

LFC Requester:	Charlene Cerny
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date 2 February 2015
Bill No: HB 228

Sponsor: Reps. Cook & Ivey-Soto
Short Revised Uniform Limited
Title: Liability Company Act

Agency Code: Attorney General's Office
Person Writing Luis Carrasco, AAG.
Phone: 827-6040 **Email** LCarrasco@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

House Bill 228 (“HB228”) is an act that would repeal the Limited Liability Company Act, NMSA 1978, Sections 53-19-1 through -74 (1993, as amended through 2003) (“LLC Act”), in its entirety, and enact the Revised Uniform Limited Liability Company Act (“Revised Act”) in its place. The Revised Act will apply to all limited liability companies (“LLCs”) formed on and after July 1, 2016, except that an LLC formed prior to this date may elect to be governed by the Revised Act in accordance with its operating agreement/applicable law and after filing an amended and restated certificate of organization with the Secretary of State (“SOS”) expressing its desire to be governed by the Revised Act. LLCs formed prior to July 1, 2016, that do not elect to be governed by the Revised Act will continue to be governed by the LLC Act, as if that act had not been repealed, but such LLCs shall not be renewed unless so provided in the original agreement or in the manner provided in the limited liability company agreement or by law for amending a limited liability company agreement. LLCs formed prior to July 1, 2016, and not electing to be governed by the Revised Act will nevertheless be subject to certain provisions of the Revised Act. Foreign LLCs will be governed by the Revised Act regardless of the time of formation. Generally, the Revised Act adopts an approach that favors flexibility and contractual arrangements and brings New Mexico more in line with LLC law in Delaware and several other states.

HB228 is largely based on the National Conference of Commissioners on Uniform State Laws, which has been approved and recommended for enactment in all states, with certain deviations to reflect particular circumstances unique to New Mexico. Several states, including Minnesota and Florida have recently adopted versions of the Revised Act. The Revised Act clarifies that the SOS is responsible for many of the duties pertaining to the oversight of LLCs, as opposed to the Public Regulation Commission, clarifies the effect of records filed with SOS on third parties with respect to the actual and apparent authority of persons acting on behalf of the LLC and describes the rights of third parties who rely on those records when they contain inaccurate information. The Revised Act further provides management structures for LLCs, namely, member-managed and manager-managed, and describes the duties of members and managers and the rights of third parties under each structure. The Revised Act also permits LLCs to file statements of authority with the SOS in order to place third parties on notice of the authority, restricted or otherwise, of certain members or managers of the LLC, as well as clarifies what authority those members or managers have to bind the LLC.

Other features of the Revised Act include changes to and clarification of the voting rights of members in certain circumstances; clarifies the duties of a transferee (“assignee” under the LLC Act); and places new and significant restrictions on access to and inspection of LLC records. Additionally, the Revised Act imposes an obligation directly on the members or managers of an LLC to correct information in articles of organization that become inaccurate; allows for derivative actions to enforce a right of the LLC, when, within a reasonable time, an action is not instituted after a member or manager makes a demand; if it would be futile to wait for the members or managers to bring a derivative action following a demand, the Revised Act would permit a member to initiate the action unilaterally. The Revised Act establishes more defined processes and limitations on provisions for apportioning distributions, profits/losses, member voting rights, dissociation (including the creation of special litigation committee procedures), service of process and allows for interest exchanges, in contrast to the LLC Act. The Revised Act further defines the processes and limitations on authorizations for mergers and conversions.

A series of amendments to the LLC Act since its inception may make it more difficult to understand and the Revised Act attempts to facilitate ease of understanding. The Revised Act appears to emphasize the importance of the operating agreement and provides LLCs and their officers an enhanced degree of flexibility in designing its management structure, capital and profit participation schemes, and other matters to facilitate its objectives.

(Credit: Florida Senate Judiciary Committee; Gregory M. Marks; Stephen M. Quinlivan; David C. Jenson; Jenifer L. Frohne; Robert D. Rominski)

FISCAL IMPLICATIONS

HB228 authorizes the Attorney General to maintain actions to enjoin a foreign LLC from doing business in New Mexico contrary to the Revised Act, and to be given notice and an opportunity to be heard in proceedings by the district courts to specify the disposition of property held for a charitable purpose by a domestic or foreign entity relative to a merger, interest exchange, conversion or domestication. However, HB228 contains no appropriation to the Attorney General’s Office to maintain such actions or participate in such proceedings.

SIGNIFICANT ISSUES

It is not clear how an LLC that was formed prior to July 1, 2016, and that has not elected to be subject to the Revised Act can be governed by the LLC Act despite the fact that the LLC Act would be repealed, in its entirety, by the Revised Act. Similarly, at p. 106, line 23, reference to NMSA 1978, Section 53-19-5 is made, but the Revised Act would repeal this section if enacted. Further, the LLC Act explicitly authorizes the Attorney General to bring an action against an LLC to secure civil penalties, but the Revised Act makes no such provision; it is unclear whether this is intentional.

PERFORMANCE IMPLICATIONS

See FISCAL IMPLICATIONS above.

ADMINISTRATIVE IMPLICATIONS

See FISCAL IMPLICATIONS, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

Section 709(B) (pp. 87-98) is unclear as to whether the fees, taxes, interest and penalties that would have been due to the SOS while the company was administratively dissolved are those fees that the LLC would have been responsible had it not been dissolved.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

N/A.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The status quo will remain. The LLC Act will remain in effect and the attempt to facilitate uniformity in laws governing LLCs amongst many states through adoption of the Revised Act will not be fulfilled in New Mexico. The Attorney General will continue to be explicitly authorized to pursue civil penalties against LLCs not complying with the LLC Act and LLC members will continue to enjoy broad access to company records and information.

AMENDMENTS

See SIGNIFICANT ISSUES and TECHNICAL ISSUES above.