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**Summary Outline of Mississippi Revised LLC Act (House Bill 683)**

**In General**

The Revised Act is very friendly to small business but also supports freedom of contract principles. Existing LLCs that have written operating agreements will be able to continue to operate under those agreements. Generally the Revised Act:

- Revises and clears up uncertainty in the existing laws to make them easier to read and understand
- Adds new sections to the current laws including provisions from the Delaware LLC Act, which is regarded as having the best business laws in the country. By using the same language as Delaware, we will be able to use Delaware's comprehensive body of case law to interpret our LLC laws. Currently there is very little applicable Mississippi case law.
- Other new sections have been added from the Revised Uniform LLC Act ("RULLCA")
- Provides for more default rules than the current Act which apply if an LLC has no operating agreement or if the agreement is silent on the issue.
- Re-numbered and re-located existing sections and added new sections
- Gender-specific terms have been revised to be gender-neutral

**Key Features of Revised Act not contained in Current Act**

- Allows but does not require LLCs to have officers, such as President, CEO, etc.
- Sets forth things that must be in a written operating agreement to be enforceable and provisions in the Revised Act that cannot be varied by the LLC. These are in the current Act but they are not compiled into one section of the Act.
- Adds default rule that the LLC must obtain the members' approval by a majority decision of an agreement to sell its assets outside the ordinary course of business. The current laws require this as a default rule for a merger but not an asset sale
- Eliminates concept of dissociation which is no longer necessary for tax reasons

- Provides that heirs of a deceased member become members as a default rule, except in cases where the member must be a professional, such as in a PLLC
- Provides for “in-name” only members (members who don’t vote or share in the profits). This is not provided for under existing laws. This provision is optional.
- Provides as a default rule that member voting is based on profit sharing – under current act each member gets one vote regardless of their profit sharing percentage
- Provides for ways to add new members to an LLC when there are no members to allow the LLC to continue operating and avoid dissolution for not having any members. This situation could occur when the sole member of a single member LLC files for bankruptcy. Under the current laws the LLC would have to be dissolved.
- Adds new provision regarding enforceability of limitations on assignments of financial interests (such as pledges of their interests as collateral for a loan) which prevails over the MS UCC (which currently renders such limitations unenforceable)
  - Members will be able to agree among themselves that they won’t assign their individual financial rights to a third party or pledge them as collateral for a loan.
- Requires domestic LLCs and foreign LLCs to file annual reports and pay a filing fee (no fee for domestic LLCs; \$250 for foreign LLCs) similar to the annual reports filed by corporations Authorizes the Secretary of State to administratively dissolve or revoke the authority of LLCs that are no longer operating for failure to file such annual reports
- The entire Revised Act applies to all LLCs formed or registered after January 1, 2011
- Transition provisions which provide that annual reports and new fees provisions of the Revised Act become effective for existing LLCs on January 1, 2011, but the rest of the Revised Act will become effective for existing LLCs on January 1, 2012, also permits existing LLCs to elect to be governed by the Revised Act before this date if they take certain steps to do so.

## **Article 1 General Provisions**

- Definitions. (Section 79-29-105. Added many new definitions and renamed and re-numbered definitions
  - Clarified that a limited liability company is not subject to 97-13-15 (Limitations on corporate contributions to political party or candidate)
  - Changed “limited liability company interest” to “financial interest”
  - Added the term “officer” – which will allow but not require LLC’s to have officers and to use officer titles
  - Changed “limited liability company agreement” to “operating agreement”
  - Added “governance interest” as a defined term
  - Clarified that members have both governance interests and financial interests or a combination of all or neither.
  - Added more detail to definitions of “operating agreement” and “member,” such as LLC can have members that do not have governance rights or financial rights (“in name only” members)

- Section 79-29-107. Added new provision addressing notices and written consents in lieu of meetings which permits notices and consents in electronic form
- Section 79-29-123. Added new section on construction and application of operating agreement and general standards of conduct
  - This section lists in one place the things that must be in a written operating agreement in order to be enforceable. Section 79-29-123(7).
  - It also lists in one place the provisions of the act that the LLC cannot vary or eliminate by its operating agreement or by its certificate of formation. Section 79-29-123(3). The addition of this new section allowed all the default rule lead in language to be removed from other provisions of the act, except for where the provision must be contained in a written operating agreement.
  - This section also sets forth the applicable fiduciary duties for members, managers, officers and other persons who are parties to or otherwise bound by the operating agreement and how they can be modified. The fiduciary duties are the same as under the current act, except fiduciary duties for officers have been added, which mirror the fiduciary duties of managers. Section 79-29-123(6).
  - Clarifies that the implied contractual covenant of good faith and fair dealing cannot be eliminated with respect to any party to an operating agreement. Section 79-29-123(3)(g).
  - Provides as a default rule that all members must approve an amendment to the operating agreement, except in the case of a merger (which is a majority vote default rule). Section 79-29-123(2)(b).
  - Moved the indemnification provisions to this section and revised them to read more like Delaware's laws. Indemnification is permissive and must be provided for in the certificate of formation or the operating agreement. The existing restrictions on indemnification have been retained. Section 79-29-123(5).

## **Article 2 Formation and Certificate of Formation**

- Section 79-29-201. Eliminates the current “check the box” item in the certificate of formation that an LLC must check to specify whether the LLC is member-managed or manager-managed. LLCs can still include this in the certificate of formation as optional language.
  - LLC can make this designation now in their operating agreement. If the operating agreement (and certificate of formation) is silent on this issue, then the default rule is that the LLC is member-managed.
- Section 79-29-205. Deleted requirement that exists in current law to make two separate filings to dissolve an LLC. Only one filing will be required, which will be similar to a dissolution filing for a MS corporation
- Section 79-29-211. Clarified and explained the existing process for the handling of refused documents and added a right to appeal similar to the corporation act
- Section 79-29-213. Added new provision addressing when it is necessary to correct a filing and how to correct filings
- Section 79-29-215. Annual report. Requires all LLCs to file an annual report which requires LLCs to report on information which is similar to the annual reports filed by corporations. Manager-managed LLCs must disclose names and addresses of all managers. Member-managed LLCs must disclose the

name and address of at least one member. LLCs must also disclose in this report whether they have a written operating agreement

- Section 79-29-219. Added new provision to allow the public to request certificates of existence for domestic LLCs
- Sections 79-29-221 – 79-29-229. Mergers. Eliminated requirement to have a plan of merger or file a copy of the plan of merger or merger agreement with the Secretary of State's Office. Also eliminated requirement to file a copy of the successor's operating agreement with the Secretary of State's Office
- Section 79-29-231. Revised appraisal rights section to provide the certificate of formation or the written operating agreement may eliminate, expand or restrict these rights and may vary, modify, eliminate or expand any of the provisions of this section. Confusing language has been revised or deleted
- Section 79-29-233. Added default rule that the LLC must obtain the members' approval by a majority decision of an agreement to sell its assets outside the ordinary course of business

### **Article 3 Members**

- Eliminates the concept of dissociation.
- Section 79-29-301. Clarifies when and how certain types of persons are admitted as members of the LLC upon the happening of various events, such as in connection with a merger, acquiring the interest from the LLC, and in the case of assignee of a financial interest
- Provides that if a member dies, the heirs become members of the LLC as a default rule. Section 79-29-301(2)(d). Under current law if a member dies, the death is an event of dissociation causing the deceased member to cease to be a member and causing the heirs receive a financial interest in the LLC but not to become members as a default rule
- Section 79-29-301(2)(e). Provides that if a corporate member merges into another entity, the surviving entity becomes the member. Under current law if a member merges into another entity, this is an event of dissociation, and the surviving entity receives a financial interest, but does not become a member.
- Provides that a person may be admitted as a member (even a sole member) without making a contribution to the LLC or being obligated to make a contribution to the LLC.
- Provides that a person may become a member (even a sole member) without having a financial interest or a governance interest in the LLC
- Section 79-29-303. Provides that a written operating agreement may allow a person to withdraw from the LLC and/or may give the LLC the power to expel a member
- Section 79-29-303. Clarifies that any member who has been expelled or withdrawn from membership in the LLC ceases to be a member and ceases to have any governance rights
- Section 79-29-305. Provides for a default rule that the management of the LLC is vested in the members based on their percentage held in the profits of the LLC. Under the current law the default rule is each member gets one vote and decisions are made by majority vote

- Section 79-29-305. Clarifies that members may choose to be managed by managers and if they decide to be managed by managers they must include this in their operating agreement
- Section 79-29-305. Adds a new provision that the members of a member-managed LLC may delegate their management rights to agents, officers and employees of a member or the LLC. Such delegation shall not cause the delegates to become members or managers and shall not cause the members to cease to be members
- Section 79-29-307. Adds an agency power for officers, similar to the agency power for managers under the current law
- Section 79-29-309. Voting, classes and meeting
  - Provides that the vote of each member is based on their percentage held in the profits of the LLC
  - Provides a default rule of greater than 50% (current default rule is majority vote, each member gets one vote)
  - Provides that the LLC can have members that have no voting rights if it provides for this in a written operating agreement
  - Provides for actions to be taken by written consent without a membership meeting. Members who did not sign the written consent must be provided with notice of the signed consent within 20 days.
  - Provides for meetings and notices by electronic means and for voting by proxy
  - Provides that if a meeting has not been held in 15 months, a 20% member may call a membership meeting
- Section 79-29-311. Provides for the same liability to third parties as under the current act, except adds reference to “officers”
- Section 79-29-313. Clarifies that a person who has ceased to be a member shall continue to have any financial rights that such person had at the time of the cessation but shall cease to have any governance rights or any other rights
- Section 79-29-313. Reduces the number of default events by which a member ceases to be a member of an LLC to the following:
  - A member: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for the person any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of the nature described above; or (vi) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the member or of all or any substantial part of the member’s properties; or
  - If one hundred twenty (120) days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law or regulation, the proceeding has not been dismissed, or if within ninety (90) days after the appointment without the member’s consent or acquiescence of a trustee, receiver or liquidator of the member or of all or any substantial part of the member’s properties, the appointment is not vacated or stayed or within ninety (90) days after the expiration of any stay, the appointment is not vacated.

- Under the current law the incompetency of a member is an event of dissociation. Incompetency is not an event of bankruptcy or dissolution under the new act.
- Section 79-29-315. Adds new section on access to information
  - Allows those in control of the LLC's business to limit access to certain information from its members and managers
  - Allows those in control to set reasonable standards by which they disclose information to members and officers
  - Provides for the ability to enforce rights arising under this section in chancery court

#### **Article 4 Management**

- Section 79-29-401. Retains the same provisions as in the management of LLC by manager or managers section under the current act, except for the addition of language that managers may also serve as officers to the extent provided in the operating agreement
- Section 79-29-401. Provides that operating agreement may set forth provisions concerning manager meetings, provides for notices and meetings by electronic means, and actions that can be taken without meeting with written consent
- Section 79-29-403. Reliance on reports and information. This section was re-written to make it easier to read and understand
- Section 79-29-405. Added new section re delegation of rights and powers to manage
  - Provides that the managers can delegate to other persons the manager's rights and powers to manage and control the business and affairs of the limited liability company, including to delegate to agents, officers and employees of: (a) a member, (b) a manager or (c) the limited liability company, and to delegate by a management agreement or another agreement with, or otherwise to, other persons.
  - Such delegation shall not cause the manager to cease to be a manager of the limited liability company or cause the person to whom any such rights and powers have been delegated to be a manager of the limited liability company.
- Section 79-29-407. Added new provision addressing resignation of manager

#### **Article 5 Finance.**

- Retains the same language as in the current act, no substantive changes
- Section 79-29-509. Added provision that defense of usury is not available

#### **Article 6 Distributions**

- Section 79-29-603. Added new provision on distribution on withdrawal of a member to take the place of the current section on distribution upon dissociation
  - Section provides that upon withdrawal the withdrawing member is entitled to receive distributions and the fair value of his financial interest based on his rights to share in the distributions from the LLC

- Provides a default rule for how to calculate fair value of the financial interest
- Section 79-29-605. Distribution in kind. Adds a default rule that the LLC can require a member to accept a distribution in kind to the extent that the percentage of the asset distributed is equal to a percentage of that asset which is equal to the percentage in which the member shares in distributions from the limited liability company
- Section 79-29-609. Limitations on distributions. Add language that the term “distribution” shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program
- Section 79-29-611(2). Liability for wrongful distribution. New language added which provides for liability of a member who knowingly receives a wrongful distribution (regardless of whether the members voted for or against it or did not vote)

### **Article 7 Assignment of Financial Interests**

- Section 79-29-703(1). Adds a default rule that the assignee of a member’s financial interest shall have no rights to participate in the management of the LLC
- Section 79-29-703(2). Provides as a default rule that an assignment of a financial interest does not dissolve the LLC or entitle the assignee to exercise any rights or powers of a member
- Section 79-29-703(2). Clarifies that a member ceases to be a member and ceases to hold a governance interest and ceases to have any powers of a member upon the assignment of the member’s entire financial interest
- Adds new language which states that a member’s interest in the LLC can be evidenced by a certificate issued by the LLC. Section 79-29-703(3)
- Adds new language which states that an LLC can acquire by purchase, redemption or otherwise interests in the LLC, similar to a corporation buying back its stock. Section 79-29-703(5)
- Section 79-29-705. Charging Orders
  - Clarifies the charging order provisions and rights of creditors to get them
  - Provides that a charging order constitutes a lien on the judgment debtor member’s financial interest
  - Provides that a charging order is the creditors’ exclusive remedy by which the creditor can satisfy a judgment out of the judgment debtor’s financial interest
  - Provides that chancery court has jurisdiction over these matters
- Section 79-29-707. Rights of assignee to become member if assignment would cause the LLC to have no members. Adds a new a default rule whereby if an assignee has been assigned a member’s entire financial interest, in which immediately following the assignment, the LLC would have no members, then the assignee can become a member of the LLC, provided the assignee agrees to become a member
- Section 79-29-709. Clarifies powers of personal representative of deceased, incompetent or dissolved member

- If a member is adjudged incompetent, the member's personal representative may exercise all rights until such time that the member's competency is regained, including the member's governance rights, on behalf of the member and any power under an operating agreement of an assignee to become a member.
- If a member dies, a personal representative of the member's estate may exercise all rights for the purpose of settling such estate, including the governance rights that were held by such member at the time of the member's death and any power under an operating agreement of an assignee to become a member.
- If a member is a corporation, trust or other entity and such entity is dissolved, terminated or liquidated, the personal representative of the entity may exercise all rights and powers of that member until a successor is established, including the member's governance rights.
- Section 79-29-711. Adds new provision regarding enforceability of limitations on assignments of financial interests which prevails over the MS UCC

The provisions of the MS UCC do not apply to a member's financial interest in a domestic limited liability company, including the rights, powers and interests arising under the limited liability company's certificate of formation or operating agreement or under this chapter. To the extent of any conflict or inconsistency between this section and Sections 75-9-406 and 75-9-408, this section prevails. It is the express intent of this section to permit the enforcement, as an agreement among the members of a limited liability company, of any provision of an operating agreement that would otherwise be ineffective under Sections 75-9-406 and 75-9-408.

## Article 8 Dissolution

- Section 79-29-801. Voluntary (nonjudicial) dissolution
  - Added provision to authorize dissolution when there are no members
  - Removed provisions on dissolution upon events of dissociation, since this concept has been removed from the act
  - Allows for ways for new members to be admitted when there are no members if certain steps are followed in a timely manner to avoid dissolution of an LLC due to no members
  - Provides that certain events will not cause dissolution of the LLC
- Section 79-29-803. Judicial Dissolution
  - Provides for the same events of judicial dissolution as under the current act
  - Also provides for judicial dissolution in a proceeding by the LLC to have its voluntary dissolution continued under court supervision
  - Provides that an officer, manager, assignee or owner of financial interest can apply to the chancery court to judicially dissolve the LLC if the LLC has no members and there is no mechanism in its operating agreement to admit a member
    - If none of these persons exist then any creditor of the LLC or the Secretary of State can apply for judicial dissolution
    - Provides that the court may appoint receivers to wind up the LLC or custodians to manage the LLC and describes their powers. The court may also order that these persons be paid compensation for their services
  - Provides for court to enter a dissolution decree and how to file the decree with the Secretary of State's office

- Section 79-29-807. Provides that assets of a dissolved LLC that are unclaimed will be deposited into the state treasury for safekeeping, similar to assets of a dissolved corporation
- Section 79-29-809. Sets forth who can wind up the LLC, and how persons can apply to chancery court to have the LLC wound up by the court or by a liquidating trustee appointed by the court
- Section 79-29-811. Agency powers of members and managers during dissolution is the same as under the current law, except reference to officers was added
- Section 79-29-813. Distribution of assets. Provides the same method of distribution of assets as in the current law but also requires the LLC to:
  - pay or make reasonable provision to pay all known claims, including contingent, conditional or unmatured contractual claims
  - make provisions to provide compensation for any claims which are the subject of pending litigation to which the LLC is a party
  - make provisions for unknown claims which are likely to arise within 3 years after dissolution
  - states that claims will be paid according to their priority if there is not sufficient assets
- Provides liability for members who knowingly receive distributions that violated the above requirements, with a 2 year statute of limitations
- Section 79-29-815. Authorizes the chancery court to appoint managers of the LLC to be trustees or appoint persons to be receivers to take charge of the property and collect the debts owed to the LLC
- Sections 79-29-817 and 79-29-819. Retains the existing provisions dealing with notifying known and unknown claimants, except the statute of limitations to state a claim under the unknown claims section has been reduced from 5 to 3 years
- Sections 79-29-821 – 79-29-827. Administrative Dissolution
  - Added new provisions to authorize the Secretary of State to administratively dissolve LLC's for failure to pay fees, file an annual report, failure to have a registered agent, etc., similar to the grounds for administrative dissolution of a corporation
  - Sets forth the procedure for administrative dissolution, which is similar to procedure for corporations
  - Provides for a way to reinstate an administratively dissolved LLC and a way to appeal any denial of reinstatement, similar to the procedure for corporations
  - States that reinstatement relates back and takes effect as of the date of the administrative dissolution, the same as for reinstatement of corporations
- Section 79-29-829. Voluntary Revocation of Dissolution. Added new section that authorizes an LLC which has filed its certificate of dissolution to voluntarily dissolve to revoke the filing if the LLC decides it does not want to dissolve. Currently corporations can revoke their dissolution, but LLC's cannot
- Section 79-29-831. New provisions on effect of dissolution

- Clarifies that administrative dissolution does not impair the validity of contracts or prevent the LLC from defending any actions in state court
- Clarifies that a member, manager or officer is not liable for the debts or obligations of the LLC solely by reason of administrative dissolution of a LLC
- Clarifies that an administratively dissolved LLC may not maintain any action in state court until the LLC is reinstated
- Provides that an LLC which is voluntarily or judicially dissolved maintains its legal existence but may carry on business only necessary to wind up and liquidate its business and affairs

**Article 9 Professional Limited liability companies.** This article will be substantively reviewed at a later date along with the other professional business entity statutes. Minor changes have been made to conform it to the rest of the Revised Act.

### **Article 10 Foreign limited liability companies**

- Section 79-29-1003. Requires foreign LLC's that register to do business in Mississippi to have their application signed by a member, manager or officer and they must provide a certificate of good standing from their home state of formation
- Section 79-29-1015. Clarifies that a foreign LLC is not considered to be doing business in this state solely because it is a shareholder in a corporation that transacts business in this state
- Sections 79-29-1023 – 79-29-1027. Administrative Revocation. Provides for administrative revocation of registration for foreign LLCs for failure to file an annual report (as well as for other grounds), very similar to the administrative dissolution provisions for domestic LLC's, including procedures to reinstate after administrative revocation
- Section 79-29-1025. Provides for the effect of administrative revocation, similar to the provisions for effect of administrative dissolution of domestic LLCs
- Section 79-29-1029. Provides for persons to obtain a certificate of authorization for a foreign LLC

### **Article 11 Derivative Actions**

- Section 79-29-1101. Clarifies that a member or an owner of a financial interest can bring a derivative action in chancery court to recover a judgment in its favor if managers or members with authority do so have refused to bring the action or if an effort to cause them to bring the action is not likely to succeed
- Section 79-29-1103. Requires that the plaintiff must be a member or owner of financial interest at the time of bringing the action and at the time of the transaction of which the plaintiff complains
- Eliminated requirement under current laws to make a written demand on the LLC and the 90-day waiting period for the LLC to respond to the written demand
- Section 79-29-1113. Provides for the court to require the defendant to pay the plaintiff's expenses (including reasonable attorneys' fees) if the plaintiff wins the action, and also provides for the court to require the plaintiff to pay the defendant's expenses if it finds that the proceeding was commenced without reasonable cause or for an improper purpose

- Section 79-29-1115. Requires MS law to govern the rights of any foreign LLC derivative actions brought in the state court of MS

## Article 12 Miscellaneous

- Section 79-29-1203. Fees. Section 79-29-1203 (Fees) which provides for all filing fees under the act shall stand repealed on July 1, 2012
  - Changes current \$250 fee for application for registration of a foreign LLC to add an additional \$10 for each day, not to exceed a total of \$1,000 for each year, the foreign LLC transactions business in the state without registering with the state. The additional amount reflects the same amount that corporations that fail to register before transacting business in the state must pay.
  - Annual report fees: No Fee for domestic LLCs; \$250 for foreign LLCs
  - New \$25 fee to file service of process on the Secretary of State's Office, same as the fee charged for corporations
  - Authorizes the Secretary of State to adopt rules to provide for discounts of fees to encourage online filing of documents and for other reasons determined by the Secretary of State, such as discounts for multiple filings
- Section 79-29-1211. Added provision that a manager, member or officer may consent in writing to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of this state, or the exclusivity of arbitration in a specified jurisdiction or in this state, and to be served with legal process in the manner prescribed in such operating agreement or other writing. Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in this state, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of this state with respect to matters relating to the organization or internal affairs of a limited liability company.

## New Article 13 Transition Provisions

- **Provisions Applicable to pre-existing and new LLCs.** Section 79-29-1303. Provides that the following provisions become effective on January 1, 2011 (the "Effective Date") for pre-existing LLCs and for new LLCs
  - Fees;
  - requirement to file annual reports; and
  - administrative dissolution/revocation provisions and related reinstatement provisions
- **Provisions applicable to New LLCs.** Section 79-29-1301. Provides that the entire Revised Act (including the above provisions) will apply to all new LLCs formed or registered after January 1, 2011(Effective Date)
- **Provisions applicable to pre-existing LLCs.**
  - Section 79-29-1309. Provides that the rest of the new Revised Act will become effective January 1, 2012 (the "Mandatory Application Date") for pre-existing LLCs, but allows LLC's to elect to be governed by the new law before that date
  - Sections 79-29-1305 and 79-29-1307. Sets forth the procedures as to how a pre-existing LLC can elect to be governed by the new law before the Mandatory Application Date, by amending their organizational documents and making a filing with the Secretary of State's office