605.0105 Operating agreement; scope, function, and limitations.—

(1) Except as otherwise provided in subsections (3) and (4), the operating agreement governs the following:
   (a) Relations among the members as members and between the members and the limited liability company.
   (b) The rights and duties under this chapter of a person in the capacity of manager.
   (c) The activities and affairs of the company and the conduct of those activities and affairs.
   (d) The means and conditions for amending the operating agreement.

(2) To the extent the operating agreement does not otherwise provide for a matter described in subsection (1), this chapter governs the matter.

(3) An operating agreement may not do any of the following:
   (a) Vary a limited liability company's capacity under s. 605.0109 to sue and be sued in its own name.
   (b) Vary the law applicable under s. 605.0104.
   (c) Vary the requirement, procedure, or other provision of this chapter pertaining to:
      1. Registered agents; or
      2. The department, including provisions pertaining to records authorized or required to be delivered to the department for filing under this chapter.
   (d) Vary the provisions of s. 605.0204.
   (e) Eliminate the duty of loyalty or the duty of care under s. 605.04091, except as otherwise provided in subsection (4).
   (f) Eliminate the obligation of good faith and fair dealing under s. 605.04091, but the operating agreement may prescribe the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable.
   (g) Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law.
   (h) Unreasonably restrict the duties and rights stated in s. 605.0410, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of a reasonable restriction on use.
   (i) Vary the power of a person to dissociate under s. 605.0601, except to require that the notice under s. 605.0602(1) be in a record.
   (j) Vary the grounds for dissolution specified in s. 605.0702.
   (k) Vary the requirement to wind up the company's business, activities, and affairs as specified in s. 605.0709(1), (2)(a), and (5).
   (l) Unreasonably restrict the right of a member to maintain an action under ss. 605.0801-605.0806.
   (m) Vary the provisions of s. 605.0804, but the operating agreement may provide that the company may not appoint a special litigation committee. However, the operating agreement may not prevent a court from appointing a special litigation committee.
   (n) Vary the right of a member to approve a merger, interest exchange, or conversion under s. 605.1023(l)(b), s. 605.1033(l)(b), or s. 605.1043(l)(b), respectively.
   (o) Vary the required contents of plan of merger under s. 605.1022, a plan of interest exchange under s. 605.1032, a plan of conversion under s. 605.1042, or a plan of domestication under s. 605.1052.
   (p) Except as otherwise provided in ss. 605.0106 and 605.0107(2), restrict the rights under this chapter of a person other than a member or manager.
   (q) Provide for indemnification for a member or manager under s. 605.0408 for any of the following:
      1. Conduct involving bad faith, willful or intentional misconduct, or a knowing violation of law.
      2. A transaction from which the member or manager derived an improper personal benefit.
      3. A circumstance under which the liability provisions of s. 605.0406 are applicable.

4. A breach of duties or obligations under s. 605.04091, taking into account a variation of such duties and obligations provided for in the operating agreement to the extent allowed by subsection (4).

(4) Subject to paragraph (3)(g), without limiting other terms that may be included in an operating agreement, the following rules apply:
   (a) The operating agreement may:
      1. Specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts; or
      2. Alter the prohibition stated in s. 605.0405(1)(b) so that the prohibition requires solely that the company's total assets not be less than the sum of its total liabilities.
   (b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility that the member would otherwise have under this chapter and imposes the responsibility on one or more other members, the operating agreement may, to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit a duty or obligation that would have pertained to the responsibility.
   (c) If not manifestly unreasonable, the operating agreement may:
      1. Alter or eliminate the aspects of the duty of loyalty under s. 605.04091(2);
      2. Identify specific types or categories of activities that do not violate the duty of loyalty; and
      3. Alter the duty of care, but may not authorize willful or intentional misconduct or a knowing violation of law.

(5) The court shall decide as a matter of law whether a term of an operating agreement is manifestly unreasonable under paragraph (3)(f) or paragraph (4)(c). The court:
   (a) Shall make its determination as of the time the challenged term became part of the operating agreement and shall consider only circumstances existing at that time; and
   (b) May invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is readily apparent that:
      1. The objective of the term is unreasonable; or
      2. The term is an unreasonable means to achieve the provision's objective.

(6) An operating agreement may provide for specific penalties or specified consequences, including those described in s. 605.0403(5), if a member or transferee fails to comply with the terms and conditions of the operating agreement or if other events specified in the operating agreement occur.

History.—s. 2, ch. 2013-180.

605.0402 Form of contribution.—A contribution may consist of tangible or intangible property or other benefit to a limited liability company, including money, services performed, promissory notes, other agreements to contribute money or property, and contracts for services to be performed.

History.—s. 2, ch. 2013-180.

605.0403 Liability for contributions.—

(1) A promise by a person to contribute to the limited liability company is not enforceable unless it is set out in a writing signed by the person.

(2) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally.

(3) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value of the part of the contribution that has not been made. The foregoing option is in addition to and not in lieu of other rights, including the right to specific performance, that the limited liability company may have against the person under the articles of organization or operating agreement or applicable law.

(4) The obligation of a person to make a contribution may be compromised only by consent of all members. If a creditor of a limited liability company extends credit or otherwise acts in reliance on an obligation

described in subsection (1) without notice of a compromise under this subsection, the creditor may enforce the obligation.

(5) An operating agreement may provide that the limited liability company interest of a member who fails to make a contribution that the member is obligated to make is subject to specified penalties for or specified consequences of the failure. The penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the defaulting member's limited liability company interest to that of nondefaulting members, a forced sale of that limited liability company interest, forfeiture of the defaulting member's limited liability company interest, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's limited liability company interest by appraisal or by formula and redemption or sale of the defaulting member's limited liability company interest at such value, or other penalty or consequence.

History.—s. 2, ch. 2013-180.

605.0404 Sharing of distributions before dissolution and profits and losses.—

(1) Distributions made by a limited liability company before its dissolution and winding up must be shared by the members and persons dissociated as members on the basis of the agreed value, as stated in the company's records, of the contributions made by each of the members and persons dissociated as members to the extent that the contributions have been received by the company, except to the extent necessary to comply with a transfer effective under s. 605.0502 or charging order in effect under s. 605.0503.

(2) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(3) A person does not have a right to demand or receive a distribution from a limited liability company in a form other than money. Except as otherwise provided in s. 605.0710(4), a limited liability company may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(4) If a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of and is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution.

(5) Profits and losses of a limited liability company must be allocated among the members and persons dissociated as members on the basis of the agreed value, as stated in the company's records, of the contributions made by each of the members and persons dissociated as members to the extent that the contributions have been received by the company.

History.—s. 2, ch. 2013-180.

605.0405 Limitations on distributions.—

(1) A limited liability company may not make a distribution, including a distribution under s. 605.0710, if after the distribution:

  (a) The company would not be able to pay its debts as they become due in the ordinary course of the company's activities and affairs; or

  (b) The company's total assets would be less than the sum of its total liabilities, plus the amount that would be needed if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to those of persons receiving the distribution.

(2) A limited liability company may base a determination that a distribution is not prohibited under subsection (1) on:

  (a) Financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances; or

  (b) A fair valuation or other method that is reasonable under the circumstances.

(3) Except as otherwise provided in subsection (5), the effect of a distribution under subsection (1) is measured:
    (a) In the case of a distribution by purchase, redemption, or other acquisition of a transferable interest in the company, as of the earlier of the date on which:
        1. Money or other property is transferred or the debt is incurred by the company; and
        2. The person entitled to distribution ceases to own the interest or right being acquired by the company in return for the distribution.
    (b) In the case of a distribution of indebtedness, as of the date on which the indebtedness is distributed.
    (c) In all other cases, as of the date on which:
        1. The distribution is authorized if the payment occurs within 120 days after that date; or
        2. The payment is made if the payment occurs more than 120 days after the distribution is authorized.
(4) A limited liability company's indebtedness to a member or transferee incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.
(5) A limited liability company's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (1) if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that a distribution could then be made under this section. If the indebtedness is issued as a distribution, and by its terms provides that the payments of principal and interest are made only to the extent a distribution could be made under this section, then each payment of principal or interest of that indebtedness is treated as a distribution, the effect of which is measured on the date the payment is actually made.
(6) In measuring the effect of a distribution under s. 605.0710, the liabilities of a dissolved limited liability company do not include a claim that is disposed of under ss. 605.0710-605.0713.

History.—s. 2, ch. 2013-180.

605.0406 Liability for improper distributions.—

(1) Except as otherwise provided in subsection (2), if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of s. 605.0405 and, in consenting to the distribution, fails to comply with s. 605.04091, the member or manager is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of s. 605.0405.
(2) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability in subsection (1) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.
(3) A person who receives a distribution knowing that the distribution violated s. 605.0405 is personally liable to the limited liability company, but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under s. 605.0405.
(4) A person against whom an action is commenced because that person is or may be liable under subsection (1) may:
    (a) Implead another person who is or may be liable under subsection (1) and seek to enforce a right of contribution from the person; or
    (b) Implead a person who received a distribution in violation of subsection (3) and seek to enforce a right of contribution from an impleaded person in the amount the person received in violation of subsection (3).
(5) An action under this section is barred unless commenced within 2 years after the distribution.

History.—s. 2, ch. 2013-180.

605.0407 Management of limited liability company.—

(1) A limited liability company is a member-managed limited liability company unless the operating agreement or articles of organization:
    (a) Expressly provide that:
        1. The company is or will be manager-managed;
        2. The company is or will be managed by managers; or
        3. Management of the company is or will be vested in managers; or
    (b) Include words of similar import to those in subparagraphs (a)1.-3. except that, unless the context in which the expression is used otherwise requires, the terms "managing member" and "managing members" do not, in and of themselves, constitute words of similar import for this purpose.

(2) In a member-managed limited liability company, the management and conduct of the company are vested in the members, except as expressly provided in this chapter.

(3) In a manager-managed limited liability company, a matter relating to the activities and affairs of the company is decided exclusively by the manager, or if there is more than one manager, by the managers, except as expressly provided in this chapter.

(4) A member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities and affairs of the company, in the absence of an agreement to the contrary.

(5) A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.

(6) The dissolution of a limited liability company does not affect the applicability of this section and ss. 605.04071-605.04074. However, a person who wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

History.—s. 2, ch. 2013-180.

605.04074 Agency rights of members and managers.—

(1) In a member-managed limited liability company, the following rules apply:
    (a) Except as provided in subsection (3), each member is an agent of the limited liability company for the purpose of its activities and affairs. An act of a member, including signing an agreement or instrument of transfer in the name of the company for apparently carrying on in the ordinary course of the company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.
    (b) An act of a member which is not done for apparently carrying on in the ordinary course of the limited liability company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company only if the act was authorized by appropriate vote of the members.

(2) In a manager-managed limited liability company, the following rules apply:
    (a) A member is not an agent of the limited liability company for the purpose of its business solely by reason of being a member.
    (b) Except as provided in subsection (3), each manager is an agent of the limited liability company for the purpose of its activities and affairs, and an act of a manager, including signing an agreement or instrument of transfer in the name of the company, for apparently carrying on in the ordinary course of the company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority.
    (c) An act of a manager which is not apparently for carrying on in the ordinary course of the limited liability company's activities and affairs or activities and affairs of the kind carried on by the company, binds the company only if the act was authorized by appropriate vote of the members.

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

History.—s. 2, ch. 2013-180.

605.04091 Standards of conduct for members and managers.—

(1) Each manager of a manager-managed limited liability company and member of a member-managed limited liability company owes fiduciary duties of loyalty and care to the limited liability company and members of the limited liability company.

(2) The duty of loyalty is limited to:
   (a) Accounting to the limited liability company and holding as trustee for it any property, profit, or benefit derived by the manager or member, as applicable:
      1. In the conduct or winding up of the company's activities and affairs;
      2. From the use by the member or manager of the company's property; or
      3. From the appropriation of a company opportunity;
   (b) Refraining from dealing with the company in the conduct or winding up of the company's activities and affairs as, or on behalf of, a person having an interest adverse to the company, except to the extent that a transaction satisfies the requirements of this section; and
   (c) Refraining from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.

(3) The duty of care in the conduct or winding up of the company's activities and affairs is limited to refraining from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or a knowing violation of law.

(4) A manager of a manager-managed limited liability company and a member of a member-managed limited liability company shall discharge their duties and obligations under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A manager of a manager-managed limited liability company or a member of a member-managed limited liability company does not violate a duty or obligation under this chapter or under the operating agreement solely because the manager's or member's conduct furthers the manager's or member's own interest.

(6) In discharging his, her, or its duties, a manager of a manager-managed limited liability company or a member of a member-managed limited liability company is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
   (a) One or more members or employees of the limited liability company whom the manager or member reasonably believes to be reliable and competent in the matters presented.
   (b) Legal counsel, public accountants, or other persons as to matters the manager or member reasonably believes are within the persons' professional or expert competence.
   (c) A committee of managers or members of which the affected manager or member is not a participant, if the manager or member reasonably believes the committee merits confidence.

(7) A manager or member, as applicable, is not acting in good faith if the manager or member has knowledge concerning the matter in question which makes reliance otherwise authorized under subsection (6) unwarranted.

(8) In discharging his, her, or its duties, a manager of a manager-managed limited liability company or member of a member-managed limited liability company may consider factors that the manager or member deems relevant, including the long-term prospects and interests of the limited liability company and its members, and the social, economic, legal, or other effects of any action on the employees, suppliers, and customers of the limited liability company, the communities and society in which the limited liability company operates, and the economy of this state and the nation.

(9) This section applies to a person winding up the limited liability company activities and affairs as the legal representative of the last surviving member as if such person were subject to this section.

History.—s. 2, ch. 2013-180.

605.04092 Conflict of interest transactions.—

(1) As used in this section, the following terms and definitions apply:

(a) A member or manager is "indirectly" a party to a transaction if that member or manager has a material financial interest in or is a director, officer, member, manager, or partner of a person, other than the limited liability company, who is a party to the transaction.

(b) A member or manager has an "indirect material financial interest" if a spouse or other family member has a material financial interest in the transaction, other than having an indirect interest as a member or manager of the limited liability company, or if the transaction is with an entity, other than the limited liability company, which has a material financial interest in the transaction and controls, or is controlled by, the member or manager or another person specified in this subsection.

(c) "Fair to the limited liability company" means that the transaction, as a whole, is beneficial to the limited liability company and its members, taking into appropriate account whether it is:

1. Fair in terms of the member's or manager's dealings with the limited liability company in connection with that transaction; and
2. Comparable to what might have been obtainable in an arm's length transaction.

(2) If the requirements of this section have been satisfied, a transaction between a limited liability company and one or more of its members or managers, or another entity in which one or more of the limited liability company's members or managers have a financial or other interest, is not void or voidable because of that relationship or interest; because the members or managers are present at the meeting of the members or managers at which the transaction was authorized, approved, effectuated, or ratified; or because the votes of the members or managers are counted for such purpose.

(3) If a transaction is fair to the limited liability company at the time it is authorized, approved, effectuated, or ratified, the fact that a member or manager of the limited liability company is directly or indirectly a party to the transaction, other than being an indirect party as a result of being a member or manager of the limited liability company, or has a direct or indirect material financial interest or other interest in the transaction, other than having an indirect interest as a result of being a member or manager of the limited liability company, is not grounds for equitable relief and does not give rise to an award of damages or other sanctions.

(4) (a) In a proceeding challenging the validity of a transaction described in subsection (3), the person challenging the validity has the burden of proving the lack of fairness of the transaction if:

1. In a manager-managed limited liability company, the material facts of the transaction and the member's or manager's interest in the transaction were disclosed or known to the managers or a committee of managers who voted upon the transaction and the transaction was authorized, approved, or ratified by a majority of the disinterested managers even if the disinterested managers constitute less than a quorum; however, the transaction cannot be authorized, approved, or ratified under this subsection solely by a single manager; and
2. In a member-managed limited liability company, or a manager-managed limited liability company in which the managers have failed to or cannot act under subparagraph 1., the material facts of the transaction and the member's or manager's interest in the transaction were disclosed or known to the members who voted upon such transaction and the transaction was authorized, approved, or ratified by a majority-in-interest of the disinterested members even if the disinterested members constitute less than a quorum; however, the transaction cannot be authorized, approved, or ratified under this subsection solely by a single member; or

(b) If neither of the conditions provided in paragraph (a) has been satisfied, the person defending or asserting the validity of a transaction described in subsection (3) has the burden of proving its fairness in a proceeding challenging the validity of the transaction.

(5) The presence of or a vote cast by a manager or member with an interest in the transaction does not affect the validity of an action taken under paragraph (4)(a) if the transaction is otherwise authorized, approved, or ratified as provided in 1subsection (4), but the presence or vote of the manager or member may be counted for purposes of determining whether the transaction is approved under other sections of this chapter.
(6) In addition to other grounds for challenge, a party challenging the validity of the transaction is not precluded from asserting and proving that a particular member or manager was not disinterested on grounds of financial or other interest for purposes of the vote on, consent to, or approval of the transaction.

History.—s. 2, ch. 2013-180.

1**Note.**—The reference to subsection (4) was substituted by the editors for the phrase "that subsection" to provide clarity.

605.04093 Limitation of liability of managers and members.—

(1) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is not personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions by a manager in a manager-managed limited liability company or a member in a member-managed limited liability company unless:
    (a) The manager or member breached or failed to perform the duties as a manager in a manager-managed limited liability company or a member in a member-managed limited liability company; and
    (b) The manager's or member's breach of, or failure to perform, those duties constitutes any of the following:
        1. A violation of the criminal law unless the manager or member had a reasonable cause to believe his, her, or its conduct was lawful or had no reasonable cause to believe such conduct was unlawful. A judgment or other final adjudication against a manager or member in any criminal proceeding for a violation of the criminal law estops that manager or member from contesting the fact that such breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the manager or member from establishing that he, she, or it had reasonable cause to believe that his, her, or its conduct was lawful or had no reasonable cause to believe that such conduct was unlawful.
        2. A transaction from which the manager or member derived an improper personal benefit, directly or indirectly.
        3. A distribution in violation of s. 605.0406.
        4. In a proceeding by or in the right of the limited liability company to procure a judgment in its favor or by or in the right of a member, conscious disregard of the best interest of the limited liability company, or willful misconduct.
        5. In a proceeding by or in the right of someone other than the limited liability company or a member, recklessness or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
(2) As used in this section, the term "recklessness" means acting or failing to act in conscious disregard of a risk known, or a risk so obvious that it should have been known, to the manager in a manager-managed limited liability company or the member in a member-managed limited liability company, and known to the manager or member, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or failure to act.
(3) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is deemed not to have derived an improper personal benefit from any transaction if the transaction has been approved in the manner as is provided in s. 605.04092 or is fair to the limited liability company as defined in s. 605.04092(1)(c).

(4) The circumstances set forth in subsection (3) are not exclusive and do not preclude the existence of other circumstances under which a manager in a manager-managed limited liability company or a member in a member-managed limited liability company will be deemed not to have derived an improper benefit.

History.—s. 2, ch. 2013-180.