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MEMO

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Limited Liability Companies (Florida Statute Chapter §608)

A limited liability company resembles a limited partnership without general partners. It resembles an S corporation for state law purposes and a general partnership for federal tax purposes. The purpose of this form of organization is to allow each member to enjoy limited liability, yet for the organization to be taxed as a partnership for federal income tax purposes.

The advantages of a limited liability company include:

1. Limited liability for all members, i.e. the liability of the members is limited to their contributions to the capital of the LLC. Fla. Stat. 608.436
2. Not taxed at the company level for Florida or federal income tax purposes. Rather, the company is taxed as a partnership.
3. The period of duration is unlimited. Dissolution occurs upon the death, retirement, resignation, bankruptcy or expulsion of a member, unless the remaining members consent to continue business or a right to continue is contained in the articles of organization.
4. No limitations on the number or type of shareholders, or on having multiple classes of stock, as with an S corporation.
5. Management can be handled by members, non-members, or both. A particularly attractive feature of the LLC entity is its flexibility of management. The statutes governing LLCs do not set out strict rules for the issuance of ownership interests, creation of classes of interest or distributions to different classes. There are no requirements for complex hierarchies of directors, shareholders and officers, or delineations of power to amend bylaws, elect managers, or authorize distributions. The members of an LLC are able to determine the entity's management structure (or lack of it) themselves through the operating agreement that initiates the company.

6. As in partnership, a member's tax basis is increased by his or her proportionate share of liabilities.
7. Less restrictions than Florida Revised Uniform Partnership Act.
8. A member's contribution may be in cash, property, or services.
9. As in a partnership, there is flexibility to allocate income and losses for federal income tax purposes.
10. Foreign entities and nonresident aliens can transact businesses in the form of LLCs and take advantage of the key benefits LLCs offer, such as limited liability, passthrough taxation and member control. Passthrough taxation cannot be achieved by foreign persons through an S corporation since only a U.S. resident individual (or a qualified trust benefiting a U.S. resident) is allowed to be a shareholder of an S corporation. I.R.C. § 1361(b)(1)(C);

The main disadvantage to LLC's is that any transfer of a member's interest must have the consent of the majority of the other members. An assignment of a member's interest entitles the assignee to share in the company's profits and losses, but does not entitle the assignee to exercise any rights or powers of a member. Fla. Stat. §608.432. However, from the perspective of a member who seeks personal asset protection this could be considered an advantage. Another disadvantage is that there is little case law analyzing the limited liability company.

FORMATION OF AN LLC (Fla. Stat. §608)

A limited liability company may be organized for any lawful purpose and once organized has the same powers as an individual to do all things necessary to carry out the company's business and affairs. One or more persons may form a limited liability company by executing articles of organization and filing them with the Department of State. The name of a limited liability company must contain the words "limited liability company" or "limited company," or the abbreviations "L.L.C." or "L.C.," or the designations "LLC" or "LC" as the last words of the name of every limited liability company. The word "limited" may be abbreviated as "Ltd.," and the word "company" may be abbreviated as "Co." Omission of these words or abbreviation in the use of the name of the limited liability company will render any person who knowingly participates in the omission, or knowingly acquiesces in it, liable for any indebtedness, damage, or liability occasioned by the omission.

Unless otherwise provided in the articles of organization or operating agreement, responsibility for management of the limited liability company vests in its members in proportion to the then-current percentage or other interest of members in the profits of the limited liability company owned by all of the members or elected managing members. If the articles of organization or the operating agreement provide for the

management of the limited liability company by a manager or managers, responsibility for management vests in a manager or managers and the company shall be a manager-managed company. Generally, neither the members nor the managers of a limited liability company can be held personally liable for the debts or obligations of the company.

ARTICLES OF ORGANIZATION (§608.407)

In order to form a limited liability company, articles of organization of a limited liability company shall be executed and filed with the Department of State by one or more members or authorized representatives of the limited liability company. The articles of organization shall set forth:

- a. The name of the limited liability company.
- b. The mailing address and the street address of the principal office of the limited liability company.
- c. The name and street address of its initial registered agent for service of process in the state. The articles of organization shall include or be accompanied by the written statement required by s. 608.415.
- d. Any other matters that the members elect to include in the articles of organization.
- e. A limited liability company is formed at the time described in s. 608.409 if the person filing the articles of organization has substantially complied with the requirements of this section.

The articles of organization shall be executed by at least one member or the authorized representative of a member.

If the limited liability company is to be managed by one or more managers, the articles of organization may, but need not, include a statement that the limited liability company is to be a manager-managed company.

The fact that articles of organization are on file with the Department of State is notice that the entity formed in connection with the filing of the articles of organization is a limited liability company formed under the laws of this state and is notice of all other facts set forth in the articles of organization.

Operating Agreements

Operating agreements consist of provisions adopted to regulate the affairs of the company and the conduct of its business, to establish additional duties, and to govern relations among the members, managers, and company. The operating agreement need not be in writing, but any inconsistency between written and oral operating agreements must be resolved in favor of the written agreement. FS § 608.423(1). The members of a limited liability company may enter into an operating agreement before,

after, or at the time the articles of organization are filed, and the operating agreement takes effect on the date of the formation of the limited liability company or on any other date provided in the operating agreement. Fla. Stat. § 608.423(1).

Unless the articles of organization or operating agreement vest the power in the manager or managers of the company, the members of a limited liability company have the power to adopt, alter, amend, or repeal the operating agreement of the company. However, any amendment to a written operating agreement must be in writing. FS § 608.423(3).