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# OHIO LEGISLATIVE SERVICE COMMISSION

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133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by Senate Judiciary

**Primary Sponsors:** Sens. Roegner and Manning

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### SUMMARY

- Creates the Ohio Revised Limited Liability Company Act.

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\* This analysis was prepared before the Senate Judiciary Committee appeared in the Senate Journal. Please note that the legislative history may be incomplete.

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## DETAILED ANALYSIS

### Summary

The bill enacts the Ohio Revised Limited Liability Company Act (ORLLCA) in Chapter 1706 of the Revised Code. The ORLLCA replaces the existing Ohio Limited Liability Company Act (OLLCA) in Chapter 1705, providing for a period of transition between the bill’s effective date and January 1, 2022.<sup>1</sup> There are many differences between the ORLLCA and the OLLCA. Some of these differences are substantive in nature while others are not. The three most important are as follows:

1. Under current law, a limited liability company (LLC) may be managed by its members or by managers, and the OLLCA spells out the authority members and managers have in each scenario. The ORLLCA does away with this distinction and instead provides that a person’s authority to bind the LLC must be determined by referencing the operating

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<sup>1</sup> Sections 3 through 5 of the bill.

agreement, decisions of the members in accordance with the operating agreement, or the ORLLCA's default rules.<sup>2</sup>

2. Also under the current OLLCA, there are no statutory penalties for an LLC that fails to maintain a statutory agent, although there may be other legal consequences.<sup>3</sup> The ORLLCA requires the Secretary of State to cancel an LLC that fails to maintain a statutory agent, but allows the company to be reinstated upon appointment of a new agent.<sup>4</sup>
3. Lastly, in contrast to the current OLLCA, the ORLLCA allows an LLC to establish one or more designated series of assets that are associated with at least one member and that have separate rights, powers, duties, liabilities, purposes, or investment objectives.<sup>5</sup>

## General

### Transition period

Prior to January 1, 2022, the ORLLCA governs the following LLCs:

- An LLC formed on or after January 1, 2021, except an LLC that is continuing the business of a dissolved LLC under current law;
- An LLC formed before January 1, 2021, that elects to be governed by the bill.<sup>6</sup>

On and after January 1, 2022, the ORLLCA will govern all LLCs, including every foreign LLC that files an application for registration as a foreign LLC on or after January 1, 2022, every foreign LLC that registers a name in Ohio on or after January 1, 2022, every foreign LLC that has registered a name in Ohio prior to January 1, 2022, and every foreign LLC that has filed an application for registration as a foreign LLC prior to January 1, 2022, pursuant to current law.<sup>7</sup>

On and after January 1, 2021, but prior to January 1, 2022, an LLC may elect, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to the ORLLCA.<sup>8</sup>

The repeal of a statute by the bill does not affect an action commenced, proceeding brought, or right accrued prior to January 1, 2022.<sup>9</sup>

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<sup>2</sup> R.C. 1706.08 through 1706.082.

<sup>3</sup> See, e.g., *John W. Judge Co. v. United States Freight, LLC*, 2018-Ohio-2658 (holding that an LLC that did not receive service of process due to its neglect to maintain a statutory agent cannot establish excusable neglect and thereby avoid the judgment entered against it for unpaid services).

<sup>4</sup> R.C. 1706.09 and 1706.46.

<sup>5</sup> R.C. 1706.76 through 1706.7613.

<sup>6</sup> R.C. 1706.83(A) and (C) and 1705.44.

<sup>7</sup> R.C. 1706.83(B) and Sections 3 and 4 of the bill.

<sup>8</sup> R.C. 1706.83(C).

<sup>9</sup> Section 5 of the bill.

## Knowledge and notice

The ORLLCA specifies what constitutes knowledge or notice of certain facts by certain persons.

It states that a person knows a fact when either of the following is met:

- The person has actual knowledge of the fact;
- The person is deemed to know the fact under law other than the ORLLCA.

It goes on to state that a person has notice of a fact when any of the following is met:

- The person knows of the fact;
- The person receives notification of the fact;
- The person has reason to know the fact from all the facts known to the person at the time;
- The person is deemed to have notice of the fact.

A person notifies another of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact. And a person is deemed to have notice of the following:

- The following matters included in an LLC's articles of organization upon the filing of the articles:
  - The name of the LLC;
  - The name and street address of the LLC's statutory agent and a written acceptance of the appointment that is signed by the agent;
  - If applicable, a statement that the LLC may have one or more series of assets.
- An LLC's dissolution, 90 days after a certificate of dissolution becomes effective;
- An LLC's merger or conversion, 90 days after a certificate of merger or certificate of conversion becomes effective.

A member's knowledge, notice, or receipt of a notification of a fact relating to the LLC is not knowledge, notice, or receipt of a notification of a fact by the LLC solely by reason of the member's capacity as a member.<sup>10</sup>

## Nature and duration

Under the ORLLCA, an LLC is a separate legal entity, which is not affected by its status for tax purposes. An LLC has perpetual duration.<sup>11</sup>

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<sup>10</sup> R.C. 1706.03, 1706.471, 1706.712, 1706.722, and 1706.761(B)(3).

<sup>11</sup> R.C. 1706.04.

## **Powers and privileges**

The ORLLCA permits an LLC to carry on any lawful activity, whether or not for profit. An LLC possesses and may exercise all the powers and privileges granted by the bill or by any other law or by its operating agreement, together with any powers incidental thereto, including those powers and privileges necessary or convenient to the conduct, promotion, or attainment of the LLC's business, purposes, or activities.

Without limiting these general powers, an LLC may make contracts of guaranty and suretyship and enter into interest rate, basis, currency, hedge, or other swap agreements, or cap, floor, put, call, option, exchange, or collar agreements, derivative agreements, or other similar agreements.

A series (a separate series of assets established by the LLC that is associated with at least one member of the LLC and that has separate rights, powers, duties, liabilities, purposes, or investment objectives than the LLC) established under the ORLLCA may, in the series' own name, do all of the following:

- Sue and be sued;
- Contract;
- Hold and convey title to assets of the series; and
- Grant liens and security interests in assets of the series.<sup>12</sup>

## **Rules of construction and governing law**

The ORLLCA is to be construed to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements. Unless displaced by particular provisions of the ORLLCA, principles of law and equity supplement the ORLLCA. The ORLLCA prohibits the strict construction of any of its provisions based solely on the fact that those provisions are in derogation of the common law.

The ORLLCA explicitly exempts any interest in an LLC, including all rights, powers, and interests arising under an operating agreement or the ORLLCA, from the operation of certain requirements relating to secured transactions.

Every LLC is subject to the ORLLCA's provisions, regardless of whether it has one or more members or whether it is formed by a filing under the ORLLCA or by merger, consolidation, conversion, or otherwise.

Ohio law governs all of the following:

- The organization and internal affairs of an LLC;

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<sup>12</sup> R.C. 1706.05 and 1706.76 through 1706.7613.

- The liability of a member as a member for the LLC's debts, obligations, or other liabilities;
- The authority of an LLC's members and agents;
- The availability of an LLC's assets or series thereof for the LLC's obligations or another series thereof.<sup>13</sup>

## **Relation to Electronic Signatures in Global and National Commerce Act**

The ORLLCA states that it modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede the consumer disclosure provisions of that act or authorize electronic delivery of certain notices described in that act.<sup>14</sup>

## **Application**

Unless expressly stated to the contrary in the bill, all amendments of the bill apply to LLCs and members and agents whether or not existing as such at the time of the enactment of any such amendment.<sup>15</sup>

An LLC formed and existing under the ORLLCA may conduct its activities and affairs, carry on its operations, and have and exercise the powers granted by the ORLLCA in any state, foreign country, or other jurisdiction.<sup>16</sup>

## **Conforming changes**

The bill references newly created Chapter 1706 sections in existing Revised Code sections that currently reference the corresponding Chapter 1705 sections.<sup>17</sup>

## **Formation**

### **Name**

The name of an LLC must contain the words "limited liability company" or the abbreviation "L.L.C.," "LLC," "limited," "ltd.," or "Ltd." And except in certain cases such as those

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<sup>13</sup> R.C. 1706.06 and 1706.061 and R.C. 1309.406 and 1309.408, not in the bill.

<sup>14</sup> R.C. 1706.81 and 15 United States Code (U.S.C.) 7001 *et seq.*, 7001(c), and 7003(b).

<sup>15</sup> R.C. 1706.84.

<sup>16</sup> R.C. 1706.82.

<sup>17</sup> R.C. 111.16, 122.16, 122.173, 135.14, 135.142, 135.35, 150.05, 718.01, 1329.01, 1329.02, 1701.03, 1701.05, 1701.791, 1702.05, 1702.411, 1703.04, 1729.36, 1729.38, 1745.461, 1751.01, 1776.69, 1776.82, 1782.02, 1782.432, 1785.09, 3345.203, 3964.03, 3964.17, 4701.14, 4703.18, 4703.331, 4715.18, 4715.22, 4715.365, 4715.431, 4717.06, 4723.16, 4725.33, 4729.161, 4729.541, 4731.226, 4731.228, 4732.28, 4733.16, 4734.17, 4755.111, 4755.471, 4757.37, 5701.14, 5715.19, 5733.04, 5733.33, 5733.42, 5747.01, and 5751.01.



mentioned below or in the case of a reorganization, merger, or consolidation with another business entity, the Secretary of State must not accept for filing the articles of organization of an LLC if the company name set forth in the articles is not distinguishable on the records of the Secretary of State from the name of any of the following:

- Any other LLC, whether the name is of a domestic LLC or of a foreign LLC registered as a foreign LLC under the bill;
- Any corporation, whether the name is of a domestic corporation or of a foreign corporation holding a license as a foreign corporation under Ohio law;
- Any limited liability partnership, whether the name is of a domestic limited liability partnership or a foreign limited liability partnership registered in Ohio;
- Any limited partnership, whether the name is of a domestic limited partnership or a foreign limited partnership registered in Ohio;
- Any trade name to which the exclusive right, at the time in question, is registered in the office of the Secretary of State.

Despite this general prohibition on indistinguishable names, the bill allows an LLC to apply to the Secretary of State for authorization to use a name that is not distinguishable from the above if the LLC also files the consent of the other person or the person with the right to use the name. This consent must be in a writing signed by an authorized person of the other person.

If a judicial sale or other transfer by order of a tribunal involves the right to use the name of an LLC or of a foreign LLC, then the above prohibition is not applicable with respect to any person that is subject to the order.

Any person that wishes to reserve a name for a proposed new LLC, an LLC that intends to change its name, or an assumed name for a foreign LLC whose name is not available may apply for the exclusive right to use a specified name as the name of the company. If the Secretary of State finds that the specified name is available for use, the Secretary must file the application. The applicant has the exclusive right for 180 days from the date of the application to use the name. The right may be transferred by the applicant or other holder of the right by filing with the Secretary a written transfer that states the name and address of the transferee.<sup>18</sup>

## **Operating agreement**

### **Scope, functions, and limitations**

Subject to the below exceptions, the bill states that an operating agreement governs relations among the members as members and between the members and the LLC, and to the

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<sup>18</sup> R.C. 1706.07.

extent that the operating agreement does not provide for a particular matter, the bill's remaining provisions govern that matter.<sup>19</sup>

### ***Exceptions***

To the extent that a member, manager, or other person has duties, including fiduciary duties, to the LLC, or to another member or to another person that is a party to or is otherwise bound by an operating agreement, those duties may be expanded, restricted, or eliminated by a written operating agreement. However, an operating agreement may not eliminate the implied covenant of good faith and fair dealing.

A written operating agreement may provide for the limitation or elimination of liabilities for breach of contract and breach of duties, including breach of fiduciary duties, of a member, manager, or other person to an LLC or to another member or to another person that is a party to or is otherwise bound by an operating agreement. However, an operating agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied covenant of good faith and fair dealing.

A member, manager, or other person is not liable to an LLC or to another member or to another person that is a party to or is otherwise bound by an operating agreement for breach of fiduciary duty for the member's or other person's good faith reliance on the operating agreement.<sup>20</sup>

An operating agreement may provide either or both of the following:

- That a member or assignee who fails to perform in accordance with, or to comply with the terms and conditions of, the operating agreement is subject to specified penalties or specified consequences;
- That at the time or upon the happening of events specified in the operating agreement, a member or assignee may be subject to specified penalties or consequences.<sup>21</sup>

A penalty or consequence that may be specified under the above two bullet points may include any of the following:

- Reducing or eliminating the defaulting member's or assignee's proportionate interest in an LLC;
- Subordinating the member's or assignee's membership interest to that of nondefaulting members or assignees;
- Forcing a sale of the member's or assignee's membership interest;
- Forfeiting the defaulting member's or assignee's membership interest;

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<sup>19</sup> R.C. 1706.08(A).

<sup>20</sup> R.C. 1706.08(B)(1) to (3).

<sup>21</sup> R.C. 1706.08(B)(4).

- The lending by other members or assignees of the amount necessary to meet the defaulting member's or assignee's commitment;
- A fixing of the value of the defaulting member's or assignee's membership interest by appraisal or by formula and redemption or sale of the membership interest at that value;
- Any other penalty or consequence.<sup>22</sup>

An operating agreement may not do any of the following:

- Vary the nature of the LLC as a separate legal entity;
- Unless a person who is not a member, dissociated member, or assignee is provided rights under an operating agreement, restrict the rights of that person;
- Vary the power of a court under the bill's provisions governing what happens when a person is aggrieved by the failure of another person to sign or deliver a record under the bill;
- Eliminate the implied covenant of good faith and fair dealing;
- Eliminate or limit the liability of a member or other person for any act or omission that constitutes a bad faith violation of the implied covenant of good faith and fair dealing;
- Waive the provision that a promise by a member to make a contribution to an LLC or series thereof is not enforceable unless it is in a signed writing;
- Waive the prohibition on issuance of a certificate of a membership interest in bearer form;
- Waive certain requirements relating to a series of an LLC.<sup>23</sup>

### **Effect on LLC and persons admitted as members; pre-formation agreement**

Under the bill, an LLC is bound by and may enforce its operating agreement, whether or not the LLC has itself manifested assent to its operating agreement. A person that is admitted as an LLC member becomes a party to and assents to the operating agreement subject to the provision that a promise by a member to make a contribution to an LLC or series thereof is not enforceable unless it is in a signed writing.

Two or more persons intending to be the initial LLC members may make an agreement providing that upon the formation of the LLC the agreement will become its operating agreement. One person intending to be the initial LLC member may assent to terms providing that upon the formation of the LLC the terms will become the operating agreement.

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<sup>22</sup> R.C. 1706.08(B)(5).

<sup>23</sup> R.C. 1706.08(C), 1706.082(B), 1706.171, 1706.281(A), 1706.341(D), and 1706.761(B).

The operating agreement of an LLC having only one member is not unenforceable by reason of there being only one person who is a party to the operating agreement.<sup>24</sup>

### **Effect on third parties and relationship to records effective on behalf of LLC**

The bill allows an operating agreement to be amended upon the consent of all the LLC's members or in such other manner authorized by the operating agreement. If an operating agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the operating agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law; except that the approval of any person may be waived by that person and any conditions may be waived by all persons for whose benefit those conditions were intended.

An operating agreement may provide rights to any person, including a person who is not a party to the operating agreement, to the extent set forth in the operating agreement.

The obligations of an LLC and its members to a person in the person's capacity as an assignee or dissociated member are governed by the operating agreement. An assignee and dissociated member are bound by the operating agreement.<sup>25</sup>

## **Statutory agent and service of process**

### **Appointment of statutory agent**

Each LLC and registered foreign LLC must maintain continuously an Ohio agent for service of process ("statutory agent") on the company. The statutory agent must be one of the following:

- A natural person who is an Ohio resident;
- A domestic or foreign corporation, nonprofit corporation, LLC, partnership, limited partnership, limited liability partnership, limited partnership association, professional association, business trust, or unincorporated nonprofit association that has a business address in Ohio. If the statutory agent is an entity other than a domestic corporation, the statutory agent must meet the requirements of the Ohio Corporation and Partnership Laws for an entity of the statutory agent's type to transact business or exercise privileges in Ohio.

The bill prohibits the Secretary of State from accepting an LLC's original articles of organization or a foreign LLC's original registration for filing unless both of the following accompany the articles or registration:

- A written appointment of a statutory agent that is signed by an authorized representative of the LLC or foreign LLC;

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<sup>24</sup> R.C. 1706.081 and 1706.281(A).

<sup>25</sup> R.C. 1706.082.

- A written acceptance of the appointment that is signed by the designated statutory agent on a form prescribed by the Secretary of State.

In cases other than the original filing of articles or registration, the company must appoint the statutory agent and file with the Secretary of State, on a form prescribed by the Secretary of State, a written appointment of that statutory agent that is signed by an authorized representative of the company and a written acceptance of the appointment that is signed by the designated statutory agent.

The written appointment of a statutory agent must set forth the name and address in Ohio of the statutory agent, including the street and number or other particular description, and must otherwise be in such form as the Secretary of State prescribes. The Secretary of State must keep a record of the names of LLCs and foreign LLCs, and the names and addresses of their respective statutory agents.<sup>26</sup>

### **Change of statutory agent or agent's address**

If any statutory agent dies, resigns, or moves outside of Ohio, the LLC or foreign LLC must immediately appoint another statutory agent and file with the Secretary of State, on a form prescribed by the Secretary of State, a written appointment of the statutory agent and acceptance of appointment.

If the statutory agent changes the statutory agent's address, the statutory agent or the LLC or foreign LLC must file with the Secretary of State, on a form prescribed by the Secretary of State, a written statement setting forth the new address.

A statutory agent may resign by filing with the Secretary of State, on a form prescribed by the Secretary of State, a written notice of resignation that is signed by the statutory agent and by mailing a copy of that notice to the LLC or foreign LLC at the current or last known address of its principal office. The notice must be mailed to the company on or prior to the date that the notice is filed with the Secretary of State and must set forth the name of the company, the name and current address of the statutory agent, the current or last known address of the company's principal office, a statement of the resignation of the statutory agent, and a statement that a copy of the notice has been sent to the company within the specified time and manner. The authority of the resigning statutory agent terminates 30 days after the filing of the notice with the Secretary of State.

An LLC or foreign LLC may revoke the appointment of its statutory agent by filing with the Secretary of State a written appointment of another statutory agent and an acceptance of appointment and a statement indicating that the appointment of the former statutory agent is revoked.<sup>27</sup>

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<sup>26</sup> R.C. 1706.09(A) to (C).

<sup>27</sup> R.C. 1706.09(D) to (G).

## **Service of process**

Any legal process, notice, or demand required or permitted by law to be served upon an LLC may be served upon the LLC as follows:

- By delivering a copy of the process, notice, or demand to the address of the statutory agent;
- If the statutory agent is a natural person, by delivering a copy of the process, notice, or demand to the statutory agent.

In certain circumstances, a party desiring service on the LLC or foreign LLC may serve the Secretary of State as the statutory agent. Service upon the Secretary of State is acceptable if:

- The statutory agent cannot be found or no longer has the address that is stated in the Secretary of State's records or the LLC or foreign LLC has failed to maintain a statutory agent;
- The party or its representative files with the Secretary of State an affidavit that states that one of those circumstances exists and states the most recent address of the company that the party has been able to find after a diligent search.
- The party or its representative delivers to the Secretary of State four copies of the process, notice, or demand accompanied by a fee of \$5.

The Secretary of State then must give notice of that delivery to the company at either its principal office as shown upon the Secretary of State's records or at any different address specified in the affidavit of the party desiring service. The Secretary also must forward to the company at either address by certified mail a copy of the process, notice, or demand. Service upon the company is made when the Secretary of State gives the notice and forwards the process, notice, or demand.<sup>28</sup>

## **Cancellation and reinstatement**

Upon the failure of an LLC or foreign LLC to continuously maintain a statutory agent or file a change of name or address of a statutory agent, the Secretary of State must give notice of the failure by ordinary or electronic mail to the company. The notice must be sent to the electronic mail address provided to the Secretary or the address set forth in the agent's notice of resignation. Unless the default is cured within 30 days after the mailing or within any further period of time that the Secretary grants, the Secretary must cancel the LLC's articles or the foreign LLC's registration without further notice or action by the Secretary. The Secretary must make a notation of the cancellation on the Secretary's records.

An LLC or foreign LLC whose articles or registration have been canceled may be reinstated by filing, on a form prescribed by the Secretary, an application for reinstatement and the required appointment of statutory agent or required statement, and by paying the required

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<sup>28</sup> R.C. 1706.09(H).

filing fee. The rights and privileges of an LLC or foreign LLC whose articles or registration has been reinstated are subject to “**Cancellation and reinstatement**” below. The Secretary must furnish the Tax Commissioner a monthly list of all LLCs and foreign LLCs canceled and reinstated under the bill.<sup>29</sup>

### **Recordkeeping, other law, and signature requirements**

The Secretary of State must keep a record of each process, notice, and demand that pertains to an LLC or foreign LLC and that is delivered to the Secretary’s office under the bill or another Ohio law that authorizes service upon the Secretary in connection with an LLC or foreign LLC. In that record, the Secretary of State must record the time of each delivery of that type and the Secretary’s subsequent action with respect to the process, notice, or demand.

The bill does not limit or affect the right to serve any process, notice, or demand upon an LLC or foreign LLC in any other manner permitted by law.

In addition to the written appointment of a statutory agent, any other written statement filed by an LLC or foreign LLC with the Secretary must be signed by an authorized representative of the company.<sup>30</sup>

## **Articles of organization**

### **Original articles**

Under the bill, in order to form an LLC, one or more persons must execute articles of organization and deliver the articles to the Secretary of State for filing. The articles of organization must set forth all of the following:

- The LLC’s name;
- The name and street address of the LLC’s statutory agent and a written acceptance of the appointment that is signed by the statutory agent;
- If applicable, a statement that the LLC may have one or more series of assets;
- Any other matters the organizers or the members determine to include in the articles of organization.

An LLC is formed when the articles of organization are filed by the Secretary of State or at any later date or time specified in the articles of organization. The fact that articles of organization are on file in the office of the Secretary of State is notice of the matters required to be included by the first three bullet points above, but is not notice of any other fact. An operating agreement may be entered into before, at the time of, or after the filing of the articles of organization. Regardless of when the operating agreement is entered into, it may be

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<sup>29</sup> R.C. 1706.09(L), 111.16(Q), and 1706.46.

<sup>30</sup> R.C. 1706.09(I) to (K).

made effective as of the filing of the articles of organization or any other time provided in the operating agreement.<sup>31</sup>

### **Amendment or restatement of articles**

The bill permits an LLC's articles of organization to be amended at any time or to be restated with or without amendment at any time.

To amend its articles of organization, an LLC must deliver to the Secretary of State for filing, on a form prescribed by the Secretary of State, a certificate of amendment containing both of the following pieces of information:

- The name and registration number of the LLC;
- The changes the amendment makes to the articles of organization as most recently amended or restated.

Restated articles of organization must be delivered to the Secretary of State for filing in the same manner as an amendment. Restated articles of organization must be designated as such in the heading and state in the heading or in an introductory paragraph the LLC's name and the date of the filing of its articles of organization. Any amendment or change effected in connection with the restatement of the articles of organization is subject to any other provision of the ORLLCA, not inconsistent with this provision, that would apply if a separate certificate of amendment were filed to effect the amendment or change.

The original articles of organization, as amended or supplemented, are superseded by the restated articles of organization. Thereafter, the articles of organization, including any further amendment or changes, will be the articles of organization of the LLC, but the original effective date of formation remains unchanged.<sup>32</sup>

## **Records; certificate of full force and effect**

### **Signing of records**

Under the bill, a record delivered to the Secretary of State for filing must be signed as provided below:

- An LLC's initial articles of organization must be signed by at least one person;
- A record signed on behalf of an LLC must be signed by a person authorized by the LLC;
- A record filed on behalf of a dissolved LLC that has no members must be signed by the person winding up the LLC's activities;
- A statement of denial by a person must be signed by that person;

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<sup>31</sup> R.C. 1706.16 and 1706.761(B)(3).

<sup>32</sup> R.C. 1706.161.



- Any other record must be signed by the person on whose behalf the record is delivered to the Secretary of State.

Any record to be filed under the ORLLCA may be signed by an agent, including an attorney-in-fact. Powers of attorney relating to the signing of the record need not be delivered to the Secretary of State.<sup>33</sup>

### **Signing and filing pursuant to judicial order**

If a person required by the bill to sign a record or deliver a record to the Secretary of State for filing does not do so, any other person that is aggrieved by that failure to sign may petition the appropriate court to order any of the following:

- The person to sign the record;
- The person to deliver the record to the Secretary of State for filing;
- The Secretary of State to file the record unsigned.

A court may award reasonable expenses, including reasonable attorney's fees, to the prevailing party with respect to any claim made under such a petition.

If the petitioner is not the LLC or foreign LLC to whom the record pertains, the petitioner must make the LLC or foreign LLC a party to the action. A person aggrieved under the above paragraph may seek the remedies provided in that paragraph in a separate action against the person required to sign the record or as a part of any other action concerning the LLC in which the person required to sign the record is made a party.

A record filed unsigned pursuant to these requirements is effective without being signed.<sup>34</sup>

### **Delivery to and filing of records by Secretary of State; effective time and date**

Under the bill, each record authorized or required to be delivered to the Secretary of State for filing under the ORLLCA must meet all of the following requirements:

- The record must contain all information required by Ohio law to be contained in the record but, unless otherwise provided by law, must not be required to contain other information;
- The record must be on or in a medium and in such form acceptable to the Secretary of State and from which the Secretary may create a record that contains all of the information stated in the record. The Secretary may require that the record be delivered by means or on media acceptable to the Secretary. The bill imposes requirements on

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<sup>33</sup> R.C. 1706.17, 1706.20, and 1706.472(A) and (B).

<sup>34</sup> R.C. 1706.171.

paper records, if they are permitted, and permits the Secretary to impose other reasonable requirements on both paper and electronic records.

- The record generally must be in English, but records of a foreign person need not be in English if accompanied by a reasonably authenticated English translation. A person's name set forth in the record need not be in English if expressed in English letters or Arabic or Roman numerals.

Unless the Secretary of State determines that a record does not comply with the filing requirements of the ORLLCA, the Secretary must file the record and send a certificate and a receipt for the fees to the person who submitted the record. Upon request and payment of the requisite fee, the Secretary must furnish to the requester a certified copy of a requested record.

Except as otherwise provided in the bill's provisions regarding the resignation of a statutory agent and the correction of filed records, a record delivered to the Secretary of State for filing under the ORLLCA may specify an effective time and a delayed effective date of not more than 90 days following the date of receipt by the Secretary of State. Subject to the bill's provisions regarding the resignation of a statutory agent and the correction of filed records, a record filed by the Secretary of State is effective as follows:

- If the record does not specify an effective time and does not specify a delayed effective date, on the date the record is filed as evidenced by the Secretary of State's endorsement of the date on the record;
- If the record specifies an effective time but not a delayed effective date, on the date the record is filed at the time specified in the record;
- If the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of the following:
  - The specified date;
  - The 90<sup>th</sup> day after the record is filed.
- If the record specifies an effective time and a delayed effective date, at the specified time on the earlier of the following:
  - The specified date;
  - The 90<sup>th</sup> day after the record is filed.<sup>35</sup>

### **Correction of filed record**

An LLC or foreign LLC may file with the Secretary of State a certificate of correction to correct a record previously filed if at the time of filing the record contained incorrect or inaccurate information or was defectively signed. The certificate of correction must not state a delayed effective date and must do all of the following:

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<sup>35</sup> R.C. 1706.172, 1706.09(F), and 1706.173.

- Describe the record to be corrected, including its filing date, or attach a copy of the record;
- Specify the inaccurate information or the defect in the signing;
- Correct the incorrect or inaccurate information or defective signature.

When filed, a certificate of correction is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed as to persons that previously relied on the uncorrected record and would be adversely affected by the correction.<sup>36</sup>

### **Liability for incorrect or inaccurate information in filed record**

The bill states that a person who signs a record authorized or required to be filed under the ORLLCA thereby affirms under the penalty for falsification that the facts stated in the record are true in all material respects. If a record delivered to the Secretary of State for filing and filed by the Secretary of State contains incorrect or inaccurate information, a person that suffers a loss by reasonable reliance on the information may recover damages for the loss from a person that (1) signed the record, or caused another to sign it on the person's behalf, and (2) knew the information to be incorrect or inaccurate at the time the record was signed.<sup>37</sup>

### **Certificate of full force and effect or registration**

Under the bill, the Secretary of State, upon request and payment of the requisite fee, must furnish to any person a certificate of full force and effect for an LLC if the Secretary of State's records show that the LLC has been formed under the Ohio law. The certificate must state:

- The LLC's name and date of formation;
- That the LLC is in full force and effect on the Secretary of State's records.

The Secretary of State, upon request and payment of the requisite fee, must furnish to any person a certificate of registration for a foreign LLC if the Secretary of State's records show that the Secretary of State has filed a certificate of registration for the foreign LLC, has not canceled the certificate, and has not filed a statement of cancellation of the certificate. The certificate must state the foreign LLC's name and that the foreign LLC is authorized to transact business in Ohio.<sup>38</sup>

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<sup>36</sup> R.C. 1706.173.

<sup>37</sup> R.C. 1706.174 and R.C. 2921.13, not in the bill.

<sup>38</sup> R.C. 1706.175(B).

Subject to any qualification stated in the applicable certificate, the certificate is, for a period of 30 days after the date of the certificate, conclusive evidence that the LLC is in existence or the foreign LLC is authorized to transact business in Ohio.<sup>39</sup>

## **Power and authority**

### **Power to bind the LLC**

The bill prohibits any person from having the power to bind an LLC, or a series thereof, except:

- To the extent the person is authorized to act as the agent of the LLC or series pursuant to the operating agreement;
- To the extent the person is authorized to act as the agent of the LLC or series regarding the direction and oversight of the activities and affairs of an LLC or series thereof;
- To the extent provided in “**Statement of authority**” below;
- To the extent provided by law other than the bill’s provisions.<sup>40</sup>

### **Statement of authority**

Under the bill, an LLC, on behalf of itself or a series thereof, may deliver to the Secretary of State for filing on a form prescribed by the Secretary a statement of authority, which:

- Must include the name and registration number of the LLC;
- May state the authority of a specific person, or, with respect to any position that exists in or with respect to the LLC or series, of all persons holding the position, to enter into transactions on behalf of the LLC or series.

To amend or cancel a statement of authority filed by the Secretary of State, an LLC must, on behalf of itself or a series thereof, deliver to the Secretary of State for filing an amendment or cancellation on a form prescribed by the Secretary stating all of the following:

- The name and registration number of the LLC;
- The date of filing of the statement of authority to which the amendment or cancellation statement pertains;
- The contents of the amendment or a declaration that the statement to which it pertains is canceled.

An effective statement of authority is conclusive in favor of a person that gives value in reliance on the statement, except to the extent that when the person gives value the person has knowledge to the contrary.

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<sup>39</sup> R.C. 1706.175.

<sup>40</sup> R.C. 1706.18 and 1706.30(A).

Upon filing, a certificate of dissolution filed pursuant to the bill's dissolution provisions operates as a cancellation of each statement of authority. After a certificate of dissolution becomes effective, an LLC may, on behalf of itself or a series thereof, deliver to the Secretary of State for filing a statement of authority that is designated as a post-dissolution or post-cancellation statement of authority.

Upon filing, a statement of denial filed pursuant to "**Statement of denial**" below operates as an amendment of the statement of authority to which the statement of denial pertains.<sup>41</sup>

### **Statement of denial**

If a person is named in a filed statement of authority, the person may deliver to the Secretary of State for filing a statement of denial that states the name and registration number of the LLC, states the date of filing of the statement of authority to which the statement of denial pertains, and denies the person's authority.<sup>42</sup>

## **Members**

### **Liability of members to third parties**

Under the bill, a person who is an LLC member is not liable, solely by reason of being a member, for a debt, obligation, or liability of the LLC or a series thereof; or for the acts or omissions of any other member, agent, or employee of the LLC or a series thereof. The failure of an LLC or any of its members to observe any formalities relating to the exercise of the LLC's powers or the management of its activities is not a factor to consider in, or a ground for, imposing liability on the members for the LLC's debts, obligations, or liability.<sup>43</sup>

### **Admission, contributions, and distributions**

#### **Admission**

The bill provides that in connection with an LLC's formation, a person is admitted as an LLC member upon the occurrence of either of the following:

- If the organizer was authorized by one or more persons intending to be LLC members to file the articles of organization on their behalf, the formation of the LLC;
- If the organizer was not authorized by any other person intending to be LLC members, each organizer has the authority of an LLC member upon the formation of the LLC until the admission of the initial member of the LLC.

After formation of an LLC, a person may be admitted as an LLC member in any of the following manners:

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<sup>41</sup> R.C. 1706.19, 1706.20, and 1706.471(B)(1).

<sup>42</sup> R.C. 1706.20.

<sup>43</sup> R.C. 1706.26.

- As provided in the operating agreement;
- As the result of a merger or conversion;
- With the consent of all the members or in the case of an LLC having only one member, the consent of the member;
- If, within 90 consecutive days after the occurrence of the dissociation of the last remaining member, both of the following occur:
  - All holders of the membership interest last assigned by the last person to have been a member consent to the designation of a person to be admitted as a member;
  - The designated person consents to be admitted as a member effective as of the date the last person to have been a member ceased to be a member.

A person may be admitted as a member without acquiring a membership interest and without making or being obligated to make a contribution to the LLC. A person may be admitted as the sole member without acquiring a membership interest and without making or being obligated to make a contribution to the LLC.<sup>44</sup>

### **Contributions**

Under the bill, a contribution of a member to an LLC, or a series thereof, may consist of cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services.

A promise by a member to make a contribution to an LLC, or a series thereof, is not enforceable unless set forth in a writing signed by the member.

A member's obligation to make a contribution to an LLC, or a series thereof, is not excused by the member's death, disability, or other inability to perform personally. If a member does not make a contribution required by an enforceable promise, the member or the member's estate is obligated, at the election of the LLC, or a series thereof, to contribute money equal to the value of the portion of the contribution that has not been made. The election is in addition to, and not in lieu of, any other rights that the LLC or series may have under the operating agreement or applicable law.

The obligation of a member to make a contribution to an LLC may be compromised only by consent of all the members. A conditional obligation of a member to make a contribution to an LLC may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by that member. Conditional obligations include contributions payable upon a discretionary call of an LLC before the time the call occurs. The provisions described in this paragraph do not apply to a member's obligation to make a contribution to a series of an LLC.

The obligation of a member associated with a series to make a contribution to the series may be compromised only by consent of all the members associated with that series. A

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<sup>44</sup> R.C. 1706.27 and 1706.71 through 1706.74.

conditional obligation of a member to make a contribution to a series may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by that member. Conditional obligations include contributions payable upon a discretionary call of that series before the time the call occurs.<sup>45</sup>

### **Distributions**

The bill provides that all members must share equally in any distributions made by an LLC before its dissolution and winding up. A member has a right to a distribution before the dissolution and winding up of an LLC as provided in the operating agreement. A decision to make a distribution before the dissolution and winding up of the LLC is a decision in the ordinary course of activities of the LLC. A member's dissociation does not entitle the dissociated member to a distribution.

A member does not have a right to demand and receive a distribution from an LLC in any form other than money. Except as otherwise provided in the bill's provisions regarding payment of surplus upon dissolution, of the Revised Code, an LLC may distribute an asset in kind if each member receives a percentage of the asset in proportion to the member's share of contributions.

If a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the LLC with respect to the distribution.

The above provisions do not apply to a distribution made by a series. The bill goes on to provide that all members associated with a series share equally in any distributions made by the series before its dissolution and winding up. A member associated with a series has a right to a distribution before the dissolution and winding up of the series as provided in the operating agreement. A decision of the series to make a distribution before the dissolution and winding up of the series is a decision in the ordinary course of activities of the series. A member's dissociation from a series with which the member is associated does not entitle the dissociated member to a distribution from the series.

A member associated with a series does not have a right to demand and receive a distribution from the series in any form other than money. Except as otherwise provided in the bill's provisions regarding payment of surplus upon the winding up of a series, a series may distribute an asset in kind if each member associated with the series receives a percentage of the asset in proportion to the member's share of distributions from the series.

If a member associated with a series becomes entitled to receive a distribution from the series, the member has the status of, and is entitled to all remedies available to, a creditor of the series with respect to the distribution.<sup>46</sup>

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<sup>45</sup> R.C. 1706.28 and 1706.281(C)(2).

<sup>46</sup> R.C. 1706.29, 1706.475(C), and 1706.7613(C).

## Activities and affairs of an LLC or series

Under the bill, the activities and affairs of the LLC are under the direction, and subject to the oversight, of its members. In the case of a series, the activities and affairs of the series are under the direction, and subject to the oversight, of the members associated with the series.

Except as provided in the below paragraphs, a matter in the ordinary course of activities of the LLC or series may be decided by a majority of the members or majority of members associated with the series.

The consent of all members is required to do any of the following:

- Amend the operating agreement;
- File a petition of the LLC for relief under the federal Bankruptcy Code or a comparable federal, state, or foreign law governing insolvency;
- Undertake any act outside the ordinary course of the LLC's activities;
- Undertake, authorize, or approve any other act or matter for which the bill requires the consent of all members.

The consent of all members associated with a series is required to do either of the following:

- Undertake any act outside the ordinary course of the series' activities;
- Undertake, authorize, or approve any other act or matter for which the bill requires the consent of all the members associated with a series.

Any matter requiring the consent of members may be decided without a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the member by signing an appointing record, personally or by the member's agent.

The bill does not entitle a member to remuneration for services performed for an LLC.<sup>47</sup>

## General standards of conduct

Unless either a written operating agreement for the LLC or a written agreement with a member establishes additional fiduciary duties, if a manager has been designated to supervise or manage the activities or affairs of the LLC, the only obligation a member owes, in the member's capacity as a member, to the LLC and the other members is to discharge the member's duties and obligations under the ORLLCA and the operating agreement and exercise any rights consistent with the implied covenant of good faith and fair dealing. The duties of loyalty and care under the bill do not apply to such a member.

Unless either a written operating agreement for the LLC or a written agreement with a member establishes additional fiduciary duties or the duties of the member have been

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<sup>47</sup> R.C. 1706.30.



modified, waived, or eliminated under the bill, in the event that there have not been designated one or more managers to supervise or manage the activities of the LLC, the only fiduciary duties a member owes to the LLC and the other members is the duty of loyalty and the duty of care set forth in the bill.

A member's duty of loyalty to the LLC and the other members is limited to the following:

- To account to the LLC and hold for it any property, profit, or benefit derived by the member in the conduct and winding up of the LLC business or derived from a use by the member of LLC property or from the appropriation of an LLC opportunity;
- To refrain from dealing with the LLC in the conduct or winding up of the LLC business as or on behalf of a party having an interest adverse to the LLC.

A member's duty of care to the LLC and the other members in the conduct and winding up of the LLC business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

A member must discharge the member's duties to the LLC and the other members under the ORLLCA and under the operating agreement and exercise any rights consistent with the implied covenant of good faith and fair dealing.

The bill states that a member does not violate a duty or obligation under the ORLLCA or under the operating agreement merely because the member's conduct furthers the member's own interest.

All the members of an LLC may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty. It is a defense to a claim that a member dealt with the LLC having an adverse interest and any comparable claim in equity or at common law that the transaction was fair to the LLC. If, as permitted, by the ORLLCA or the LLC's operating agreement, a member enters into a transaction with an LLC that otherwise would be prohibited by the bill's provisions regarding dealing with the LLC while having an adverse interest, the member's rights and obligations arising from the transaction are the same as those of a person that is not a member.

The provisions under "**General standards of conduct**" apply to a person winding up the LLC business as the personal or legal representative of the last surviving member as if the person were a member.<sup>48</sup>

### **Manager fiduciary duties to LLC and members**

The bill provides that unless either a written operating agreement for the LLC or a written agreement with a manager establishes additional fiduciary duties or the duties of the manager have been modified, waived, or eliminated in the operating agreement, the only

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<sup>48</sup> R.C. 1706.31.

fiduciary duties of a manager to the LLC or its members are the duty of loyalty and the duty of care set forth below.

A manager's duty of loyalty to the LLC and its members is limited to the following:

- To account to the LLC and hold for it any property, profit, or benefit derived by the manager in the conduct and winding up of the LLC business or derived from a use by the manager of LLC property or from the appropriation of an LLC opportunity;
- To refrain from dealing with the LLC in the conduct or winding up of the LLC business as or on behalf of a party having an interest adverse to the LLC.

A manager's duty of care to the LLC in the conduct and winding up of the LLC activities is limited to acting in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the LLC. A manager is not to be considered to be acting in good faith if the manager has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by any of the persons described below in "**Reliance on reports and information**" to be unwarranted.

In addition, a manager is liable for monetary relief for a violation of the manager's duty of care only if it is proved that the manager's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the LLC or undertaken with reckless disregard for the best interests of the company. This provision does not apply if, and only to the extent that, at the time of a manager's act or omission that is the subject of complaint, either of the following is true:

- The articles or the operating agreement of the LLC state by specific reference to the bill's provisions described in the above paragraph that those provisions do not apply to the LLC;
- A written agreement between the manager and the LLC states by specific reference to the bill's provisions described in the above paragraph that those provisions do not apply to the manager.

All the members of an LLC may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. It is a defense to a claim that a manager dealt with the LLC as or on behalf of a party having an adverse interest that the transaction was fair to the LLC. If, as permitted by this paragraph or the operating agreement, a manager enters into a transaction with the LLC that otherwise would be prohibited due to the manager acting with an adverse interest, the manager's rights and obligations arising from the transaction are the same as those of a person that is not a manager.

A manager must discharge the duties to the LLC and the members under the bill and under the operating agreement and exercise any rights consistently with the implied covenant of good faith and fair dealing.

The bill states that nothing under “**Manager fiduciary duties to LLC and members**” affects the duties of a manager who acts in any capacity other than the manager’s capacity as a manager. If a manager of an LLC also is a member of the LLC, the actions taken in the capacity as a member of the LLC are subject to the provisions of “**General standards of conduct**” above. Nothing in “**Manager fiduciary duties to LLC and members**” affects any contractual obligations of a manager to the LLC.<sup>49</sup>

### **Indemnification, advancement, reimbursement, and insurance**

Under the bill, an LLC, or a series thereof, may indemnify and hold harmless a member or other person, pay in advance or reimburse expenses incurred by a member or other person, and purchase and maintain insurance on behalf of a member or other person.<sup>50</sup>

### **Right of members and dissociated members to information**

Upon reasonable notice provided to the LLC, a member may inspect and copy during regular business hours, at a reasonable location specified by the LLC, any record maintained by the LLC, to the extent the information is material to the member’s rights and duties under the operating agreement or the bill. An LLC may charge a person that makes a demand under this provision the reasonable costs of labor and materials for copying.

A member or dissociated member may exercise rights under this provision through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or by the confidential information provisions under the second bullet point below applies both to the agent or legal representative and the member or dissociated member.

The rights described in “**Right of members and dissociated members to information**” do not extend to an assignee who is not admitted as a member.

In addition to any restriction or condition stated in its operating agreement, an LLC, as a matter within the ordinary course of its activities, may do either of the following:

- Impose reasonable restrictions and conditions on access to and use of information to be furnished under this provision, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient;
- Keep confidential from the members and any other persons, for such period of time as the LLC deems reasonable, any information that the LLC reasonably believes to be in the nature of trade secrets or other information the disclosure of which the LLC in good faith believes is not in the best interest of the LLC or could damage the LLC or its

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<sup>49</sup> R.C. 1706.311 and 1706.331.

<sup>50</sup> R.C. 1706.32.

activities, or that the LLC is required by law or by agreement with a third party to keep confidential.<sup>51</sup>

### **Reliance on reports and information**

The bill provides that each LLC member and agent is fully protected in relying in good faith upon the records of the LLC and upon information, opinions, reports, or statements presented by another member or agent of the LLC, or by any other person as to matters the member or the agent reasonably believes are within that other person's professional or expert competence, including information, opinions, reports, or statements as to any of the following:

- The value and amount of the assets, liabilities, profits, or losses of the LLC, or a series thereof;
- The value and amount of assets or reserves or contracts, agreements, or other undertakings that would be sufficient to pay claims and obligations of the LLC, or series thereof, or to make reasonable provisions to pay those claims and obligations;
- Any other facts pertinent to the existence and amount of assets from which distributions to members or creditors might properly be paid.<sup>52</sup>

### **Power of personal representative of deceased member**

If a member dies, the deceased member's personal representative or other legal representative may, for purposes of settling the estate, exercise the rights of a current member under "**Right of members and dissociated members to information**" above.<sup>53</sup>

### **Member's membership interest**

The only interest of a member that is assignable is the member's membership interest, which is personal property.<sup>54</sup>

### **Assignment of LLC interest**

An assignment, in whole or in part, of a membership interest:

- Is permissible;
- Does not by itself cause a member to cease to be a member of the LLC;
- Does not by itself cause a member to cease to be associated with a series of the LLC;
- Does not by itself cause a dissolution and winding up of the LLC, or a series thereof;

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<sup>51</sup> R.C. 1706.33.

<sup>52</sup> R.C. 1706.331.

<sup>53</sup> R.C. 1706.332.

<sup>54</sup> R.C. 1706.34.

- Subject to “**Power of personal representative of deceased member**” above, does not entitle the assignee to do either of the following:
  - Participate in the management or conduct of the activities of the LLC, or a series thereof;
  - Have access to records or other information concerning the activities of the LLC, or a series thereof.

Under the bill, an assignee has the right to receive, in accordance with the assignment, distributions to which the assignor would otherwise be entitled.

A membership interest may be evidenced by a certificate of membership interest issued by the LLC, or a series thereof. An operating agreement may provide for the assignment of the membership interest represented by the certificate and make other provisions with respect to the certificate. The bill prohibits certificates of membership interest from being in bearer form.

An LLC, or a series thereof, need not give effect to an assignee’s rights until the LLC, or a series thereof, has notice of the assignment.

When a member assigns a membership interest, the assignor retains the rights of a member other than the right to distributions assigned and retains all duties and obligations of a member. This does not apply when a person assigns all of the person’s membership interest, other than for security purposes, thereby dissociating the person from the LLC.

When a member assigns a membership interest to a person that is admitted as a member with respect to the assigned interest, the assignee is only liable for the member’s obligations to make contributions to the extent that the obligations are known to the assignee when the assignee voluntarily accepts admission as a member.<sup>55</sup>

### **Charging order**

The bill provides that on application to a court of competent jurisdiction by any judgment creditor of a member or assignee, the court may charge the membership interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged and after the LLC has been served with the charging order, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the membership interest.

After the LLC is served with a charging order, the LLC or any member is entitled to pay to or deposit with the clerk of the court issuing the charging order any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the charged membership interest. The payment or deposit discharges the LLC and the judgment debtor from liability for the amount paid or deposited and any interest that might accrue on it. Upon receipt of the payment or deposit, the clerk must notify the judgment creditor of its receipt. The judgment creditor must, after any payment or deposit into the court, petition the court for

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<sup>55</sup> R.C. 1706.341, 1706.281, and 1706.441(J).

payment of so much of the amount paid or deposited as necessary to pay the judgment. Excess amounts must be distributed to the judgment debtor, and the charging order must be extinguished. The court may order the clerk to deposit, pending the judgment creditor's petition, any money paid or deposited with the clerk, in an interest bearing account at a bank authorized to receive deposits of public funds.

A charging order constitutes a lien on the judgment debtor's membership interest and does not affect the judgment debtor's status. A judgment debtor that is a member retains the rights of a member and remains subject to all duties and obligations of a member. A judgment debtor that is an assignee retains the rights of an assignee and remains subject to all duties and obligations of an assignee. The bill does not deprive any member or assignee of the benefit of any exemption laws applicable to the member's or assignee's membership interest.

The charging order constitutes the sole and exclusive remedy by which a judgment creditor of a member or assignee may satisfy a judgment out of the judgment debtor's membership interest. The judgment creditor has no right to foreclose, under the ORLLCA or any other law, upon the charging order, the charging order lien, or the judgment debtor's membership interest. The judgment creditor has no right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the judgment debtor's membership interest or the property of an LLC. Court orders for actions or requests for accounts and inquiries that the judgment debtor might have made to the LLC are not available to a judgment creditor attempting to satisfy the judgment out of the judgment debtor's membership interest and may not be ordered by a court.<sup>56</sup>

## **Dissociation**

Under the bill, a person is prohibited from voluntarily dissociating from an LLC. A person's dissociation from an LLC is wrongful only if one of the following applies:

- The dissociation is in breach of an express provision of the operating agreement;
- The person is expelled as a member by a determination of a tribunal;
- The person is dissociated by becoming a debtor in bankruptcy or making a general assignment for the benefit of creditors.<sup>57</sup>

A person that wrongfully dissociates as a member is liable to the LLC and, subject to the bill's derivative action provisions, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or liability of the member to the LLC or the other members.<sup>58</sup>

A person is dissociated as a member from an LLC in any of the following circumstances:

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<sup>56</sup> R.C. 1706.342.

<sup>57</sup> R.C. 1706.41(A) and (B) and 1706.411(D).

<sup>58</sup> R.C. 1706.41(C) and 1706.61.

- An event stated in the operating agreement as causing the person's dissociation occurs;
- The person is expelled as a member pursuant to the operating agreement;
- The person is expelled as a member by the unanimous consent of the other members if any of the following apply:
  - It is unlawful to carry on the LLC's activities with the person as a member;
  - The person is an entity and, within 90 days after the LLC notifies the person that it will be expelled as a member because the person has filed a statement of dissolution or the equivalent, or its right to transact business has been suspended by its jurisdiction of formation, the statement of dissolution or the equivalent has not been revoked or its right to transact business has not been reinstated;
  - The person is an entity and, within 90 days after the LLC notifies the person that it will be expelled as a member because the person has been dissolved and its activities are being wound up, the entity has not been reinstated or the dissolution and winding up have not been revoked or canceled.
- On application by the LLC, the person is expelled as a member by tribunal order for any of the following reasons:
  - The person has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the LLC's activities;
  - The person has willfully or persistently committed, or is willfully or persistently committing, a material breach of the operating agreement or the person's duties or obligations under the ORLLCA or other applicable law;
  - The person has engaged, or is engaging, in conduct relating to the LLC's activities that makes it not reasonably practicable to carry on the activities with the person as a member.
- In the case of a person who is an individual, the person dies, a guardian or general conservator is appointed for the person, or a tribunal determines that the person has otherwise become incapable of performing the person's duties as a member under the ORLLCA or the operating agreement;
- The person, other than a sole remaining LLC member, becomes a bankruptcy debtor, executes an assignment for the benefit of creditors, or seeks, consents, or acquiesces to the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;
- In the case of a trust or a person acting as a member by virtue of being a trustee, the trust's entire membership interest in the LLC is distributed, but not solely by reason of the substitution of a successor trustee;
- In the case of an estate or a person acting as a member by virtue of being an estate's personal representative, the estate's entire membership interest in the LLC is

distributed, but not solely by reason of the substitution of a successor personal representative;

- In the case of a member that is not an individual, the legal existence of the person otherwise terminates;
- There has been an assignment of all of the person's membership interest other than an assignment for security purposes.<sup>59</sup>

A dissociated person has no right to participate as a member in the LLC's activities and affairs and is entitled only to receive the distributions to which that member would have been entitled if the member had not dissociated. Upon dissociation, the member's duty of loyalty and duty of care continue only with regard to matters arising and events occurring before the dissociation, unless the member participates in winding up the LLC's business. Dissociation as a member does not of itself discharge the person from any debt, obligation, or liability to an LLC or the other members that the person incurred while a member.<sup>60</sup>

## **Delinquency**

### **Cancellation and reinstatement**

Except as otherwise provided in the bill, upon reinstatement of an LLC's articles or a foreign LLC's registration, the LLC's rights and privileges existing at the time its articles or registration were canceled are fully vested in the company as if they had not been canceled. The LLC is again entitled to exercise the rights and privileges authorized by its articles. The name of a company whose articles have been canceled is reserved for a period of one year after the date of cancellation. If the reinstatement is not made within one year after that date and it appears that a corporate name, LLC name, limited liability partnership name, limited liability partnership name, trade name, or assumed name has been filed, the name of which is not distinguishable upon the record as provided in the bill's LLC name provisions, the Secretary of State must require the applicant for reinstatement, as a condition prerequisite to such reinstatement, to amend its articles or registration by changing its name.

Upon reinstatement, both of the following apply to the exercise of or an attempt to exercise any rights or privileges on behalf of the company by an officer, agent, or employee of the company, after cancellation and prior to reinstatement of the articles or registration:

- The exercise or attempt to exercise has the same force and effect that the exercise or an attempt to exercise would have had if the company's articles or registration had not been canceled, if both of the following apply:
  - The exercise of or an attempt to exercise the right or privilege was within the scope of the company's articles that existed prior to cancellation;

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<sup>59</sup> R.C. 1706.411.

<sup>60</sup> R.C. 1706.412, 1706.31(C) and (D), and 1706.472.



- The officer, agent, or employee had no knowledge that the company's articles or registration had been canceled.
- The company is liable exclusively for the exercise or attempt to exercise, if the conditions set forth in the above bullet points are met.

Upon reinstatement of a company's articles or registration, the exercise or attempt to exercise any rights or privileges, after cancellation and prior to reinstatement of the articles or registration, does not constitute a violation of the bill's statutory agent, cancellation, and reinstatement provisions, if the conditions set forth in the above bullet points are met.

The provisions described in "**Delinquency**" are remedial in nature and are to be construed liberally to accomplish the purpose of providing full reinstatement of an LLC's articles of organization or a foreign LLC's registration, in accordance with this provision, to the time of the cancellation of the articles or registration.<sup>61</sup>

## **Appeals**

The bill allows an LLC or foreign LLC to appeal a cancellation within 30 days after the effective date of the cancellation. The appeal must be made to one of the following:

- The court of common pleas of the county in which the street address of the LLC or foreign LLC's principal office is located;
- If the LLC or foreign LLC has no principal office in Ohio, to the court of common pleas of the county in which the street address of its statutory agent is located;
- If the LLC or foreign LLC has no statutory agent, to the Franklin County Court of Common Pleas.

The LLC or foreign LLC must commence its appeal by petitioning the appropriate court to set aside the cancellation or to determine that the LLC or foreign LLC has cured the grounds for cancellation and attaching to the petition copies of those records of the Secretary of State as may be relevant.

The appropriate court may take, or may summarily order the Secretary of State to take, whatever action the court considers appropriate. This order or decision may be appealed as in any other civil proceeding.<sup>62</sup>

## **Dissolution**

### **Events causing dissolution**

The bill provides that an LLC is dissolved, and that its activities must be wound up, upon the occurrence of any of the following:

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<sup>61</sup> R.C. 1706.46, 1706.07, and 1706.09.

<sup>62</sup> R.C. 1706.461.

- An event or circumstance that the operating agreement states causes dissolution;
- The consent of all the members;
- An LLC with canceled articles has failed to cure the grounds for cancellation for three years or more and any member or person authorized pursuant to “**Power to bind the LLC**” above consents to the dissolution;
- The passage of 90 consecutive days after the occurrence of the dissociation of the last remaining member; provided that upon dissociation of the last remaining member pursuant to the bill’s provisions regarding the member’s death, the appointment of a guardian or general conservator, or a determination by a tribunal that the member is incapable of performing the member’s duties, the LLC is not dissolved if either of the following applies:
  - The operating agreement provides for the admission of a substitute member effective prior to the passage of such time period;
  - A substitute member has been admitted, as evidenced by a written record, prior to the passage of such time period, which admission is to be effective as of the date of such dissociation.
- On application by a member, the entry by the appropriate court of an order dissolving the LLC on the grounds that it is not reasonably practicable to carry on the LLC’s activities in conformity with the operating agreement.<sup>63</sup>

### **Effect of dissolution**

Under the bill, a dissolved LLC continues its existence as an LLC but may not carry on any activities except as is appropriate to wind up and liquidate its activities and affairs. Appropriate activities include all of the following:

- Collecting its assets;
- Disposing of its properties that will not be distributed in kind to persons owning membership interests;
- Discharging or making provisions for discharging its liabilities;
- Distributing its remaining property in accordance with “**Application of assets in winding up LLC’s activities**” below;
- Doing every other act necessary to wind up and liquidate its activities and affairs.

The bill allows an LLC to do any of the following in the course of winding up the LLC’s activities:

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<sup>63</sup> R.C. 1706.47 and 1706.411(E).

- Deliver to the Secretary of State for filing, on a form prescribed by the Secretary of State, a certificate of dissolution setting forth all of the following:
  - The LLC’s name and registration number;
  - That the LLC has dissolved;
  - If it is not to be effective upon filing, the certificate’s effective date, which must be a date certain that is after the filing date;
  - A copy of the notice it will publish pursuant to the bill’s provisions in **“Other claims against dissolved LLC”**;
  - Any other information the LLC considers proper.
- Preserve the LLC’s activities and property as a going concern for a reasonable time;
- Prosecute, defend, or settle civil, criminal, and administrative actions or proceedings;
- Assign the LLC’s property;
- Resolve disputes by mediation or arbitration;
- Merge or convert in accordance with **“Merger and conversion”** below.  
An LLC’s dissolution, in itself:
  - Is not an assignment of the LLC’s property;
  - Does not prevent the commencement of a proceeding by or against the LLC in its LLC name;
  - Does not abate or suspend a proceeding pending by or against the LLC on the effective date of dissolution;
  - Does not terminate the authority of its statutory agent;
  - Does not abate, suspend, or otherwise alter the application of the provisions under **“Liability of members to third parties”** above.<sup>64</sup>

### **Right to wind up business and activities**

Subject to the last bullet point under **“Effect of dissolution”** above, after dissolution, the remaining members, if any, and if none, a person appointed by all holders of the membership interest last assigned by the last person to have been a member, may wind up the LLC’s activities. The appropriate tribunal may order supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC’s activities as follows:

- On application of a member, if the applicant establishes good cause;

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<sup>64</sup> R.C. 1706.471, 1706.26, 1706.474(A), and 1706.71 through 1706.74.

- On application of an assignee, if both of the following apply:
  - The LLC does not have any members;
  - Within a reasonable time following the dissolution, a person has not been appointed pursuant to the paragraph above.
- In connection with a proceeding under the last bullet point of “**Events causing dissolution**” above.<sup>65</sup>

### **Known claims against dissolved LLC**

Under the bill, a dissolved LLC may dispose of any known claims against it by following the procedures described in the paragraph below at any time after the effective date of the dissolution of the LLC.

A dissolved LLC may give notice of its dissolution in a record to the holder of any known claim. The notice must do all of the following:

- Identify the dissolved LLC;
- Describe the information required to be included in a claim;
- Provide a mailing address to which the claim is to be sent;
- State the deadline by which the LLC must receive the claim, which must be at least 90 days after the notice’s effective date.
- State that if not sooner barred, the claim will be barred if not received by the deadline.

Unless sooner barred by any other statute limiting actions, a claim against a dissolved LLC is barred if (1) a claimant who was given notice does not deliver the claim by the deadline, or (2) a claimant whose claim was rejected by the LLC does not commence a proceeding to enforce the claim within 90 days after the effective date of the rejected notice.

Nothing in these provisions is to be construed to extend any otherwise applicable statute or period of limitations.

For purposes of the above provisions, “claim” includes an unliquidated claim, but does not include either of the following:

- A contingent liability that has not matured so that there is no immediate right to bring suit;
- A claim based on an event occurring after the effective date of dissolution.<sup>66</sup>

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<sup>65</sup> R.C. 1706.472, 1706.471(C)(5), and 1706.471(E).

<sup>66</sup> R.C. 1706.473.

## Other claims against dissolved LLC

The bill allows a dissolved LLC to publish notice of its dissolution and request that persons with claims against the dissolved LLC present them in accordance with the notice. The notice must meet all of the following requirements:

- It must be posted prominently on the principal website then maintained by the LLC, if any, and provided to the Secretary of State to be posted on the website maintained by the Secretary of State in accordance with the last two paragraphs of **“Other claims against dissolved LLC.”** The notice is considered published when posted on both websites or, if the LLC does not then maintain a website, when posted on the website maintained by the Secretary of State.
- It must describe the information that must be included in a claim and provide a mailing address to which the claim must be sent;
- It must state that if not sooner barred, the claim will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice.<sup>67</sup>

If a dissolved LLC publishes a notice in accordance with the above bullet points, unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved LLC within two years after the publication of the notice:

- A claimant who was not given voluntary notice by the dissolved LLC of the LLC’s dissolution described in **“Known claims against dissolved LLC”** above;
- A claimant whose claim was timely sent to the dissolved LLC but not acted on by the dissolved LLC;
- A claimant whose claim is contingent at the effective date of the dissolution of the LLC, or is based on an event occurring after the effective date of the dissolution of the LLC.<sup>68</sup>

A claim that is not barred under these provisions, any other statute limiting actions, or **“Known claims against dissolved LLC”** above may be enforced as follows:

- Against a dissolved LLC, to the extent of its undistributed assets;
- Except as provided below regarding security for contingent, unknown, and post-dissolution claims, if the assets of a dissolved LLC have been distributed after dissolution, against a member or assignee to the extent of that person’s proportionate share of the claim or of the assets distributed to the member or assignee after dissolution, whichever is less. A person’s total liability for all claims under these two

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<sup>67</sup> R.C. 1706.474(A), (B), and (J).

<sup>68</sup> R.C. 1706.474(C) and 1706.473(B).

bullet points may not exceed the total amount of assets distributed to the person after dissolution of the LLC.<sup>69</sup>

A dissolved LLC that published a notice under this provision may file an application with the appropriate court in the county in which the dissolved LLC's principal office is located or, if it has none in Ohio, in the county in which the dissolved LLC's statutory agent is or was last located, for a determination of the amount and form of security to be provided for payment of the following claims:

- Claims that are contingent;
- Claims that have not been made known to the dissolved LLC;
- Claims that are based on an event occurring after the effective date of the dissolution of the LLC but that, based on the facts known to the dissolved LLC, are reasonably estimated to arise after the effective date of the dissolution of the LLC.<sup>70</sup>

Provision need not be made for any claim that is or is reasonably anticipated to be barred.<sup>71</sup>

Within ten days after the filing of the application provided for in the above paragraph, notice of the proceeding must be given by the dissolved LLC to each potential claimant as described in that paragraph.<sup>72</sup>

The appropriate court may appoint a guardian ad litem (a person who acts to protect the interests of certain designated persons) to represent all claimants whose identities are unknown in any proceeding brought under this provision. The reasonable fees and expenses of the guardian must be paid by the dissolved LLC.<sup>73</sup>

Provision by the dissolved LLC for security in the amount and the form ordered by the appropriate court under the three bullet points above satisfies the dissolved LLC's obligation with respect to claims that are contingent, have not been made known to the dissolved LLC, or are based on an event occurring after the effective date of the dissolution of the LLC. Such claims must not be enforced against a person owning a membership interest to whom assets have been distributed by the dissolved LLC after the effective date of the dissolution of the LLC.<sup>74</sup>

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<sup>69</sup> R.C. 1706.474(D) and (H).

<sup>70</sup> R.C. 1706.474(E).

<sup>71</sup> R.C. 1706.474(E) and (C).

<sup>72</sup> R.C. 1706.474(F).

<sup>73</sup> R.C. 1706.474(G).

<sup>74</sup> R.C. 1706.474(H).

The bill states that nothing in these provisions is to be construed to extend any otherwise applicable statute of limitations.<sup>75</sup>

Except as provided in the paragraph below, the Secretary of State must make both of the following available to the public in a format that is searchable, viewable, and accessible through the internet:

- A list of all LLCs that have filed certificates of dissolution;
- For each dissolved LLC on the list described in the above bullet point, a copy of both the certificate of dissolution and the notice delivered under the bill's notice provisions.<sup>76</sup>

After the materials relating to a particular LLC have been posted for five years, the Secretary of State may remove the information relating to that LLC from the website.<sup>77</sup>

### **Application of assets in winding up LLC's activities**

Under the bill, upon the winding up of an LLC, payment or adequate provision for payment, must be made to creditors, including members who are creditors, in satisfaction of liabilities of the LLC. After complying with this requirement, an LLC must distribute any surplus as follows:

- First, to each person owning a membership interest that reflects contributions made on account of the membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions;
- Then to each person owning a membership interest in the proportions in which the owners of membership interests share in distributions before dissolution.

If the LLC does not have sufficient surplus to comply with the first bullet point above, any surplus must be distributed among the owners of membership interests in proportion to the value of their respective unreturned contributions.<sup>78</sup>

## **Foreign LLCs**

### **Governing law**

The bill provides that the law of the jurisdiction under which a foreign LLC is formed governs all of the following:

- The organization and internal affairs of the foreign LLC;
- The liability of a member as a member for the debts, obligations, or other liabilities of the foreign LLC or a series thereof;

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<sup>75</sup> R.C. 1706.474(I).

<sup>76</sup> R.C. 1706.474(J)(1) and (B).

<sup>77</sup> R.C. 1706.474(J)(2).

<sup>78</sup> R.C. 1706.475.

- The authority of the members and agents of a foreign LLC or a series thereof;
- The liability of the assets of the foreign LLC, or a series thereof, for the obligations of another series or the foreign LLC.

A foreign LLC's application for registration as a foreign LLC may not be denied by reason of any difference between the laws of the jurisdiction under which the LLC is formed and Ohio law. But, a foreign LLC may only engage in activities in Ohio that Ohio law permits an LLC to engage in.

A foreign LLC that has filed a registration as a foreign LLC in Ohio:

- Has the same, and no greater, rights and privileges as an LLC;
- Except as otherwise provided by the ORLLCA, is subject to the same duties, restrictions, penalties, and liabilities imposed on an LLC.<sup>79</sup>

## Registration

In order for a foreign LLC or any of its series to transact business in Ohio, the bill requires the foreign LLC to register with the Secretary of State. Neither a foreign LLC nor any of its series may transact business in Ohio until the registration has been approved by the Secretary of State and the foreign LLC or series is otherwise in compliance with the bill's provisions governing foreign LLCs. The registration as a foreign LLC must state all of the following:

- The name of the foreign LLC and, if the name does not comply with the bill's name provisions, the assumed name adopted pursuant to "**Noncomplying name**" below;
- The foreign LLC's jurisdiction of formation;
- The name and street address of the foreign LLC's statutory agent and a written acceptance of the appointment that is signed by the agent;
- That the foreign LLC is a foreign LLC;
- If the foreign LLC establishes or provides for the establishment of one or more series of assets, all of the following:
  - The fact that it provides for the establishment of one or more series of assets;
  - Whether the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series, if any, are enforceable against the assets of that series only, and not against the assets of the foreign LLC generally or any other series thereof;

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<sup>79</sup> R.C. 1706.51.



- Whether any of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the foreign LLC generally or any other series thereof are enforceable against the assets of that series.

A foreign LLC is authorized to transact business in Ohio from the effective date of its registration as a foreign LLC until the earlier of the effective date of its cancellation of a foreign LLC or the effective date of the Secretary of State's cancellation of the registration.

Upon any change in circumstances that makes any statement contained in its registration no longer true, the foreign LLC must deliver to the Secretary of State for filing an appropriate certificate of correction.<sup>80</sup>

### **Actions not constituting transacting business**

Under the bill, a foreign LLC is not considered to be transacting business in Ohio within the meaning of the bill's foreign LLC provisions by reason of its or any of its series' performing in Ohio any of the following actions:

- Maintaining, defending, or settling in its own behalf any proceeding or dispute;
- Holding meetings or carrying on any other activities concerning its internal affairs;
- Maintaining accounts in financial institutions;
- Maintaining offices or agencies for the assignment, exchange, and registration of the foreign LLC's or its series' own securities or interests or maintaining trustees or depositories with respect to those securities or interests;
- Selling through independent contractors;
- Soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside Ohio before they become contracts;
- Creating, as borrower or lender, or acquiring indebtedness, mortgages, or security interests in real or personal property;
- Securing or collecting debts in its own behalf or enforcing mortgages or other security interests in real or personal property securing those debts, and holding, protecting, and maintaining property so acquired;
- Owning real or personal property;
- Conducting an isolated transaction that is not one in the course of repeated transactions of a like nature;
- Transacting business in interstate commerce.

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<sup>80</sup> R.C. 1706.511(E), 1706.07, 1706.09 and 1706.513.

Similarly, a foreign LLC is not considered to be transacting business in Ohio solely because it or any of its series:

- Owns a controlling interest in an entity that is transacting business in Ohio;
- Is a limited partner of a limited partnership or foreign limited partnership that is transacting business in Ohio;
- Is a member of an LLC or foreign LLC that is transacting business in Ohio.

These provisions do not apply in determining the contacts or activities that may subject a foreign LLC, or a series thereof, to service of process, taxation, or regulation under Ohio law other than the bill.

Nothing in these provisions limits or affects the right to subject a foreign LLC, or a series thereof, to the jurisdiction of Ohio courts or to serve upon any foreign LLC, or series thereof, any process, notice, or demand required or permitted by law to be served upon a foreign LLC, or series thereof, pursuant to any other provision of law or pursuant to the applicable Rules of Civil Procedure.<sup>81</sup>

### **Noncomplying name**

A foreign LLC whose name does not comply with the bill's name requirements may not file a registration as a foreign LLC until it adopts, for the purpose of transacting business in Ohio, an assumed name that complies with those requirements. A foreign LLC that adopts an assumed name and then files a registration as a foreign LLC under that assumed name need not file a name registration when transacting business under that assumed name. After filing the registration as a foreign LLC under an assumed name, it must transact business in Ohio under the assumed name unless it has filed a name registration under another name and is authorized to transact business in Ohio under that other name.

If a foreign LLC to which a registration as a foreign LLC has been filed changes its name to one that does not comply with the bill's name requirements, it may not transact business in Ohio until it complies with the paragraph above by filing a certificate of correction.<sup>82</sup>

### **Cancellation of registration**

The bill allows a registered foreign LLC to cancel its registration by delivering to the Secretary of State for filing a certificate of cancellation of registration of a foreign LLC. The certificate must set forth all of the following:

- The name and registration number of the foreign LLC, any assumed name adopted for use in Ohio, and the name of the jurisdiction under whose law it is organized;

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<sup>81</sup> R.C. 1706.512.

<sup>82</sup> R.C. 1706.513 and 1706.07.

- The name and street address of the statutory agent, or if a statutory agent is no longer to be maintained, a statement that the foreign LLC will not maintain a statutory agent, and the street address to which service of process may be mailed pursuant to the bill's service of process provisions;
- That the foreign LLC, and all series thereof, will no longer transact business in Ohio and that it relinquishes its authority to transact business in Ohio;
- That the foreign LLC is canceling its registration as a foreign LLC;
- That any statement of assumed name it has on file in the records of the Secretary of State and any assumed name with respect to the foreign LLC, are withdrawn upon the effective date of the cancellation of registration of a foreign LLC.

The cancellation of registration is effective upon filing by the Secretary of State, and the foreign LLC, and all series thereof, will be without authority to transact business in Ohio. The cancellation does not terminate the authority of the foreign LLC's statutory agent.<sup>83</sup>

### **Effect of failure to register**

Under the bill, no foreign LLC, or a series thereof, transacting business in Ohio, nor anyone on its behalf, is permitted to maintain a proceeding in any Ohio court for the collection of debts unless an effective foreign LLC registration is on file with the Secretary of State.

A court may stay a proceeding commenced by a foreign LLC, or series thereof, until it determines whether the foreign LLC should be registered with the Secretary of State. If the court determines that the foreign LLC should be registered, the court may further stay the proceeding until the foreign LLC registers. If the foreign LLC subsequently delivers for filing to the Secretary of State a registration as an LLC, no proceeding in any Ohio court to which the foreign LLC, or a series thereof, is a party may, after the effective date of the registration, be dismissed by reason of the foreign LLC's prior noncompliance with the provisions described in "**Registration**" above.

If a foreign LLC, or a series thereof, conducts activities in Ohio without having on file in the records of the Secretary of State a registration as a foreign LLC, the foreign LLC is liable to this state for an amount equal to the fee as prescribed by the Secretary of State from time to time. No registration as a foreign LLC may be filed until the amounts due are paid. In addition, the amounts due may be recovered in an action brought by the Attorney General. In addition to or in lieu imposing a civil penalty, the court may issue an injunction restraining the foreign LLC and all of its series from further conducting activities exercising its rights and privileges in Ohio until all amounts plus any interest and court costs have been paid, and until the foreign LLC has otherwise complied with the bill's foreign LLC provisions.

Notwithstanding the first two paragraphs of "**Effect of failure to register,**" the conducting of activities in Ohio by a foreign LLC, or a series thereof, without having a

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<sup>83</sup> R.C. 1706.514 and 1706.09.

registration as a foreign LLC on file in the records of the Secretary of State does not impair the validity of the acts of the foreign LLC, or a series thereof, or prevent the foreign LLC, or a series thereof, from defending any proceeding in Ohio.

Neither a member nor agent of a foreign LLC nor a member associated with a series or agent of a series, is liable for the debts, obligations, or other liabilities of the foreign LLC, or a series thereof, solely because the foreign LLC, or a series thereof, conducted activities in Ohio without being registered.<sup>84</sup>

## **Derivative actions**

### **Right of derivative action**

The bill allows a member to commence or maintain a derivative action in the right of an LLC or series thereof to recover a judgment in favor of the LLC or series by complying with the provisions described below.<sup>85</sup>

### **Standing**

A member may maintain a derivative action in the right of the LLC only if the member meets both of the following conditions:

- The member fairly and adequately represents the LLC's interests in enforcing the right;
- The member either:
  - Was a member of the LLC at the time of the act or omission of which the member complains;
  - Acquired a membership interest through assignment by operation of law from a person who was a member at the time of the act or omission of which the member complains.

A parallel standard applies regarding the ability of a member associated with a series of an LLC to maintain a derivative action in the right of the series.<sup>86</sup>

### **Demand**

A member may not commence a derivative action in the right of the LLC, or a series thereof, until both of the following occur:

- A written demand has been made upon the LLC or the series to take suitable action;
- 90 days have expired from the date the demand was made unless either of the following applies:

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<sup>84</sup> R.C. 1706.515 and 1706.511.

<sup>85</sup> R.C. 1706.61.

<sup>86</sup> R.C. 1706.611.

- The member has earlier been notified that the demand has been rejected by the LLC or the series;
- Irreparable injury to the LLC or the series would result by waiting for the expiration of the 90-day period.<sup>87</sup>

### **Stay of proceedings**

For the purpose of allowing the LLC or the series thereof time to undertake an inquiry into the allegations made in the demand or complaint commenced pursuant to the bill, the court may stay any derivative action for the period the court considers appropriate.<sup>88</sup>

### **Dismissal**

The bill requires the court to dismiss the derivative action on motion by the LLC if one of the groups specified in the paragraph below has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative action is not in the best interests of the LLC.

Subject to the requirements of the paragraph below, the determination of whether the maintenance of the derivative action is in the best interests of the LLC must be made by a majority vote of either (1) the LLC's independent members or (2) the members of a committee consisting of independent members appointed by a majority of the independent members.

If the determination is not made pursuant to the two paragraphs above, the determination must be made by the person, or, in the case of more than one person, by a majority of the persons, sitting upon a panel of one or more persons appointed by a court upon motion filed with the court by the LLC for those purposes. The plaintiff in the derivative action has the burden of proving that any of the above requirements regarding the LLC's best interests are met.

A parallel procedure and standard applies with regard to the dismissal of a derivative action in the right of a series of an LLC.

The court must appoint only independent persons to the panels described in the above provisions. The presence of one or more of the following circumstances, without more, does not prevent a person from being considered independent for purposes of this provision:

- The naming of the person as a defendant in the derivative action or as a person against whom action is demanded;
- The approval by that person of the act being challenged in the derivative action or demand where the act did not result in personal benefit to that person;

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<sup>87</sup> R.C. 1706.612.

<sup>88</sup> R.C. 1706.613.

- The making of the demand pursuant to “**Demand**” above or the commencement of the derivative action pursuant to these provisions.

Subject to “**Discontinuance or settlement**” below, a panel appointed by the court has the authority to continue, settle, or discontinue the derivative proceeding as the court may confer upon the panel.<sup>89</sup>

### **Discontinuance or settlement**

Under the bill, a derivative action may not be discontinued or settled without the court’s approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of members of the LLC, or the interests of members associated with a series of the LLC, the court must direct that notice be given to the members affected.<sup>90</sup>

### **Payment of expenses**

On termination of the derivative action the court may do any of the following:

- Order the LLC or series, as applicable, to pay the plaintiff’s reasonable expenses, including attorney fees, incurred by the plaintiff in the derivative action if the court finds that the derivative action has resulted in a substantial benefit to the LLC or series;
- Order the plaintiff to pay any defendant’s reasonable expenses, including attorney fees, incurred by the defendant in defending the derivative action if it finds that the derivative action was commenced or maintained without reasonable cause or for an improper purpose;
- Order a party to pay an opposing party’s expenses incurred because of the filing of a pleading, motion, or other paper, if it finds both of the following:
  - That the pleading, motion, or other paper was not well grounded in fact, after reasonable inquiry, or not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
  - That the pleading, motion, or other paper was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.<sup>91</sup>

### **Applicability to foreign LLCs**

The bill provides that in any derivative action in the right of a foreign LLC, or a series thereof, the right of a person to commence or maintain a derivative action in the right of a foreign LLC, or a series thereof, and any matters raised in the action covered by the above provisions regarding derivative actions are governed by the law of the jurisdiction under which

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<sup>89</sup> R.C. 1706.614.

<sup>90</sup> R.C. 1706.615.

<sup>91</sup> R.C. 1706.616.

the foreign LLC was formed. But, any matters raised in the action covered by **“Stay of proceedings,” “Discontinuance or settlement,”** and **“Payment of expenses”** are governed by the Ohio law.<sup>92</sup>

### **Direct actions by members**

Subject to the paragraph below, a member may maintain a direct action against another member or members or the LLC, or a series thereof, to enforce the member’s rights and otherwise protect the member’s interests, including rights and interests under the operating agreement or the ORLLCA or arising independently of the membership relationship.

A member maintaining a direct action under the above paragraph must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the LLC, or series thereof.

A member may maintain a direct action to enforce a right of an LLC if all members at the time of suit are parties to the action. A member associated with a series may maintain a direct action to enforce a right of the series if all members associated with the series at the time of suit are parties to the action.<sup>93</sup>

## **Merger and conversion**

### **Merger**

#### **In general**

The bill allows an LLC to merge with one or more other constituent entities (a constituent entity is a party to a merger) pursuant to the provisions below and to an agreement of merger if all of the following conditions are met:

- The governing statute of each of the other entities authorizes the merger;
- The merger is not prohibited by the law of a jurisdiction that enacted any of the governing statutes;
- Each of the other entities complies with its governing statute in effecting the merger.

An agreement of merger must be in a record and must include all of the following:

- The name and form of each constituent entity;
- The name and form of the surviving entity (an entity into which one or more other entities are merged, whether the entity preexisted the merger or was created pursuant to the merger) and, if the surviving entity is to be created pursuant to the merger, a statement to that effect;

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<sup>92</sup> R.C. 1706.617, 1706.613, 1706.615, and 1706.616.

<sup>93</sup> R.C. 1706.62.

- The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent entity into any combination of money, interests in the surviving entity, and other consideration as permitted under the paragraph below;
- If the surviving entity is to be created pursuant to the merger, the surviving entity's organizational documents that are proposed to be in a record;
- If the surviving entity is not to be created pursuant to the merger, any amendments to be made by the merger to the surviving entity's organizational documents that are, or are proposed to be, in a record.

In connection with a merger, rights or securities of or interests in the constituent entity may be any of the following:

- Exchanged for or converted into cash, property, or rights or securities of or interests in the surviving entity;
- In addition to or in lieu of the above bullet point, exchanged for or converted into cash, property, or rights or securities of or interests in another entity;
- Canceled.<sup>94</sup>

### **Action on plan of merger by constituent LLC**

To be effective, the bill requires an agreement of merger to be consented to by all the members of a constituent LLC. After the agreement of merger is approved, and at any time before a certificate of merger is delivered to the Secretary of State for filing under "**Filings and effective date**" below, a constituent LLC may amend the agreement or abandon the merger:

- As provided in the agreement; or
- Except as otherwise prohibited in the agreement, with the same consent as was required to approve the agreement.<sup>95</sup>

### **Filings and effective date**

After each constituent entity has approved the agreement of merger, a certificate of merger must be signed on behalf of both of the following:

- Each constituent LLC, as provided in "**Signing of records**" above;
- Each other constituent entity, as provided in its governing statute.

A certificate of merger under these provisions must include all of the following:

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<sup>94</sup> R.C. 1706.71.

<sup>95</sup> R.C. 1706.711.



- The name and form of each constituent entity, the jurisdiction of its governing statute, and its registration number, if any, as it appears on the records of the Secretary of State;
- The name and form of the surviving entity, the jurisdiction of its governing statute, and, if the surviving entity is created pursuant to the merger, a statement to that effect;
- The date the merger is effective under the governing statute of the surviving entity;
- If the surviving entity is to be created pursuant to the merger, the articles of organization or other organizational document that creates the entity that is required to be in a public record;
- If the surviving entity exists before the merger, any amendments provided for in the agreement of merger for the organizational document that created the entity that are in a public record;
- A statement as to each constituent entity that the merger was approved as required by the entity's governing statute;
- If the surviving entity is a foreign entity not authorized to transact business in Ohio, the street address of its statutory agent;
- Any additional information required by the governing statute of any constituent entity.

Each constituent LLC must deliver the certificate of merger for filing in the office of the Secretary of State. If the surviving entity is an LLC, the merger becomes effective upon the later of filing in the office of the Secretary of State or as specified in the certificate of merger. Otherwise, it becomes effective as provided by the governing statute of the surviving entity.<sup>96</sup>

### **Effect of merger**

Under the bill, when a merger becomes effective, all of the following apply:

- The surviving entity continues or comes into existence;
- Each constituent entity that merges into the surviving entity ceases to exist as a separate entity;
- All property owned by each constituent entity, or series thereof, that ceases to exist vests in the surviving entity without reservation or impairment;
- All debts, obligations, or other liabilities of each constituent entity, or series thereof, that ceases to exist continue as debts, obligations, or other liabilities of the surviving entity;
- An action or proceeding pending by or against any constituent entity, or series thereof, that ceases to exist continues as if the merger had not occurred;

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<sup>96</sup> R.C. 1706.712.

- Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent entity, or series thereof, that ceases to exist vest in the surviving entity;
- Except as otherwise provided in the agreement of merger, the terms and conditions of the agreement of merger take effect;
- Except as otherwise agreed, if a constituent LLC ceases to exist, the merger does not dissolve the LLC for the purposes of the bill's dissolution provisions and does not dissolve a series for purposes of the bill's series provisions;
- If the surviving entity is created pursuant to the merger, the organizational document that creates the entity becomes effective;
- If the surviving entity existed before the merger, any amendments provided for in the certificate of merger for the organizational document that created the entity become effective.

If before the merger a constituent entity was subject to being sued in Ohio on a liability, and if the surviving entity is a foreign entity, it is deemed to consent to the jurisdiction of Ohio courts to enforce the liability owed by the constituent entity. Service of process on a surviving entity that is a foreign entity and not authorized to transact business in Ohio for the purposes of enforcing a liability may be made in the same manner and has the same consequences as provided in the bill's service of process provisions as if the surviving entity was a foreign LLC.<sup>97</sup>

## **Conversion**

### **In general**

Under the bill, an entity other than an LLC may convert to an LLC, and an LLC may convert to an entity other than an LLC (a "converting entity" converts into a "converted entity") pursuant to the following provisions and a written declaration of conversion if all of the following apply:

- The governing statute of the entity that is not an LLC authorizes the conversion;
- The law of the jurisdiction governing the converting entity and the converted entity does not prohibit the conversion;
- The converting entity and the converted entity comply with their respective governing statutes and organizational documents in effecting the conversion.

A written declaration of conversion must be in a record (inscribed on a tangible medium or stored in an electronic or other medium and retrievable in written or paper form through an automated process) and include all of the following:

- The name and form of the converting entity before conversion;

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<sup>97</sup> R.C. 1706.713, 1706.09, 1706.47 through 1706.475, and 1706.76 through 1703.7613.

- The name and form of the converted entity after conversion;
- The organizational documents of the converted entity that are, or are proposed to be, in a record;
- The terms and conditions of the conversion, including the manner and basis for converting interests in the converting entity into any combination of money, interests in the converted entity, and other consideration allowed under the paragraph below;

In connection with a conversion, rights or securities of or interests in the converting entity may be any of the following:

- Exchanged for or converted into cash, property, or rights or securities of or interests in the converted entity;
- In addition to or in lieu of the above bullet point, exchanged for or converted into cash, property, or rights or securities of or interests in another entity;
- Canceled.<sup>98</sup>

### **Action on declaration of conversion by converting LLC**

A declaration of conversion must be consented to by all the members of a converting LLC. After it is approved, and at any time before a certificate of conversion is delivered to the Secretary of State for filing, the LLC may amend the declaration or abandon the conversion:

- As provided in the declaration; or
- Except as otherwise prohibited in the declaration, by the same consent as was required to approve the declaration.<sup>99</sup>

### **Filings and effective date**

After a declaration of conversion is approved, both of the following apply:

- A converting LLC must deliver to the Secretary of State for filing a certificate of conversion, which must be signed under the same rules as initial articles of organization and include all of the following:
  - A statement that the converting LLC has been converted into the converted entity;
  - The name and form of the converted entity and the jurisdiction of its governing statute;
  - The date the conversion is effective under the governing statute of the converted entity;

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<sup>98</sup> R.C. 1706.72.

<sup>99</sup> R.C. 1706.721.

- A statement that the conversion was approved both as required by the ORLLCA and the governing statute of the converted entity;
- If the converted entity is a foreign entity not authorized to transact business in Ohio, the street address of its statutory agent.
- If the converted entity is an LLC, the converting entity must deliver to the Secretary of State for filing articles of organization which must include, in addition to the information required by the bill's operating agreement provisions, all of the following:
  - A statement that the converted entity was converted from the converting entity;
  - The name and form of the converting entity;
  - The jurisdiction of the converting entity's governing statute and a statement that the conversion was approved as required by that statute.

A conversion becomes effective as follows:

- If the converted entity is an LLC, when the articles of organization take effect;
- Otherwise, as provided by the governing statute of the converted entity.<sup>100</sup>

### **Effect of conversion**

The bill provides that when a conversion takes effect, all of the following apply:

- All property owned by the converting entity, or series thereof, remains vested in the converted entity;
- All debts, obligations, or other liabilities of the converting entity, or series thereof, continue as liabilities of the converted entity;
- An action or proceeding pending by or against the converting entity, or series thereof, continues as if the conversion had not occurred;
- Except as prohibited by law other than the ORLLCA, all of the rights, privileges, immunities, powers, and purposes of the converting entity, or series thereof, remain vested in the converted entity;
- Except as otherwise provided in the plan of conversion, the terms and conditions of the declaration of conversion take effect;
- Except as otherwise agreed, for all purposes of Ohio law, the converting entity, and any series thereof, is not required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion is not deemed to constitute a dissolution of the converting entity, or series thereof;

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<sup>100</sup> R.C. 1706.722, 1706.16(A), and 1706.723(B).

- For all purposes of the Ohio law, the rights, privileges, powers, and interests in property of the converting entity, and all series thereof, as well as the debts, liabilities, and duties of the converting entity, and all series thereof, is not deemed to have been assigned to the converted entity as a consequence of the conversion;
- If the converted entity is an LLC, for all purposes of Ohio law, the LLC is deemed to be the same entity as the converting entity, and the conversion constitutes a continuation of the existence of the converting entity in the form of an LLC;
- If the converted entity is an LLC, its existence is deemed to have commenced on the date the converting entity commenced its existence in the jurisdiction in which it first came into being.

A converted entity that is a foreign entity consents to the jurisdiction of Ohio courts to enforce any debt, obligation, or other liability for which the converting LLC, or series thereof, is liable if, before the conversion, the converting LLC, or series thereof, was subject to being sued in Ohio on that liability. Service of process on a converted entity that is a foreign entity and not authorized to transact business in Ohio for purposes of enforcing a liability may be made in the same manner and has the same consequences as provided in the bill's service of process provisions, as if the converted entity were a foreign LLC.<sup>101</sup>

### **Restrictions on approval of mergers and conversions**

Under the bill, if a member of a constituent or converting LLC will have personal liability with respect to a surviving or converted entity, approval or amendment of a plan of merger or a declaration of conversion is ineffective without the consent of the member, unless both of the following conditions are met:

- The LLC's operating agreement provides for approval of a merger or conversion with the consent of fewer than all the members;
- The member has consented to the provision of the operating agreement described in the bullet point above.

A member does not give the consent required merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.<sup>102</sup>

### **Bill not exclusive**

The bill's provisions governing mergers and conversions do not preclude an entity from being merged or converted under law other than the ORLLCA.<sup>103</sup>

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<sup>101</sup> R.C. 1706.723 and 1706.09.

<sup>102</sup> R.C. 1706.73.

<sup>103</sup> R.C. 1706.74.

## Series LLCs

### In general

Under the bill, an LLC's operating agreement may establish or provide for the establishment of one or more designated series of assets that has both of the following:

- Either or both of the following:
  - Separate rights, powers, or duties with respect to specified property or obligations of the LLC or profits and losses associated with specified property or obligations;
  - A separate purpose or investment objective.
- At least one member associated with each series.

A series so established may carry on any activity, whether or not for profit.<sup>104</sup>

### Limitation on liabilities of series against assets

The assets of a series of an LLC, the LLC, and other series are generally kept separate. The debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a series are enforceable against the assets of that series only, and are not enforceable against the assets of the LLC generally or any other series thereof. The bill creates a reciprocal standard for the LLC itself. This limitation applies only if all of the following conditions are met:

- The records maintained for that series account for the assets of that series separately from the other assets of the company or any other series;
- The LLC's operating agreement contains a statement to the effect of the limitations;
- The LLC's articles of organization contain a statement that the LLC may have one or more series of assets subject to these limitations (statement of limitations).

Assets of a series may be held directly or indirectly, including in the name of the series, in the name of the LLC, through a nominee, or otherwise. If the records of a series are maintained in a manner so that the assets of the series can be reasonably identified, the records are considered to satisfy the bill's requirement that records of a series' assets be maintained for that series separate from those of the LLC or other series.

The statement of limitations described above is sufficient regardless of whether either of the following applies:

- The LLC has established any series under the ORLLCA when the statement of limitations is contained in the articles of organization;

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<sup>104</sup> R.C. 1706.76.

- The statement of limitations makes reference to a specific series of the LLC.<sup>105</sup>

## **Dissociation from series**

### **Member's power to dissociate; wrongful dissociation**

The bill prohibits a person from voluntarily dissociating from a series. It goes on to state that a person's dissociation from a series is wrongful only if one of the following applies:

- The person's dissociation is in breach of an express provision of the operating agreement;
- The person is expelled as a member associated with the series by determination of a tribunal;
- The person is dissociated as a member associated with a series by becoming a debtor in bankruptcy or making a general assignment for the benefit of creditors.

A person that wrongfully dissociates as a member associated with a series is liable to the series and, subject to "**Right of derivative action**" above, to the other members associated with that series for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or liability of the member associated with a series to the series or the other members associated with that series.<sup>106</sup>

### **Events causing dissociation from series**

A person is dissociated as a member associated with a series when any of the following occurs:

- An event stated in the operating agreement as causing the person's dissociation from the series occurs;
- The person is dissociated as a member of the LLC;
- The person is expelled as a member associated with that series pursuant to the operating agreement;
- The person is expelled as a member associated with the series by the unanimous consent of the other members associated with that series and if any of the following applies:
  - It is unlawful to carry on the series' activities with the person as a member associated with that series;
  - The person is an entity and, within 90 days after the series notifies the person that it will be expelled as a member associated with that series because the person has filed a certificate of dissolution or the equivalent, or its right to transact business has

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<sup>105</sup> R.C. 1706.761 through 1706.763.

<sup>106</sup> R.C. 1706.764, 1706.61, and 1706.765(E).

- been suspended by its jurisdiction of formation, the certificate of dissolution or the equivalent has not been revoked or its right to transact business has not been reinstated;
- The person is an entity and, within 90 days after the series notifies the person that it will be expelled as a member associated with that series because the person has been dissolved and its activities are being wound up, the entity has not been reinstated or the dissolution and winding up have not been revoked or canceled.
  - On application by the series, the person is expelled as a member associated with that series by tribunal order for any of the following reasons:
    - The person has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, that series' activities;
    - The person has willfully or persistently committed, or is willfully or persistently committing, a material breach of the operating agreement or the person's duties or obligations under the ORLLCA or other applicable law;
    - The person has engaged, or is engaging, in conduct relating to that series' activities that makes it not reasonably practicable to carry on the activities with the person as a member associated with that series.
  - In the case of a person who is an individual, the person dies, a guardian or general conservator is appointed for the person, or a tribunal determines that the person has otherwise become incapable of performing the person's duties as a member associated with a series under the ORLLCA or the operating agreement;
  - The person, other than a sole remaining member associated with a series, becomes a debtor in bankruptcy, executes an assignment for the benefit of creditors, or seeks, consents, or acquiesces to the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;
  - In the case of a trust or a person acting as a member associated with a series by virtue of being a trustee, the trust's entire membership interest associated with the series is distributed, but not solely by reason of the substitution of a successor trustee;
  - In the case of an estate or a person acting as a member associated with a series by virtue of being an estate's personal representative, the estate's entire membership interest associated with the series is distributed, but not solely by reason of the substitution of a successor personal representative;
  - In the case of a member associated with a series that is not an individual, the legal existence of the person otherwise terminates.<sup>107</sup>

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<sup>107</sup> R.C. 1706.765.



### **Effect of dissociation from series**

Under the bill, a dissociated person has no right to participate in the activities and affairs of that series and is entitled only to receive the distributions to which that member would have been entitled if the member had not dissociated from that series. A person's dissociation does not do any of the following:

- Discharge the person from any debt, obligation, or liability to that series, the LLC, or the other members that the person incurred while a member associated with that series;
- Cause the member to dissociate from any other series or require the winding up of the series;
- Cause the member to dissociate from the LLC.<sup>108</sup>

### **Dissolution and winding up of series**

#### **In general**

The bill allows a series to be dissolved and its activities and affairs wound up without causing the dissolution of the LLC. The dissolution and winding up of a series does not abate, suspend, or otherwise affect the limitation on liabilities of the series. Under the bill, a series is dissolved and its activities and affairs must be wound up upon the first to occur of the following:

- The dissolution of the LLC;
- An event or circumstance that the operating agreement states causes dissolution of the series;
- The consent of all of the members associated with the series;
- The passage of 90 days after the occurrence of the dissociation of the last remaining member associated with the series;
- On application by a member associated with the series, the entry by the appropriate court of an order dissolving the series on the grounds that it is not reasonably practicable to carry on the series' activities in conformity with the operating agreement.<sup>109</sup>

#### **Effect of dissolution of series**

A dissolved series continues its existence as a series but may not carry on any activities except as is appropriate to wind up and liquidate its activities and affairs. Appropriate activities include all of the following:

- Collecting the assets of the series;

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<sup>108</sup> R.C. 1706.766.

<sup>109</sup> R.C. 1706.767 and 1706.768.

- Disposing of the properties of the series that will not be distributed in kind to persons owning membership interests associated with the series;
- Discharging or making provisions for discharging the liabilities of the series;
- Distributing the remaining property of the series in accordance with “**Application of assets in winding up series’ activities**” below;
- Doing any other act necessary to wind up and liquidate the series’ activities and affairs, which can include preserving the series’ activities and property for a reasonable time, assigning the series’ property, and participating in lawsuits and resolving disputes.

A series’ dissolution, in itself:

- Is not an assignment of the series’ property;
- Does not prevent the commencement of a proceeding by or against the series in the series’ name;
- Does not abate or suspend a proceeding pending by or against the series on the effective date of dissolution;
- Does not abate, suspend, or otherwise alter the application of “**Application of assets in winding up series’ activities**” below.<sup>110</sup>

### **Right to wind up business and activities of series**

The bill provides that, generally, after dissolution of a series, the remaining members associated with the series, if any, and if none, a person appointed by all holders of the membership interest last assigned by the last person to have been a member associated with the series, may wind up the series’ activities.

A tribunal may order supervision of the winding up of the series, including the appointment of a person to wind up the series’ activities for any of the following reasons:

- On application of a member associated with the series, if the applicant establishes good cause;
- On application of an assignee associated with a series, if there are no members associated with the series and, within a reasonable time following the dissolution, no person has been appointed to wind up the series;
- In connection with a proceeding to dissolve the series on the grounds that it is not reasonably practicable to carry on the series’ activities in conformity with the operating agreement.<sup>111</sup>

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<sup>110</sup> R.C. 1706.769 and 1706.7613.

<sup>111</sup> R.C. 1706.7610, 1706.768(E), and 1706.769(C).

### **Known claims against dissolved series**

Under the bill, a dissolved series may dispose of any known claims against it, at any time after the effective date of the dissolution of the series, by giving notice of the dissolution in a record to the holder of any known claim. The notice must do all of the following:

- Identify the LLC and the dissolved series;
- Describe the information required to be included in a claim;
- Provide a mailing address to which the claim is to be sent;
- State the deadline by which the dissolved series must receive the claim, which must be at least 120 days after the notice's effective date;
- State that if not sooner barred, the claim will be barred if not received by the deadline.

Unless sooner barred by any other statute limiting actions, a claim against a dissolved series is barred if (1) a claimant who was given the above notice does not deliver the claim to the dissolved series by the deadline or (2) a claimant whose claim was rejected by the dissolved series does not commence a proceeding to enforce the claim within 90 days after the effective date of the rejected notice.

Nothing in these provisions is to be construed to extend any otherwise applicable statute of limitations.

For purposes of these provisions, "claim" includes an unliquidated claim, but does not include a contingent liability that has not matured so that there is no immediate right to bring suit or a claim based on an event occurring after the effective date of dissolution.<sup>112</sup>

### **Other claims against dissolved series**

The bill allows a dissolved series to publish notice of its dissolution and request that persons with claims against the dissolved series present them in accordance with the notice. The notice must meet all of the following criteria:

- It must be posted prominently on the principal website then maintained by the LLC, if any, and provided to the Secretary of State to be posted on the website maintained by the Secretary of State for posting certificates of dissolution. The notice is considered published when posted on the Secretary of State's website.
- It must describe the information that must be included in a claim and provide a mailing address to which the claim must be sent.
- It must state that if not sooner barred, the claim will be barred unless a proceeding to enforce the claim is commenced within two years following the publication of the notice.

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<sup>112</sup> R.C. 1706.7611.

If a dissolved series publishes a notice in accordance with the above paragraph, unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved series within two years after the publication date of the notice:

- A claimant who was not given notice under the bill's provisions regarding known claims;
- A claimant whose claim was timely sent to the dissolved series but not acted on by the dissolved series;
- A claimant whose claim is contingent at the effective date of the dissolution of the series, or is based on an event occurring after the effective date of the dissolution of the series.

A claim that is not barred under this provision, any other statute limiting actions, or "**Known claims against dissolved series**" above may be enforced against either of the following:

- A dissolved series, to the extent of its undistributed assets associated with the series;
- A member or assignee associated with the series to the extent of that person's proportionate share of the claim or of the assets of the series distributed to the member or assignee after dissolution, whichever is less, except as provided in the second to last paragraph of "**Other claims against dissolved series**," and only if the assets of a dissolved series have been distributed after dissolution. A person's total liability for all claims under this paragraph may not exceed the total amount of assets of the series distributed to the person after dissolution of the series.

A dissolved series that published a notice under these provisions may file an application with the appropriate court in the county in which the LLC's principal office is located or, if it has none in Ohio, in the county in which the LLC's statutory agent is or was last located. The application must be for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved series or that are based on an event occurring after the effective date of the dissolution of the series but that, based on the facts known to the dissolved series, are reasonably estimated to arise after the effective date of the dissolution of the series. Provision need not be made for any claim that is or is reasonably anticipated to be barred under the bill.

Within ten days after the filing of the application, notice of the proceeding must be given by the dissolved series to each potential claimant as described in that paragraph.

The appropriate court may appoint some guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this provision. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved series.

Provision by the dissolved series for security in the amount and the form ordered by the appropriate court satisfies the dissolved series' obligation with respect to claims that are contingent, have not been made known to the dissolved series, or are based on an event

occurring after the effective date of the dissolution of the series. Those claims may not be enforced against a person owning a membership interest to whom assets have been distributed by the dissolved series after the effective date of the dissolution of the series.

Nothing in these provisions is to be construed to extend any otherwise applicable statute of limitations.<sup>113</sup>

### **Application of assets in winding up series' activities**

The bill requires that upon the winding up of a series, payment or adequate provision for payment be made to creditors of the series, including, to the extent permitted by law, members who are associated with the series and who are also creditors of the series, in satisfaction of liabilities of the series. After a series complies with this provision, any surplus must be distributed as follows:

- First, to each person owning a membership interest associated with the series that reflects contributions made on account of that membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions;
- Then to each person owning a membership interest associated with the series in the proportions in which the owners of membership interests associated with the series share in distributions prior to dissolution of the series.

If the series does not have sufficient surplus to comply with the first bullet point above, any surplus must be distributed among the owners of membership interests associated with the series in proportion to the value of their respective unreturned contributions.<sup>114</sup>

### **Definitions<sup>115</sup>**

**"Assignment"** means a transfer, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, or transfer by operation of law.

**"Constituent entity"** means an entity that is party to a merger.

**"Contribution"** means anything of value including cash, property, or services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, that a person contributes to an LLC, or a series thereof, in the person's capacity as a member.

**"Debtor in bankruptcy"** means a person who is the subject of an order for relief under the U.S. Bankruptcy Code, a comparable order under a successor statute of general application, or a comparable order under any federal, state, or foreign law governing insolvency.

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<sup>113</sup> R.C. 1706.7612, 1706.474(J), and 1706.7611(B).

<sup>114</sup> R.C. 1706.7613.

<sup>115</sup> R.C. 1706.01.

**“Distribution”** means a transfer of money or other property from an LLC, or a series thereof, to another person on account of a membership interest.

**“Entity”** means a general partnership, limited partnership, limited liability partnership, limited liability company, association, corporation, professional corporation, professional association, nonprofit corporation, business trust, real estate investment trust, common law trust, statutory trust, cooperative association, or any similar organization that has a governing statute, in each case, whether foreign or domestic.

**“Foreign limited liability company”** means an entity that is all of the following:

- An unincorporated association;
- Organized under the laws of a state other than Ohio or under the laws of a foreign country;
- Organized under a statute pursuant to which an association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity; and
- Not required to be registered, qualified, or organized under any Ohio law other than the ORLLCA.

**“Governing statute”** means the law that governs an entity’s internal affairs.

**“Limited liability company,”** except in the phrase “foreign LLC,” means an entity formed or existing under the ORLLCA.

**“Manager”** means any person designated by the limited liability company or its members with the authority to manage all or part of the activities or affairs of the limited liability company on behalf of the limited liability company, which person has agreed to serve in such capacity, whether such person is designated as a manager, director, officer, or otherwise.

**“Member”** means a person that has been admitted as a member of an LLC under the ORLLCA and that has not dissociated as a member.

**“Membership interest”** means a member’s right to receive distributions from an LLC or series thereof.

**“Operating agreement”** means any valid agreement, written or oral, of the members, or any written declaration of the sole member, as to the affairs and activities of an LLC and any series thereof. “Operating agreement” includes any amendments to the operating agreement.

**“Organizational documents”** means any of the following:

- For a general partnership or foreign general partnership, its partnership agreement;
- For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement;
- For a limited liability limited partnership or foreign limited liability limited partnership, its certificate of limited partnership and partnership agreement;

- For an LLC or foreign LLC, its articles of organization and operating agreement, or comparable records as provided in its governing statute;
- For a business or statutory trust or foreign business or statutory trust, its trust instrument, or comparable records as provided in its governing statute;
- For a for-profit corporation or foreign for-profit corporation, its articles of incorporation, regulations, and other agreements among its shareholders that are authorized by its governing statute, or comparable records as provided in its governing statute;
- For a nonprofit corporation or foreign nonprofit corporation, its articles of incorporation, regulations, and other agreements that are authorized by its governing statute or comparable records as provided in its governing statute;
- For a professional association, its articles of incorporation, regulations, and other agreements among its shareholders that are authorized by its governing statute, or comparable records as provided in its governing statute;
- For any other entity, the basic records that create the entity, determine its internal governance, and determine the relations among the persons that own it, are members of it, or govern it.

**“Organizer”** means a person executing the initial articles of organization filed by the Secretary of State in accordance with the ORLLCA.

**“Person”** means an individual, entity, trust, estate, government, custodian, nominee, trustee, personal representative, fiduciary, or any other individual, entity, or series thereof in its own or any representative capacity, in each case, whether foreign or domestic.

**“Principal office”** means the location specified by an LLC, foreign LLC, or other entity as its principal office in the last filed record in which the limited liability company, foreign LLC, or other entity specified its principal office on the records of the Secretary of State. If no such location has previously been specified, then “principal office” means the location reasonably apparent to an unaffiliated person as the principal executive office of the limited liability company, foreign LLC, or other entity.

**“Record”** means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in written or paper form through an automated process.

**“Sign”** means, with the present intent to authenticate or adopt a record, either of the following:

- To execute or adopt a tangible symbol; or
- To attach to or logically associate with the record an electronic symbol, sound, or process.

**“State”** means a state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to the jurisdiction of the U.S..

**“Surviving entity”** means an entity into which one or more other entities are merged, whether the entity preexisted the merger or was created pursuant to the merger.

**“Tribunal”** means a court or, if provided in the operating agreement or otherwise agreed, an arbitrator, arbitration panel, or other tribunal.

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## HISTORY

Action	Date
Introduced	02-11-20
Reported, S. Judiciary	---

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