

Comments in Support of Senate Bill 909

March 23, 2023

Valerie H. Sasaki, Chair, Oregon Laws Commission

Dear Chair Prozanski, Vice-Chair Thatcher, Members Dembrow, Findley, Gelser Blouin, Linthicum, and Manning,

Thank you for the opportunity to speak with you today about Senate Bill 909.

My name is Valerie Sasaki. I'm a tax and business attorney admitted to practice in Oregon, Washington, Idaho, and Utah. I'm here today in my role as Chair of the Oregon Laws Commission and Vice-Chair of the OLC workgroup that has recommended adoption of the Revised Uniform LLC Act.

When Oregon first adopted its limited liability company act, back in 1993, it was cutting edge legislation. Practitioners and business owners didn't quite know what this new type of entity was or how it could be useful for Oregonians. They just knew that this new entity type had tax advantages over corporations, was more flexible to administer than corporations, and provided limited liability. Now, 30 years later, LLCs have grown to become the most commonly formed business entity in Oregon. LLCs are especially popular with small business owners and startup entities.

Oregon has made some changes to its limited liability company act since 2003, notably with 2017's House Bill 2191, which implemented certain changes in favor of transparency and enhanced enforcement. However, Oregon has not undertaken a wholesale evaluation of whether the LLC Act meets the modern needs of Oregonians.

The members of the Oregon State Bar's Business Law Section noted back in 2017 that Oregon was not in conformity with the Uniform Laws Commission's Revised Uniform LLC Act. The Business Law Section, after consulting with representatives of the Uniform Laws Commission, submitted a request to the Oregon Laws Commission to constitute a workgroup to: (1) examine whether Oregon should adopt the Revised Uniform LLC Act; and, (2) if the workgroup determined that it should adopt the model act, recommend specific language that would reflect the legislature's clear policy statements and current practice in Oregon. The Oregon Laws Commission approved that request and appointed John DiLorenzo to serve as chair of this workgroup and me to serve as Vice-Chair. The Supreme Court appointed a diverse group of members to serve on this workgroup, including members of the bar, accountants, professors, and representatives from the Oregon Department of Revenue and Secretary of State's office.

The Oregon Laws Commission Revised Uniform LLC Act workgroup had its first meeting in March of 2019. Although we met in person on a monthly basis through 2019, we (along with everyone) switched to zoom meetings in the Spring of 2020. We continued to meet through the Summer of 2022 when we submitted our edited draft with commentary to legislative counsel's office.

Senate Bill 909 is the result of those years of work. The LLC Act must provide rules that apply to sophisticated, represented LLCs and also to small business LLCs that may be formed without the benefit of legal representation. The workgroup members and Commission do not believe that this proposal is a sea change from current Oregon practice, but a necessary evolution to reflect modern business practice. While the proposed bill still provides the flexibility to craft sophisticated economic relationships and deal terms, it also provides default rules that we believe are more closely aligned with the expectations and practices of Oregon's small business owners.

I have attached a summary of each of the major articles of the Revised Uniform LLC Act and where they are in the proposed Senate Bill 909. As I noted above, this is an updating of current Oregon law. The bill clarifies certain things, such as the role of charging orders in the LLC context. It also provides new, simpler tools to accomplish things (like interest exchanges and domestication) that require multiple steps and expensive drafting to accomplish now.

It is the workgroup's – and my – belief that adoption of Senate Bill 909 will help Oregon business owners and those interested in investing in Oregon business of all sizes. I am happy to answer any questions that you have for me today, or as we move forward.

MEMORANDUM

Date: March 20, 2023

To: Senate Judiciary Committee Members

From: Valerie Sasaki, Chair, Oregon Laws Commission

RE: SB909: Revised Uniform LLC Act Summary

Background:

The Oregon Laws Commission Revised Uniform Laws Commission workgroup began work in March of 2019. The workgroup determined that Oregon should adopt a version of the model act that reflected the legislature's clear policy decision in favor of transparency for this type of entity, as reflected in House Bill 2191 (2017).

Article Summaries:

SB 909 §§1- 21 (RULLCA Article 1): This article contains the general provisions governing some basic mechanics including how long the LLC is in existence, what purposes the LLC may be organized for, the name of the LLC, the agent for service of process. This section also addresses the role of the operating agreement and the ability of the members to structure the management responsibilities and the powers of the members and managers in a way that the members agree. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon statutes.

SB 909 §§ 23- 35 (RULLCA Article 2): This article talks about how members form the LLC and confirms the role of the Secretary of State's office related to public records for filing the LLC. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon statutes. Note that the workgroup recommended substitution of ORS 63.787 language for proposed RULLCA 212.

SB 909 §§ 36 - 40 (RULLCA Article 3): This article governs the external-facing interactions of the LLC's members and managers with third parties. Specifically, with folks who are not members and are dealing with the LLC. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised statutes including ORS § 63.771 regarding records access.

SB 909 §§ 41 – 50 (RULLCA Article 4): This article governs the internal-facing relationships of the members' relationship with each other and with the LLC. It

provides the default rules for member management and manager management. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. This section in particular reflects a modern approach to LLCs, for example by discussing total assets at SB 909 §45/RULLCA 405(a)(2) in the context of distribution limitations while still embracing the concept of what is “reasonable under the circumstances” and preserving the fair value concept of ORS §63.229(1)(b).

SB 909 §§ 51 – 54 (RULLCA Article 5): This article discusses the nature of the LLC interest and the idea that members should be able to decide who they wish to be in business with. It also talks about the rights of transferees of a member’s interest, and creditors of members, who seek to enforce or foreclose on a charging order. This is similar to ORS § 63.259 but reflects the evolution of Oregon and national caselaw on what remedies are available to the creditors of members in LLCs.

SB 909 §§ 55 – 57 (RULLCA Article 6): This article states what can cause a member to be removed from the LLC (dissociation) and the consequences of that dissociation. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. The workgroup wished to make clear that it believes there are no major policy changes from Oregon law in this Article 6. For example, the workgroup understands that SB 909 §57 / RULLCA 603 preserves the policy objectives of ORS §§ 63.209(2).

SB 909 §§ 58 – 68 (RULLCA Article 7): This article talks about the dissolution of a limited liability company. It discusses what can cause dissolution as well as the rights of members and third parties upon dissolution of a limited liability company. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. For example, SB 909 §58 / RULLCA 701 (4)(a) incorporates text from ORS §§63-661 and 63.771. The workgroup did not recommend adoption of RULLCA 706, which it believes is appropriate for Oregon and consistent with other neighboring state adoptions. As another example, the workgroup also recommended addition of language at SB §65 / RULLCA 707 to reflect language from ORS §63.674.

SB 909 §§ 69 – 74 (RULLCA Article 8): This article discusses direct and derivative claims by members and for the establishment, conduct, and judicial review of special litigation committees. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency

objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. The workgroup does not recommend adoption of RULLCA 801, which permitted direction actions by LLC members against another member, manager, or the LLC company, consistent with current Oregon common law. Similarly, the workgroup recommends substitution of language from ORS 63.801(2) for RULLCA 805 to reflect current Oregon practice relating to stays pending investigation in a derivative proceeding and incorporate the process of ORS 60.952(6) (of the Private Corporations Act) relating to purchases of interests during a court proceeding.

SB 909 §§ 75 – 89 (RULLCA Article 9): This article governs how foreign limited liability companies register to do business in Oregon, conduct business, and withdraw from doing business in Oregon. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. For example, the workgroup recommends the inclusion of language from ORS §63.704(2)-(4) at SB 909 §76 / RULLCA 902 to preserve financial neutrality. The workgroup recommended various changes and additions in this section to reflect the legislature’s transparency objectives.

SB 909 §§90 – 120 (RULLCA Article 10): This article governs mergers, interest exchanges, conversions, and domestications of limited liability companies in Oregon. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. The workgroup does want to note that current Oregon statutes provide for mergers (ORS §§63.481, et seq) and conversions (ORS §§63.470, et seq.); however, they do not provide a clear statutory mechanism for either interest exchanges (allowing the acquisition of one or more classes of LLC interest without affecting the separate existence of the LLC) or domestications (permitting Oregon LLCs to become foreign LLCs where authorized in other jurisdiction). Oregon practitioners have been forced to find work arounds for these situations under current law. The workgroup believes that the addition of these tools is an improvement on current Oregon law and consistent with current Oregon policy objectives.

SB 909 §§ 121 – 122 (RULLCA Article 11): This article contains some final miscellaneous provisions including transition rules. These provisions generally parallel similar provisions in ORS Chapter 63 and, where appropriate to reflect legislative transparency objectives or reflect current Oregon law and practice, pull in language from current Oregon Revised Statutes. The workgroup did not recommend adoption of RULLCA 1104, relating to severability, as it determined ORS 174.040 sufficiently addressed that concern.

SB 909 §126: Application of Act. The workgroup has received questions from practitioners about the effective date of Oregon’s adoption of RULLCA. Section 126 states that RULLCA only applies to entities that are formed or organized (or that merges with another entity, engage in an interest exchange, converts, or undergoes a domestication) on after the effective date of this 2023 Act, unless the entity elects to be subject to this Act in a manner specified in the entity’s operating agreement. RULLCA will also apply to contracts that a person enters into on or after the effective date of this 2023 Act. RULLCA does not affect an action or proceeding that begins or right that accrues before the effective date of this 2023 Act.