

## OHIO'S REVISED LIMITED LIABILITY COMPANY ACT: OHIO REVISED CODE CHAPTER 1706

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For the first time since its adoption in 1994, Ohio is completely restating its limited liability company act by way of the “Enact Ohio Revised Limited Liability Company Act” (“New Act”). Rather than just editing the existing provisions of Ohio Revised Code (“O.R.C”) Chapter 1705, the New Act creates an entirely new chapter in O.R.C. 1706, effective January 1, 2022. The New Act is based largely on the Prototype LLC Act developed by the LLCs, Partnerships and Unincorporated Entities Committee of the American Bar Association Section of Business Law.

The New Act strikes a delicate balance between incorporating modern concepts and retaining some familiar characteristics of Ohio LLC law. Conveniently, the New Act maintains existing Ohio LLC terminology that is not present in the Prototype Act (e.g., “articles of organization” vs. “certificate of formation”), so that many existing LLCs will not be forced to revise their current documents. And, thankfully, Ohio still does not require LLCs to file an annual report, nor does it require LLCs to disclose their managers or members through the New Act. Here are some of the notable changes in the New Act:

### **Series LLCs (O.R.C. 1706.76 to 1706.7613):**

Perhaps the most novel concept introduced, the New Act authorizes the formation of “Series LLCs.” Ohio is the 15th state to permit the use of Series LLCs. For reference, a Series LLC is a form of LLC that can, through its operating agreement, establish one or more series of assets and liabilities organized under

the parent (or “umbrella”) LLC. Subject to compliance with the statutory rules in O.R.C 1706.76, liabilities of one series are not enforceable against the other series, nor are they enforceable against the parent LLC. The inverse is also true—the liabilities of a parent LLC are not enforceable against a series.

Each series in an Ohio Series LLC must have either (1) 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, and/or (2) a separate purpose or investment objective. In addition, at least one member must “be associated” with each series. The New Act further requires that the assets and records of each series must be kept separate, that the operating agreement must employ specific statutory language, and that the Articles of Organization authorize the LLC to create series.

In theory, Series LLCs can be a useful tool for asset protection, particularly with respect to real estate investment companies or a business with multiple product lines. Whether and how businesses (and lenders) embrace the Series LLCs will be interesting to monitor.

### **Management Structure and Authority (O.R.C 1706.18):**

The current act allows LLCs to be managed by either their members or their manager(s). The New Act eliminates this dichotomy to provide that a person’s ability to act as an agent and

to bind the LLC can be authorized by (1) the operating agreement; (2) the decisions of members in accordance with the operating agreement; (3) a “statement of authority” filed with the Ohio Secretary of State pursuant to O.R.C. 1708.09; or (4) the Act’s default rules. This is intended to provide additional flexibility for an LLC’s management, a recurring theme through the New Act.

### **Fiduciary Duties (O.R.C. 1706.08, 1706.31, & 1706.311):**

The New Act permits an LLC, through its operating agreement, to limit or eliminate fiduciary duties among its members, managers, and officers. In fact, the only non-waivable fiduciary duty is the implied covenant of good faith and fair dealing. This provides additional flexibility to contract around traditional concepts of equity. And, in a practical sense, it makes more attractive investments in LLCs by allowing an investor to limit its duties to those expressly within the terms of a contract and allowing investors and management to dabble in other potentially competitive businesses. By contrast, other investors will need to carefully consider their recourse against the other members and management of the LLC.

### **Penalties for Members’ Failure to Perform (O.R.C. 1708(B)):**

The New Act permits an operating agreement to impose penalties on its members for their failure to perform certain obligations or upon the occurrence of certain events. Among other consequences, these include (i) reducing or even forfeiting a member’s interests or (ii) broadly, “any other penalty or consequence.” Owners and investors should carefully consider these provisions through their respective lenses.

### **Cancellation for Failure to Maintain a Registered Agent (O.R.C. 1706.09):**

Unlike the current LLC act and Ohio’s corporate statute, the New Act imposes statutory penalties on those LLCs that fail to maintain or update their statutory agents. In fact, the Secretary of State is directed to cancel any such LLC’s articles after giving it notice and a 30-day opportunity to cure. Fear not, however, for a cancelled LLC can be reinstated.

### **Foreign LLCs (O.R.C. 1706.51 to 1706.515).**

The current LLC act has only one section that focuses on foreign LLCs. Under the New Act, however, six new sections more thoroughly address the issue. A foreign LLC not registered to do business in Ohio cannot bring a suit for collecting its debts, and it can be fined by the Attorney General for a set fee. Series LLCs in foreign states can now be registered here. And O.R.C. 1706.512 provides a list of what does not constitute transacting business in Ohio, some of which is surprising (e.g., owning real property). So, while Ohio continues to welcome foreign entities to do business, the New Act places greater importance on the registration of those foreign entities.

### **Default Rules (O.R.C. 1706.08):**

In almost each section, the current LLC act provides a default rule “except as otherwise modified by the LLC’s operating agreement” or “except as otherwise provided in the articles of organization.” O.R.C. 1706.08 removes this repetitive qualifying language and provides a comprehensive list of provisions which cannot be modified by an operating agreement (e.g., certain fiduciary duties, obligations to make capital contributions).

### **Conclusion:**

Ohio LLCs have been granted a long runway to adapt to the changes in the New Act, and counsel and business owners should consider whether and how those changes will impact their counsel or their businesses. Although the New Act may not require immediate changes to the operating agreements of many LLCs, it does grant business owners more flexibility to operate their businesses going forward. This is only a high-level overview of the New Act, but the author and the attorneys in the Business Group of Schneider Smeltz Spieth Bell are familiar with the New Act and its impact on businesses in Ohio, and we are ready to counsel you and your business into Ohio’s “modern” age of LLCs.

*Please do not hesitate to contact attorney Jim Gianfagna at 216-696-4200. We are also available via email or video conference to assist you in any way we can.*