- "Covered Transactions" means a transaction in which:
  - i. Residential real property is purchased by a Legal Entity;
  - ii. The purchase price of the residential real property is in the amount of \$300,000 or more;
  - iii. Such purchase is made without a bank loan or other similar form of external financing;
  - iv. Such purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency.

## FinCEN Reporting for Entities

- Note: The definition of "Legal Entity" :  
 "Legal Entity" means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or the United States, or a foreign jurisdiction, other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities Exchange Commission ("SEC") or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.



## **CORPORATE TRANSPARENCY ACT (CTA) SUMMARY**

- Beginning Jan. 1, 2024, the Corporate Transparency Act (CTA) requires certain U.S. and foreign entities defined as "reporting companies" to report certain identifying information about themselves, their beneficial owners, and company applicants to FinCEN (the U.S. Dept. of the Treasury's Financial Crimes Enforcement Network) within a certain prescribed time period.
- Failure to comply with the new reporting requirements will result in serious civil and criminal penalties. Adopted as Title 64 of the 2021 National Defense Authorization Act.
- Mandates creation of a national database for the "beneficial ownership" information (BOI) of many businesses.
- Purpose of the disclosures is to prevent usage of anonymously owned entities for illegal purposes.
- Financial Crime Enforcement Network of the US Treasury (FinCEN) must establish database and filing procedure before filings commence; Database will not open until January 1, 2024.

## **CORPORATE TRANSPARENCY ACT (CTA) SUMMARY**

### **Filing Deadlines:**

- New businesses formed after January 1, 2024 must file BO reports within 30 days of filing (pending proposed extension to 90 days).
- All other existing businesses (other than inactive and exempt companies) must file by January 1, 2025.

## CTA – REPORTING COMPANY

- Reporting Companies: Corporations, LLCs, any other entity created by the filing of a document with Secretary of State or similar office, and any foreign entity registered to do business in any State.
- May not include: General partnerships, LLPs (because not “created” by filing), Trusts not created by a state office filing, other “associations” that do not make a filing, and any foreign entity that doesn’t register to do business.
- Exempt Entities, Section 5336(a)(11)(B): Primarily regulated companies: Public companies, certain large companies, financial institutions, registered money transmitting businesses, broker dealers, registered investment advisors, investment companies, venture capital fund advisors, insurance companies, public utilities, certain charitable organizations, and certain political organizations.
- Inactive Entity Exemption: Applies to certain businesses formed prior to January 1, 2020 that are not engage in an active business, and do not hold any kind of assets, including ownership in any entity. Within past 12 months cannot (1) have had a change in ownership, or (2) sent or received funds in an amount greater than \$1,000 (either directly or through an affiliate).
- This exemption does NOT apply to any entity owned by a foreign person, directly or indirectly, wholly or partially.

## CTA – FILING REQUIREMENTS

- FinCEN will publish instructions and guidance to complete the Beneficial Owner (BOI) report form. Can be filed electronically, and will be available at: [www.fincen.gov/boi](http://www.fincen.gov/boi)
- Requirements will include:
  - Personal identifying information for every reportable “beneficial owner” (and for new companies will need to include for every “applicant”),
  - Includes name, address, current passport, or drivers license number, and an image of the identification document. (For individuals that are likely to have multiple filings they will have the option to file and obtain a “FinCEN identifier” under certain circumstances and requires a separate application. Any changes to the FinCEN identifier information must be filed within 30 days therefrom, and this is a requirement of the FinCEN identifier not the reporting company.
  - Company will be required to have a taxpayer identification number (EIN) at the time of filing.
  - Company must report all its trade or “dba” names.
  - Updates must be filed within 30 days after any change to the information.

## CTA – BENEFICIAL OWNER

- Reporting companies must disclose every individual who DIRECTLY OR INDIRECTLY, either:
- Exercised "Substantial Control" over the reporting company, or
- Owns or controls at least 25% of the ownership interest of the reporting company.

Substantial Control, As Defined in 31.C.F.R. 1010-380, includes and person who:

- Is a "senior officer" of the reporting company (not necessarily directors),
- Exercises authority over the appointment or removal of any senior officer or Manager of an LLC, majority of the board of a corporation, or similar body in another entity, or
- Directs, determines, or has "substantial influence" over, important matters made by the reporting company (list of examples is available; though not exclusive)(does not apply to negative covenants in loan agreements).

## CTA – BENEFICIAL OWNER

- Direct or indirect control includes: Manager of a manager managed LLC, member of a member managed LLC, board representation for corporations (depending on the circumstances), ownership or control of a majority of voting shares, rights associated with any financing arrangement, control over intermediary entities that exercise substantial control over the entity, arrangements with entities or individuals acting as nominees, any could be through any other contract, arrangement, understanding or relationship depending on the circumstances (ie, joint ownership, nominee, intermediary, custodian or agent agreements).
- For any trust with an ownership interest: Reporting must include (a) trustee of the trust or other individual with authority to dispose of trust assets, and (b) beneficiary who receives all income and principal from the trust or has the right to the assets of the trust. Also includes grantor or settlor who has the right to revoke the trust or the right to the distribution or assets, and any individual who through ownership or control of intermediary entities that owns or controls ownership interests in the reporting company.

## CTA – PENALTIES AND OTHER CONSIDERATIONS

- Penalties apply to any individual, reporting company or other entity who willfully provides, or attempts to provide, false or fraudulent BOI, and can include (a) civil fine of up to \$10,000 (accruing \$500 for each day a report is outstanding), up to two years in prison, and additional penalties for unauthorized disclosure or unauthorized use of the BOI.
- Practice suggestions: Need to review operating agreements and shareholders agreements and many other client documents (including estate documents). Consider limitation of confidentiality clauses in operational agreements, and revising agreements to (a) impose express obligations for managers, members, officers and shareholders to provide necessary information for the BOIs, and (b) designate person(s) responsible for filing. Consider use of client intake information sheets. Revise covenants and closing conditions. Consider limitations on legal opinions.
- For more information. Go to the FinCEN CTA website for updates, clarifications, final regulations, and changes. You can also sign up for updates.

Thank you!

Feel free to contact me with any questions:

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# Florida's Revised Limited Liability Company ("LLC") Act

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This article provides an overview of the Revised LLC Act (revised act).

The revised act has taken full effect January 1, 2015,<sup>1</sup> and is a comprehensive and outstanding rewrite of the prior act. It was written during a four year period by a committee formed by the Florida Bar (LLC Drafting Committee), with significant participation and collaboration by members of the Florida Bar Business Law, Real Property, Probate and Trust Law, and Tax sections. It incorporates important updated provisions from the revised uniform LLC act (promulgated by the Uniform Law Commission, and as amended in 2011), as well as provisions from Delaware, other states, and Florida corporate and partnership law (as LLCs are a hybrid between corporations and partnerships), and this new and improved chapter of the Florida Statutes<sup>2</sup> is likely to facilitate the use of more LLCs.

## Florida LLCs have become the entity of choice.

There are more active Florida LLCs than corporations, and each year that is becoming more so, with new Florida LLCs now being formed at almost twice the rate of corporations. Florida has more LLCs than any State in the nation, including Delaware, and LLCs are increasingly being used more and more for real estate and other transactions, as it offers a more flexible management structure, "pass through" taxation, exemption from Florida's corporate income tax, the same limited liability protections for owners (members) as received by owners of corporations, and additional asset protection for multi-member LLCs.

The revised act is a default statute, and as in the prior act, the relationship is governed primarily by the operating agreement (which is strongly encouraged, but not legally required). The revised act strengthens freedom of contract (items permissible in an operating agreement), expands definitions, expands nonwaivable provisions, clarifies agency and authority rules, provides for new statements of authority, eliminates the title/concept of "managing member," and retains the distinction for asset protection purposes between single member and multi-member LLCs (Olmstead Patch). It provides the ability to reduce but not eliminate fiduciary duties, permits new members with no participation interest, permits members to dissociate, expands dissolution provisions, clarifies service of process, and liberally permits the entity to be combined with other entities by way of merger or conversion.

## Authority; “Manager Managed” or “Member Managed”

Although permitted but not explicitly required by the revised act, in order to electronically file articles of organization, the articles of organization must include the name and address of one or more individuals or entities that are authorized to manage and control the LLC.<sup>3</sup> The articles of organization can also include a statement as to whether the LLC is manager managed or member managed,<sup>4</sup> and this is typically recommended to establish the party or parties that are authorized to act on behalf of the LLC.

When contracting or otherwise dealing with LLCs, third parties (other than members, dissociated members, transferees, and managers), are entitled to rely on Florida Department of State records unless otherwise advised.

If authority is not clearly stated in the articles of organization, it will be necessary to review the operating agreement to determine authority, and it’s important to note that the revised act provides that in the event of conflict between the articles of organization and operating agreement, the operating agreement shall control.

Upon determining whether the company is member managed or manager managed, the revised act provides important authority and guidance for real estate transactions:

“Unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or a manager, a member of a member-managed company or a manager of a manager-managed company may sign and deliver an instrument transferring or affecting the limited liability company’s interest in real property. **The instrument is conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument.**”<sup>6</sup> [Emphasis added.]

The revised act, in contrast to the revised uniform limited liability company act, provides statutory apparent authority as described above, which is particularly important for real estate transactions.

## Manager or Member

Often the manager(s) and members(s) are the same person(s), and it is generally best (and it is common practice) to be **manager managed** so the company will **disclose in State records who is authorized to act on behalf of the company**, as it is required to do so, **but not disclose its ownership**. This is also generally preferable because of deemed notice rules, and provisions related to the delegation of rights and powers.<sup>7</sup>

The **terms** manager managed and member managed are **not interchangeable**. The revised act clearly provides that a member does not have any authority to act for a manager managed LLC, and the revised act does not empower a manager with any powers to act for a member managed LLC.<sup>8</sup>

## Statement of Authority

The revised act allows the company to file a statement of authority in order to limit the apparent authority of one or more members or managers, or in order to provide authority for a member, manager or other party to act on behalf of the LLC.<sup>9</sup>

These statements fall into two categories. A properly filed statement of authority (filed with the Florida Department of State)<sup>10</sup> that **does not pertain to transfers of real property** will be **conclusive in favor of any person who gives value in reliance on the grant**, provided that the person giving value doesn't have knowledge to the contrary, or that the statement was subsequently canceled or amended to terminate the authority at issue.<sup>11</sup>

A statement of authority to grant **authority to transfer real property** held in the name of the LLC, however, **requires a second step** in addition to filing with the Florida Department of State; which is the **recording of the certificate of authority in the applicable real property records** where the property is located: *"[A] certified copy of which statement if recorded in the office for recording transfers of real property, is conclusive in favor of a person who gives value in reliance on the grant without knowledge to the contrary..."*<sup>12</sup>

The company can also amend or cancel the statement of authority,<sup>13</sup> and persons granted authority are entitled to file a statement of denial of such authority.<sup>14</sup>

Thus, third parties that are dealing with an LLC in the real estate context, should review Florida Department of State records both to determine authority and to determine if there are any statements of authority, any amendments or cancellations thereto, or any statements of denial, and as stated above, to determine who is authorized to act on behalf of the LLC and whether it's *member managed or manager managed*. Although third parties are entitled to rely on the State records unless otherwise advised,<sup>15</sup> it is better practice for practitioners to also review the operating agreement, with the understanding that the revised act provides that in the event of conflict between the articles of organization and operating agreement that the operating agreement shall control.

## Title Insurance; Affidavits

Prior to insuring any conveyance of title, for marketability of title purposes title underwriters are requiring confirmation that persons executing instruments to be insured have the authority to bind the LLC **either** under a **statement of authority** filed with the Florida Department of State and recorded in the official records of the county where the property lies, or **confirmation with the Florida Department of State** that a person identified as a manager is in a *manager managed* LLC, or a person identified as a member is in a member managed LLC, as applicable, are **properly authorized**, and that there is **no recorded statement to the contrary**. Where there is knowledge that the information filed with the Florida Department of State is inconsistent with the operating agreement, there will be additional requirements which may include the requirement for all or a majority of the members in interest<sup>16</sup> to provide their consent, or for the proper party or parties to execute an affidavit consenting to the transaction and establishing the names of all current members and their respective interests. Title underwriters are also requiring a determination (often in the form of an affidavit) that the member or manager that is authorizing the transaction has not become a debtor in bankruptcy since becoming a member or manager, and if the LLC is a single member LLC, a determination should be made that there are no creditors who have acquired or are attempting to acquire control of the LLC by executing upon the member's interest.

## Additional Important Considerations

**Operating Agreement.** An LLC is a creature of contract, and it is recommended to have a written operating agreement setting forth the existence of the entity and members, whether the company is *manager managed* or *member managed*, as well as important agreements and

protocol concerning rights, duties and indemnification, and many other provisions. The revised act strengthens freedom of contract, and although it also adds many new default rules, the vast majority of these rules can be overridden or otherwise modified (except to the extent prohibited by the nonwaivable provisions of the revised act).<sup>17</sup>

**Integration.** It is particularly important to include an integration/merger clause in the operating agreement (i.e. this agreement constitutes the entire agreement between the parties ... and no waiver, consent, modification or change shall bind the parties unless in writing and signed), as an operating agreement may be implied; that is, it may be written or oral, or a combination of both.<sup>18</sup>

**Effective Date.** When filing articles of organization, the revised act permits a prior effective date that is within five business days before the date of filing.<sup>19</sup> This is particularly helpful for real estate transactions, enabling a party to sign a contract prior to the formation of the LLC (as permitted for Florida corporations).

**Elimination of term – “Managing Member.”** Although this terminology may not immediately appear to be problematic, it is confusing because it is unclear whether this term is meant to create a manager managed or a member managed LLC, and as such, **this term has been eliminated in the revised act**, and by default those LLCs with this terminology will be deemed to be member managed.<sup>20</sup> Thus, it is recommended for those entities that use this terminology (which likely were created prior to the revised act), to file articles of amendment to their articles of organization and/or revise the terminology utilized in the annual report (that is, to designate one or more individuals as either MGR (indicating manager) or AMBR (indicating authorized member), but certainly not MGRM, and to revise their operating agreement to clearly designate that the entity is either manager managed or member managed.

**Duties.** Duties may be shifted among members.<sup>21</sup>

**Admission of New Members.** Unlike the prior act, the revised act provides that absent anything to the contrary in the operating agreement, new members may **only be admitted by unanimous vote of the members**, rather than by a majority.<sup>22</sup> The revised act also provides that the operating agreement is binding upon a manager or transferee even when not signed or formally accepted by such person.<sup>23</sup>

**Amendment.** Unless otherwise provided in the operating agreement, a unanimous vote of the members is required to amend the articles of organization or operating agreement.<sup>24</sup>

**Standards of Conduct.** The revised act provides standards of conduct for members in member managed LLCs and for managers in manager managed LLCs.<sup>25</sup>

**Judicial Dissolution.** This was one of the topics most debated by the LLC Drafting Committee and has been significantly revised. The grounds for a member to seek a judicial dissolution still include a finding that it's not reasonably practicable to carry on the company's activities, and this has been expanded in the revised act to also include substantial unlawful conduct, misappropriation or waste causing injury, and deadlock that is causing or likely



to cause irreparable injury.<sup>26</sup> In addition, taking a cue from the Florida corporate statutes, the revised act provides a right to the LLC or its members to elect to purchase the interest of a member who has brought an action for judicial dissolution.<sup>27</sup>

**Right to withdraw / dissociate.** Unlike the prior act, the revised act provides a member with the right to withdraw (dissociate) from the LLC at any time, for whatever reason, though a member who wrongfully dissociates is liable for any damages to the LLC caused by the dissociation.<sup>28</sup>

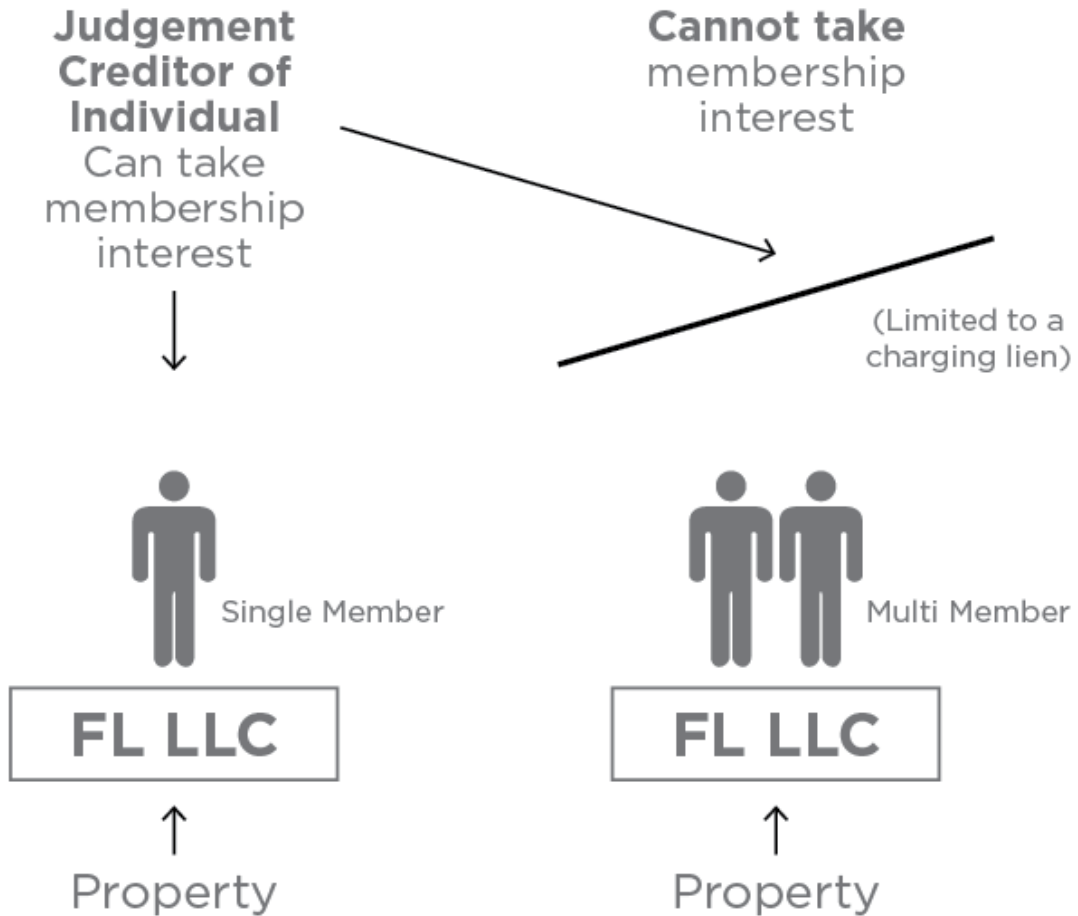
**Non-Economic Member.** Any person can become a non-economic member, with no right to distributions.<sup>29</sup> Non-members may be given a veto power over amendments to the operating agreement. This may be requested by lenders or other third parties dealing with the LLC.<sup>30</sup>

**Salary.** For those that have a member managed LLC, there is a potential trap as the revised act states that *“a member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities and affairs of the company, in the absence of agreement to the contrary.”*<sup>31</sup>

**Charging Orders.** Not long before the enactment of the revised act, the Florida Supreme Court (in the 2010 seminal “Olmstead Case”)<sup>32</sup> ruled that a judgment creditor of a single member LLC could execute on the debtors entire right, title and interest in the LLC to satisfy the judgment. This was a groundbreaking case that inspired extensive consideration by the LLC Drafting Committee, and other committees of the Florida Bar, and with their assistance the Florida legislature (in 2011) adopted the “Olmstead Patch” to clarify that **the holding in Olmstead does not apply to multi-member LLCs and that the exclusive remedy for a judgment creditor of a multi-member LLC is a charging order on the member’s transferable interest.** This is one of the most important distinctions in the Florida LLC laws (and is more fully illustrated below), and has not been changed in the revised act.<sup>33</sup> Practitioners should carefully consider this distinction when structuring LLCs for their clients.

# ASSET PROTECTION CONSIDERATIONS

*DIFFERENCE BETWEEN SINGLE MEMBER & MULTI MEMBER LLC  
IN THE CASE OF A "REVERSE PIERCING"*



## Comparison to corporations

Corporation = Creature of Statute

LLC = Creature of Contract

*A limited liability company is a hybrid between a corporation and partnership*

ITEM	CORPORATION	LIMITED LIABILITY COMPANY
Document to Form Entity	Articles of Incorporation	Articles of Organization
Governing Documents	Bylaws / Shareholders Agreement	Operating Agreement
Owners (Ownership Interest)	Shareholder(s) (Shares, Capital Stock)	Member(s) (Membership / Participation Interest)
Authorized Parties	Director(s); President, VP, Treasurer, Secretary, Chief Executive Officer, Chief Financial Officer	Member(s) or Manager(s), but not both

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1 The revised act was signed into law on June 14, 2013 and took effect on January 1, 2014, but with a grace period for all LLCs formed prior to that date. The revised act took full effect this January 1, 2015, so that all LLCs are now be governed by the revised act rather than the prior act.

2 As of January 1, 2015, Florida Chapter 605 (the revised act) entirely supersedes Chapter 608 (the prior act).

3 Section 605.0201(3), F.S., Formation of limited liability company; articles of organization.

4 Section 605.0201(3), F.S., Id.

5 Section 605.0107(4), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company. Special care should be taken, however, by anyone who files information with the department of state, such as an annual report, to make sure that the information is accurate. In the event of inaccurate information, the revised act provides that a person who suffers a loss by reliance on the inaccurate information may recover damages not only from the person who knew it was inaccurate but also from the member or manager, as applicable, on whose behalf the record was filed. Section 605.0205, F.S., Liability for inaccurate information in filed record.

6 Section 605.04074(3), F.S., Agency rights of members and managers.

7 Sections 605.0103, 605.04071, F.S. Knowledge; notice; and Delegation of rights and powers to manage.

8 Section 605.04074(2)(a), F.S. Agency Rights of Members and Managers.

9 Section 605.0302, F.S., Statement of authority.

10 To be effective, the statement must include the name of the company, the street and mailing address of its principal office, and the status or position of the person or persons. Section 605.0302(1), F.S., Id.

11 Section 605.0302 (6), F.S., Id.

- 12 Section 605.0302(6), F.S., Id.
- 13 Section 605.0302(2), F.S., Id.
- 14 Section 605.0303, F.S., Statement of denial.
- 15 Section 605. 0107(4), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.
- 16 Section 605.0102(37), F.S., Definitions.
- 17 Section 605.0105, F.S., Operating agreement; scope, function, and limitations.
- 18 Section 605.0102(45), F.S., Definitions.
- 19 Section 605.0207, F.S., Effective date and time.
- 20 Section 605.0407, F.S., Management of limited liability company.
- 21 Section 605.0105(4), F.S., Operating agreement; scope, function, and limitations.
- 22 Section 605.0401, F.S., Becoming a member.
- 23 Section 605.0106(4), F.S., Operating agreement; effect on limited liability company and person becoming member; preformation agreement; other matters involving operating agreement.
- 24 Section 605. 04073, F.S., Voting rights of members and managers.
- 25 Section 605.04091, F.S., Standards of conduct for members and managers.
- 26 Section 605.0702, F.S., Grounds for judicial dissolution.
- 27 Section 605.0706, F.S., Election to purchase instead of dissolution.
- 28 Section 605.0601, F.S., Power to dissociate as member; wrongful dissociation.
- 29 Section 605.0401(4), F.S., Becoming a member.
- 30 Section 605.0107(1), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.
- 31 Section 605.0407(4), F.S., Management of limited liability company.
- 32 Olmstead, et al v The Federal Trade Commission, Fla. Sup. Ct., No. SC08-1009 (2010).
- 33 Section 605.0503, F.S., Charging order.

Select Year: 2023

## The 2023 Florida Statutes

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[Title XXXVI](#)  
BUSINESS  
ORGANIZATIONS

[Chapter 605](#)  
FLORIDA REVISED LIMITED LIABILITY COMPANY  
ACT

[View Entire  
Chapter](#)

### **605.04074 Agency rights of members and managers. –**

(1) In a member-managed limited liability company, the following rules apply:

(a) Except as provided in subsection (3), each member is an agent of the limited liability company for the purpose of its activities and affairs, and an act of a member, including signing an agreement or instrument of transfer in the name of the company for apparently carrying on in the ordinary course of the company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

(b) An act of a member which is not done for apparently carrying on in the ordinary course of the limited liability company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company only if the act was authorized by appropriate vote of the members.

(2) In a manager-managed limited liability company, the following rules apply:

(a) A member is not an agent of the limited liability company for the purpose of its business solely by reason of being a member.

(b) Except as provided in subsection (3), each manager is an agent of the limited liability company for the purpose of its activities and affairs, and an act of a manager, including signing an agreement or instrument of transfer in the name of the company, for apparently carrying on in the ordinary course of the company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority.

(c) An act of a manager which is not apparently for carrying on in the ordinary course of the limited liability company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company only if the act was authorized by appropriate vote of the members.

(3) Unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or a manager, a member of a member-managed company or a manager of a manager-managed company may sign and deliver an instrument transferring or affecting the limited liability company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.

**History.**—s. 2, ch. 2013-180; s. 22, ch. 2015-148.

## ***HOW ARE LLCs TAXED***

The taxation of a limited liability company (LLC) depends on (i) whether the LLC has one member or more than one member and (ii) whether the LLC elects out of its default classification.

### **Default Classification**

***Single Member:*** An LLC with one member is treated as a disregarded entity for U.S. federal income tax purposes. Thus, all income, gain and loss of the LLC is treated as earned directly by its sole owner and is reported on the owner's separate tax return.

***Multi-Member:*** An LLC with more than one member is taxed a partnership. The partnership itself does not pay income tax but instead the individual members of the LLC (i.e., the partners) pay tax, if any, in accordance with their allocable share of the LLC's income/gain. The LLC will file a partnership return on IRS Form 1065 and K-1's are issued to each partner reflecting their allocable share of the LLC's income, gain or loss which then flows onto their separate tax returns.

### **Election:**

Notwithstanding the Default Classifications above, an LLC may elect to be classified as a "C" corporation or "S" corporation for U.S. federal income tax purposes (with respect to an "S" election, the entity itself must satisfy certain requirements for such status). If a corporate election is made without an "S" election, the entity will itself become a taxable entity while "S" corporations are taxed more like partnerships.

The election is made on Form 8832 – Entity Classification Election.

**WHEN DOES FIRPTA APPLY  
UPON LLC SALE/TRANSFER OF REAL PROPERTY WITH FOREIGN  
MEMBERS?**

**MULTI MEMBER LLC – Foreign Member(s)**

DEFAULT: Though it seems counterintuitive, FIRPTA does not apply on the sale of real property owned by a multi-member LLC (even if one or all of the members are foreign) as it is considered a partnership for tax purposes. If the multi-member LLC were to elect to be taxed as a “C” corporation, this would not change the fact that FIRPTA does not apply as, by definition, a “C” corporation is a “US Person” for FIRPTA withholding purposes and as such would similarly not be subject to FIRPTA withholding.

**SINGLE MEMBER LLC – Foreign Member**

DEFAULT: FIRPTA applies as the LLC is considered a disregarded entity and the sole member is treated as the direct owner of the underlying property. Thus, absent a timely election (as set forth below), the transaction will be subject to FIRPTA withholding.

EXCEPTION: FIRPTA does not apply if the LLC makes a proper election on IRS Form 8832 to be taxed as a “C” corporation). As set forth above, a “C” corporation is a “US Person” for FIRPTA purposes. With the recent change in tax rates, this election is likely to be utilized more often as the corporate tax rate is approximately equal to the long-term capital gains rates applicable to individuals holding property for more than one year. As a reminder, when one or more members are foreign the LLC will not qualify to be taxed as an “S” corporation so this election is not available.