

## **SUMMARY AND REPORT**

### **HOUSE BILL 595 (by Goodlette) and SENATE BILL 1056 (by Klein)**

#### **[FLORIDA REVISED UNIFORM LIMITED PARTNERSHIP ACT (2005) and AMENDMENTS TO OTHER FLORIDA BUSINESS ENTITY STATUTES]**

#### **Introduction and General Purpose.**

This report is intended to summarize and provide background information relating to House Bill 595, by Representative Goodlette, and its equivalent Senate bill version, Senate Bill 1056, by Senator Klein (both referred together as “Bill” below). The Bill contains the Florida Revised Uniform Limited Partnership Act (2005) (“FRULPA-2005”) that would replace in its entirety the existing Florida limited partnership statute. It also explains various amendments to other Florida business entity statutes necessitated by changes made by FRULPA-2005 or which the Bill’s drafting committee thought would be desirable and in the best interests of Florida. Other changes contained in the Bill were believed necessary to remedy perceived defects or potential problems in the existing business entity statutes.

The Bill is the culmination of the work done by a committee commonly referred to as the RE-FRULPA Drafting Committee (“Drafting Committee”). The Drafting Committee was organized by members of the Tax Section of The Florida Bar in 2002. Gregory Marks, a shareholder with the firm of Greenberg Traurig, acted as the chair and reporter of the Drafting Committee. In addition to the Tax Section attorneys serving on the committee, several members in The Florida Bar’s Business Section and Real Property, Probate and Trust Law Section also participated. Most of the attorneys involved in the process were active in prior drafting projects relating to Florida business organization statutes. The Drafting Committee (at times acting through separate sub-committees) reviewed and analyzed the Revised Uniform Limited Partnership Act (2001) (commonly referred to as “RE-RULPA”) promulgated by the National Conference of Commissioners on Uniform State of Laws (“NCCUSL”). The objective of the Drafting Committee was to determine whether the adoption of RE-RULPA in Florida would improve existing law governing limited partnerships and/or provide other advantages to those desiring to use that entity (and its “LLLP” variant) for their business or other activities.

The Drafting Committee reported its findings and recommendations to the governing bodies of The Florida Bar Sections noted above, and the adoption of RE-RULPA, with certain modifications approved by representatives of those Sections, was endorsed by each of them. In the course of their proceedings, the Drafting Committee also considered various collateral issues, most of which related to the harmonization of FRULPA-2005 (once adopted) with other business organization statutes in Florida. There was also a desire to minimize differences that exist among the Florida business organization statutes with respect to organizational or administrative matters having the same purpose or

transactions having a common goal, as long as a uniform approach or language for handling such matters was otherwise justifiable, and no rationale existed for a unique approach under the comparable provisions of the other entity laws in question. One good example of how the Drafting Committee strived for this kind of harmony is the conversion and merger enabling provisions of FRULPA-2005 and the corresponding conversions and merger provisions in the Florida corporation, limited liability company and general partnership statutes. Other examples are the fiduciary duty and constructive notice rules under the limited liability company, limited partnership and general partnership statutes. These and some other drafting issues are described in more detail below.

### **Summary of the new limited partnership act (FRULPA-2005).**

The Uniform Limited Partnership Act was promulgated in 1916. That act, as “linked” with the Uniform Partnership Act and its successor (the Revised Uniform Partnership Act --- adopted and commonly referred to as “FRUPA” in Florida), has been the law governing partnerships in the United States. Florida adopted the Uniform Limited Partnership Act in 1943. NCCUSL released a revised version of this law in 1976, and there were further amendments by NCCUSL in 1985. In 1986 Florida adopted the Florida Revised Uniform Limited Partnership Act (or “FRULPA”), which is modeled after the amended uniform act released by NCCUSL in 1985. FRULPA, as further amended from time to time, has generally served Florida well, but with some notable short-comings and quirks when compared to the comparable law of other states.

Starting in 1997 NCCUSL began the task of further amending the 1985 version of the Revised Uniform Limited Partnership Act. It believed that with the proliferation of many limited liability entity choices and changes in modern business practices, it was necessary to update and modernize the uniform law beyond the 1976 and 1985 revisions. They wanted a new limited partnership act more suited to an environment in which limited liability partnerships (“LLPs”) and limited liability companies (“LLCs”) are being used in great numbers to meet many of the needs formerly met by limited partnerships. They wanted the new act to provide a different approach than that afforded by other limited liability entities that are taxed as a “partnership” for income tax purposes. NCCUSL also believed that a new law was needed to better reflect “real world” practices involving limited partnerships and its variant, the limited liability limited partnership (“LLLP”), as well as those types of enterprises and activities for which limited partnerships are most suited or commonly used. For example, they felt that RE-RULPA would be more suitable governing law for the formation and operation of what are commonly referred to as “family limited partnerships” that are in wide use today as estate planning vehicles. In addition, they thought it would appeal to those investment promoters and other users who favor a business entity with strong, centralized management and relatively passive investors, and to those who seek to closely “tailor” or “customize” the governing documents of their venture or business (that is, the partnership agreement and certificate of limited partnership) on a “deal by deal” basis, utilizing “freedom of contract” principles as fully as possible. The result was RE-RULPA, which was released by NCCUSL in 2001, and as of the date of this report, it has been adopted in

four states: Hawaii, Illinois, Iowa and Minnesota. It is actively under consideration in many other states and has also received the endorsement of the American Bar Association.

The most remarkable change made by the new law is that it creates a “stand-alone” statute for limited partnerships, no longer linked with (or “piggy-backing”) the general partnership statute (i.e., FRUPA). NCCUSL believes that a self-contained statute will foster the development of case law more closely aligned with the unique characteristics of a limited partnership. In particular, they hope it will eliminate confusion as to which issues are dependent solely upon application of the limited partnership act and which require reference (i.e., linkage) to the general partnership act. Some commentators have suggested that this could occur simply by ending the automatic linkage in many decisions between matters concerning partners in a general partnership and matters pertaining to general partners in a limited partnership. NCCUSL also believes that future case law will be better rationalized by the natural segregation of decisions that is bound to occur under each act, and that this will allow or even encourage courts to more easily identify and rationalize (when necessary) those differences that exist between the relative rights and duties of partners under the two regimes.

Following is an outline highlighting some of most notable differences between FRULPA (the existing Florida limited partnership statute) and FRULPA-2005. In most instances, the rules referenced below are “default” rules which apply only when not modified (or “over-ridden”) by the partnership agreement of the limited partnership (or LLLP). Also, please note that the parenthetical section references below are to existing sections of FRULPA in Chapter 620, Florida Statutes, unless a specific reference is made to “FRUPA,” which is also part of Chapter 620, or in a few cases to sections of the corporate act in Chapter 607, Florida Statutes).

1. Relationship to general partnership act (FRUPA).
  - Existing Law: The entire statute is linked to (or “piggy backed” on) FRUPA (620.186).
  - Proposed Law: De-linked, and will now be “self-contained” but contains many of the same provisions found in FRUPA.
2. Permitted purposes.
  - Existing Law: Any business that a general partnership may carry on, which arguably means only activities “for profit” (620.107).
  - Proposed Law: Any lawful purpose whatsoever, including not-for-profit activities.
3. Constructive notice via publicly filed documents.

- Existing Law: A certificate of limited partnership is only notice that the limited partnership exists and that designated general partners are general partners (620.118).
  - Proposed Law: FRULPA rules carried forward, plus constructive notice is deemed to occur, 90 days after appropriate filing, of general partner dissociation and of limited partnership dissolution, termination, merger, and conversion, and certain restrictions on authority of a general partner.
4. Duration or term.
- Existing Law: Specified in certificate of limited partnership (620.108).
  - Proposed Law: Perpetual unless partnership agreement provides otherwise.
5. Affidavit describing amount of capital contributions.
- Existing Law: Must be attached to certificate of limited partnership (620.108) and updated when changes occur.
  - Proposed Law: No affidavit necessary (following approach of other states and elimination of same requirement from Florida LLC law in 1999).
6. Use of limited partner's name in entity name.
- Existing Law: Prohibited, except in unusual circumstances (620.103).
  - Proposed Law: Now permitted, and in and of itself will not affect limited liability of limited partner.
7. Limited partner liability to third parties for entity debts.
- Existing Law: Could exist when limited partner participates in the control of the business and third party reasonably believes that the limited partner is a general partner; list of "safe harbor" activities that do not constitute participating in the control of the business (620.129).
  - Proposed Law: None, regardless of whether the limited partnership is an LLLP, even if the limited partner participates in the management and control of the limited partnership. New law emphasizes limited liability shield for limited partners based solely upon their "status" of being limited partners (and not their role in control or other activities of the limited partnership).
8. Limited partner duties.

- Existing Law: None specified.
  - Proposed Law: No fiduciary duties solely by reason of being a limited partner, but limited partners must discharge their duties and exercise their rights under the partnership agreement and the act consistently with “obligations” of good faith and fair dealing. These obligations are non-waivable by partnership agreement. Also, if a limited partner takes part in management (is vested with or has delegated management functions) his fiduciary duties will be limited to the same duties of care and loyalty that would apply to a general partner under the same circumstances (added by Drafting Committee).
9. Partner access to required information and records.
- Existing Law: All partners have right of access, with no requirement of showing good cause or proper purpose (620.106 and 620.134).
  - Proposed Law: List of required information expanded slightly, and it expressly states that partner does not have to show good cause; however, the partnership agreement may set reasonable restrictions on access and general partners may impose reasonable restrictions on the use of such information.
10. Partner access to other information and records.
- Existing Law: Limited partners have the right to obtain other relevant information upon reasonable demand (620.134); and general partner rights to same are linked to general partnership act (FRUPA 620.8403).
  - Proposed Law: For limited partners, the existing FRULPA approach essentially carried forward, with procedures and standards (for making a reasonable demand) set out in greater detail; also, a requirement added that limited partnership supply (without request) known material information whenever limited partner votes or other consents are required. General partner access rights made explicit, following existing FRUPA standards, including obligation of limited partnership and general partners to volunteer certain information. Access rights also provided to former (dissociated) partners for certain purposes relating to time when they were partners.
11. General partner liability for entity debts.
- Existing Law: Unless “LLLP” election is made, all general partners are jointly and severally liable for all partnership obligations (620.125, linking to FRUPA 620.8306)
  - Proposed Law: LLLP status will now be available via a simple statement in the certificate of limited partnership (perhaps simply “checking a box” thereon). LLLP status provides a full liability shield to all general partners (and

presumably any limited partners that may be subjected to claims of third parties). If the limited partnership is not an LLLP, general partners will continue to be jointly and severally liable just as under current law.

12. General partner duties.

- Existing Law: Linked to duties of partners in a general partnership (620.125 linking to FRUPA, including 620.8404).
- Proposed Law: Essentially the same as for general partners of a general partnership under FRUPA, but clarifies that non-compete duties continue while winding-up the limited partnership's activities.

13. Capital contribution obligations; allocation of profits, losses and distributions.

- Existing Law: Capital contributions may be in the form of cash, property, services or obligations to provide same in future; the obligation of each partner must be in signed writing, may not be comprised without consent of all partners (and certain creditors) and partnership agreement may impose severe penalties for breach of the obligation (620.126, 620.135 and 620.136). The law contains separate provisions for sharing of profits and losses (620.137), and for sharing of distributions (620.138), and in each case they are allocated according to value of contributions *made and not returned*.
- Proposed Law: The uniform act was supplemented by the Drafting Committee to address perceived shortcomings regarding these issues. The new law is essentially the same except that the "signature requirement" and "penalty enabling provisions" for contribution obligations were carried forward from FRULPA. Language was added by the Drafting Committee to state that the default rule for allocation of profits, losses and distributions will be in proportion to the *total* value of contributions actually made by the partners (irrespective of whether all or part has been returned). Rules for maintaining "required records" of contributions made by partners (and for which partners are obligated to make in future) are intended to assure these proportional amounts can be readily ascertained.

14. Partner liability for distributions.

- Existing Law: Recapture liability if distribution involved the return of contributions alone; one year recapture liability if distribution not wrongful, and 6-year recapture liability if wrongful (620.148). Distributions are in violation of the act to the extent liabilities exceed fair value of assets (commonly called "balance sheet" test).
- Proposed Law: The test for whether the distribution is wrongful now includes both the balance sheet test and the so-called "equity" test for insolvency

(i.e., entity unable to pay its debts when they become due). There is a 2-year limitation period for all claims to recover all wrongful distributions.

15. Limited partner voluntary dissociation (or right of withdrawal).

- Existing Law: A limited partner may withdraw only if permitted by partnership agreement or certificate. Special grandfather and transition rules apply to partnerships created before January 1, 1996, which may continue to be subject to the “six-month notice” rule amended in 1995 (620.143).

- Proposed Law: New law will extend “dissociation” rubric and its analytical framework (that formerly applied to only general partners) to matters relating to a limited partner’s withdrawal. No “right” to voluntarily withdraw (i.e., dissociate) as a limited partner before the termination of the limited partnership for any reason, unless partnership agreement permits. The “power” to dissociate expressly recognized, but its exercise can be modified by the partnership agreement.

16. Limited partner involuntary dissociation (or withdrawal).

- Existing Law: Not addressed.

- Proposed Law: Lengthy list of causes, based upon same acts and events of “dissociation” that apply to general partners under FRUPA.

17. Limited partner dissociation—payout.

- Existing Law: Right to receive fair value based upon the partner’s right to share in distributions (620.144).

- Proposed Law: No payout required at time of dissociation; the partner becomes transferee of its own “transferable interest” (meaning economic rights or right to receive future distribution alone).

18. General partner voluntary dissociation.

- Existing Law: This “right” and “power” exists at all times but partnership agreement may provide for damages if exercised in breach of the partnership agreement and set-off damages against any distributions (620.142).

- Proposed Law: Essentially the same as current law, but new law further clarifies the dissociation act or event may constitute a breach of partnership agreement giving partnership or other partners right to damages and other remedies.

19. General partner involuntary dissociation.

- Existing Law: Various causes and events are listed (620.124).
  - Proposed Law: Expands the list of causes and events, but is essentially the same as the current list found in FRUPA.
20. General partner dissociation—payout.
- Existing Law: Right to receive fair value based upon the partner’s right to share in distributions (620.144).
  - Proposed Law: No payout required at time of dissociation. The partner becomes transferee of its own “transferable interest” (right to receive future distributions only).
21. Transfer of partner interest.
- Existing Law: Economic rights fully transferable, but management rights and partner status are not transferable (620.152).
  - Proposed Law: Essentially the same rule. Economic rights (i.e., distribution rights) referred to as “transferable interest” throughout act. Drafting Committee supplemented the model act with respect to ability of partnership to impose restrictions on transfers, and to have partnership interests represented by a certificate which may contain a legend for the purpose of giving notice of restrictions.
22. Rights of creditor of partner.
- Existing Law: Limited to charging the partnership interest and causes the judgment creditor to have only the rights of an “assignee,” but does not specify that a charging lien an "exclusive remedy" by which a judgment creditor of a partner may satisfy a judgment.
  - Proposed Law: Drafting Committee changed the uniform act provisions to further clarify the rights of judgment creditors and to emphasize that the charging lien is the exclusive remedy by which a judgment creditor of a partner may satisfy a judgment out of the judgment debtor’s interest in the partnership; the supplemental language also clarifies that other remedies (including but not limited to foreclosure on the partner’s interest) are not available and may not be ordered by a court.
23. Dissolution by partner consent.
- Existing Law: Requires unanimous written consent of all general and limited partners (620.157).

- Proposed Law: Same provision.
24. Dissolution following dissociation of a general partner.
- Existing Law: Occurs automatically unless all partners agree to continue the business and, if there is no remaining general partner, they all agree to appoint a replacement general partner (620.157).
  - Proposed Law: If at least one general partner remains, no dissolution unless within 90 days after the dissociation all partners consent to dissolve the limited partnership. If no general partner remains, dissolution occurs upon the passage of 90 days after the dissociation, unless partners consent to continue the business and admit at least one new general partner (and a new general partner is, in fact, admitted).
25. Filings related to dissolution and winding-up.
- Existing Law: Certificate of cancellation of limited partnership to be filed when limited partnership dissolves and winding-up activities completed (620.113).
  - Proposed Law: Limited partnership must file a certificate of dissolution when voluntarily dissolved (this requirement added by Drafting Committee), and may (but is not required to) file statement of termination indicating that winding up has been completed and that all partnership activities have terminated.
26. Procedures for barring claims against dissolved limited partnership.
- Existing Law: None.
  - Proposed Law: The Drafting Committee changed the uniform act provisions so that the new law adopts the same approach and procedures under the Florida corporation statute (607.1406 and 607.1407) providing for giving notice, responding to, paying and making provisions for and claims; partnerships using these rules can bar certain claims after 3 years.
27. Conversions and mergers.
- Existing Law: *Mergers* with other business organizations permitted. (620.201 through 620.205). Also permitted are *conversions* into a general partnership and conversion of a general partnership into a limited partnership (FRUPA 620.8902 and 620.8903). Appraisal rights are available to dissenting partners in a *merger* transaction(620.205).
  - Proposed Law: New law contains comprehensive and liberal provisions enabling a conversion of another organization to a limited partnership, the

conversion of a limited partnership into another organization, and the merger of limited partnership with any other organization. The term “organization” is broadly defined. These rules follows the modern trend in other states of liberalizing “cross-species” merger laws and “junction-box” statutes designed to easily facilitate simple transformation of a business entity into any other kind of business entity through either a conversion or a merger. The formless conversion approach that would be available to limited partnerships is also a proposed change in the Bill for other Florida business entity statutes (see discussion below in this report), intended to give other business entities in Florida the same degree of flexibility and freedom of choice when choosing and structuring a transformation transaction. The Drafting Committee believes that these changes will also facilitate and encourage the transformation of out-of-state entities into Florida domiciled entities. The uniform act has been supplemented to provide that appraisal rights for dissenting *limited* partners will continue to apply (these were modeled after the 2003 amendments to Florida corporate statute, 607.1301 – 607.1333), but can be waived by partnership agreement.

28. Writing requirements.

- Existing Law: Certain provisions are effectuated only upon written agreement or consent.
- Proposed Law: Removes virtually all writing requirements; but continues to require that certain information be maintained in record form (written or retrievable in tangible form), and for some records to be signed (e.g., contribution obligations).

All of the above provisions are contained in Section 15 of the Bill.

**Other significant provisions of the Bill.**

The Bill also contains changes to several other Florida business organization statutes that the Drafting Committee identified as being necessary for the full effectuation of the broad conversion and merger provisions in FRULPA-2005 in cases involving a Florida corporation, limited liability company or general partnership would be involved as the other party to the transaction (or being the other business organization from or into which the limited partnership was converting). In other words, without making these changes at the same time, only those entities from states like Delaware and others with broad “junction-box” or similar conversion rules could take full advantage of the liberal conversion rules of the new limited partnership law. Note that while Florida law currently permits many of these transactions already (namely, mergers among corporations, limited partnerships and limited liability companies; a merger or conversion when only limited and general partnerships are involved; and certain forms of a conversion when a limited liability company is the resulting entity), the enabling provisions are not consistent in

many cases and certain popular transactions are not possible by a one-step transaction (such as the conversion of a corporation into a limited liability company or into a limited partnership, and vice versa; or a conversion of a limited liability company into any other entity). Some of these can be effectuated by two or three-step transactions, and/or by utilizing non-Florida entities to carry out one or more of the “steps,” but this process is normally much more complicated, and also requires additional layers of tax reporting, foreign entity qualification and other “annual house-keeping” responsibilities than would not be the case if the transformation could be achieved with a single-step or “formless transaction” conversion. The lack of such “user friendly” transformation laws in Florida has over the years encouraged promoters and other businessmen to go to Delaware and other states to organize their business entities. The Drafting Committee anticipates that the changes it is recommending to the “cross-species” conversion and merger provision statutes in the Bill will encourage such persons to “stay home,” and encourage out-of-state business organizations to convert into Florida entities.

Another objective of the Drafting Committee was to harmonize and integrate the conversion and merger rules of the five primary business entity statutes (corporations, not-for-profit corporations, limited liability companies, general partnerships and limited partnerships). The amendment language it used for this purpose in each statute was extrapolated from existing language in that statute, or if none, then it was borrowed from a related Florida statute. In the case of the conversion and merger rules added to FRUPA, the language was taken directly from the conversion and merger provisions of FRULPA-2005. The Drafting Committee wanted to minimize differences between the two partnership acts with respect to such matters (with the exception of dissenter and appraisal rights, which, as is the case under current law, are not available to partners of a general partnership). Subject to a few exceptions noted below, it will now be possible for a Florida or non-Florida corporation, limited liability company or any kind of partnership (whether general or limited, or LLP or LLLP) to be converted into or merged with a Florida or non-Florida corporation, limited liability company or any kind of partnership.

A notable exception to the general rule in the last paragraph is a “same entity/same state” conversion, i.e., a Florida corporation may not convert into “another” Florida corporation, or a Florida limited partnership may not convert into “another” Florida limited partnership. In addition, in response to the concerns of the Department of State and others regarding certain administrative issues and the possible abuse of these liberal rules when not-for-profit entities are involved, the Bill’s provisions do not allow these rules to apply to such entities in certain cases. This was done by excluding not-for-profit entities from the definition of business organizations eligible to participate in certain mergers, and by not including in Chapter 617 (the not-for-profit corporate statute) any additional enabling provisions for conversions involving such corporations (note that Chapter 617 already contains rules for converting a profit corporation to a not-for-profit corporation). Also, a provision was added to Chapter 617 to assure that in any merger involving a not-for-profit corporation and “another business entity,” the survivor must also be a not-for-profit entity. The Bill also contains a technical amendment to Chapter 617 to ratify prior changes made under Chapter 607 intended to allow another business entity to merge with a not-for-profit corporation under certain circumstances.

One of the most important issues faced by the Drafting Committee was determining to what extent the appraisal rights for dissenting partners should be carried forward from the existing limited partnership law to the conversion and merger rules under FRULPA-2005. As has been the case with the other model limited partnership laws released by NCCUSL, no provision was made in RE-RULPA for this kind of right or remedy. The Drafting Committee's analysis of these rights also carried over to its consideration of how these rights should apply to conversions and mergers involving other Florida entities. Under the existing corporate, limited liability company and limited partnership laws, the dissenting "owners" of domestic entities engaged in a "cross-species" merger transaction have appraisal rights which were modeled on those held by certain shareholders of a Florida corporation engaged in a merger or other transaction subject to the dissenter and appraisal right rules. To complicate the analysis somewhat, while the drafting project was underway, these rules were significantly changed by amendments in 2003 to the corporate statute (Sections 607.1301 through 607.1333). After extensive discussion and analysis of this subject, the Drafting Committee decided that FRULPA-2005 should contain a dissenter and appraisal remedy despite the fact that the NCCUSL version does not have such a provision. It was felt that uniformity with the other "Florida law" on this subject was just as (or more) important as maintaining uniformity with the NCCUSL model. It was also decided that they should be modeled on the 2003 amendments to the corporate statute, and that to maintain harmony with the other Florida business organization statutes, the corresponding rules in the LLC statute should also be redrafted to be consistent with the 2003 amendments. In the case of both FRULPA-2005 and the LLC statute, these provisions were drafted as "default" rules that can be modified or over-ridden by the partnership agreement or operating agreement, as applicable. This was done in deference to the inherent "contractual" nature of these entities and in recognition of the reality that "mandating" such rights would be at odds with the objectives of those persons who most commonly use them or who would otherwise consider them the entities of choice. This was also viewed as a compromise solution for addressing the twin objectives of having a "paternalistic" rule that automatically applies (unless modified by an affirmative election to the contrary), on one hand, and for allowing the most common users of these "contractual creatures" to have "freedom of choice" and the flexibility they need for structuring their enterprises and affairs as they see fit on a case by case basis, on the other hand.

The Bill also contains a change to Chapter 607, specifically making a conversion of a Florida corporation subject to the same dissenter and appraisal rights that apply to a merger involving a Florida corporation. The conversion and merger provisions contained in the Bill also makes uniform the rules relating to evidencing such transactions in Florida real estate records. A party to a merger or the converted organization may file with the real estate records office in any county where it owns real estate a certified copy of the certificate of merger or conversion to evidence the transaction (e.g., if necessary, to show chain of title or for other reasons). This is consistent with the current practice except that it is not a mandatory requirement.

***The finding references for above provisions of the Bill (i.e., those relating to conversions and mergers and related dissenter and appraisal rights) are as follows:***

- The amendments to the corporation statute (Chapter 607) discussed above are contained in Sections 1 and 2 of the Bill.
- With respect to changes to the limited liability company statute (Chapter 608), Section 5 of the Bill contains changes regarding dissenter and appraisal rights, Sections 6 through 9 pertain to mergers to which an LLC is a party, and Section 10 relates to conversions.
- Sections 13 and 14 contain conforming and clarifying amendments to the not-for-profit corporation statute (Chapter 617).
- Section 20 contains the conversion and merger provisions relating to the general partnership statute (FRUPA, part of Chapter 620).

### **Conforming and “glitch” provisions of Bill**

The Bill also contains some “fixes” to provisions where there was a perceived need for consistency or where there was concern about potential abuse or a possible “glitch” in existing law.

Section 3 of the Bill addresses the provisions in the LLC act governing the contents of articles of organization. These are being changed to clarify that information contained in the articles should not be viewed (in and of itself or by the act of the filing the articles alone) as giving constructive notice to the public of “all” information contained in those articles. The intent was to not create a “per se rule” expressly disclaiming the existence of possible constructive notice, but rather to avoid having the statute be construed as creating the opposite “per se rule” (in other words, that constructive notice of such information has indeed occurred). The changes were intended to be consistent with comparable language inserted in FRULPA-2005 by the Drafting Committee and language already in the RE-RULPA model. The changes to the LLC statute will permit the articles of organization to contain (and in effect to be deemed constructive notice of) certain information relating to the identity and authority of managers or managing members (but without such effect in the case of an amendment changing the information in question, unless at least 90 days have elapsed from the filing of the amendment). This 90-day delayed effect is modeled on the constructive notice rules contained in RE-RULPA.

Section 4 of the Bill deals with the non-waivable duty of loyalty applicable to managers and managing members of a limited liability company. The Bill language changes one of the rules dealing with their standards of duty by stating the duty of loyalty is “*limited to*” the specific acts and duties in question (as opposed to the existing law which states that such duty “*includes without limitation*” such listed acts and duties). Section 19 of the Bill makes the same change with regard to the duty of loyalty of general partners of a general partnership under FRUPA. These changes were perceived as desirable in order to make these “non-waivable requirements” (they cannot be over-ridden by the partnership or operating agreement, whichever the case may be) consistent not only with the provisions of the new limited partnership act, but also to bring the language into line with the comparable provisions of the law in other states and the uniform model acts. There was

also a desire on the Drafting Committee's part to eliminate the current uncertainty that exists as to the reach or breadth of such a provision, particularly given the fact that it is a non-waivable provision. The Drafting Committee is aware of the fact that many businesses, promoters and other potential users of the partnership and LLC statutes in question prefer using Delaware and other states for the formation of such entities simply to avoid the uncertainty under current law resulting from the "open-ended" nature (when compared to the corresponding law of other states) of these non-waivable duties. It hopes that these changes (combined with other changes in the Bill) will cause such users to reconsider Florida as the domicile for organizing these "contractually-based" entities.

Finally, the Bill (Sections 12, 16 and 21) contains conforming amendments to sections of the LLC act and FRUPA dealing with Department of State fees, activities of foreign LLPs not constituting doing business in the state for purposes of registration requirements, and cross-references to existing laws modified elsewhere in the Bill.

Submitted by Gregory M. Marks, Chair and Reporter  
RE-FRULPA Drafting Committee  
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