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Testimony of the Ohio State Bar Association in Support of Senate Bill 276
House Civil Justice Committee
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Chair Hambley, Vice Chair Patton, Ranking Member Brown, and members of the House Civil Justice Committee. Thank you for the opportunity to testify in support of Senate Bill 276. My name is Mike Moeddel and I am a partner with Keating Muething & Klekamp PLL and the chair of the Ohio State Bar Association's (OSBA) Corporation Law Committee.

Senate Bill 276 is the result of years of hard work by the Corporation Law Committee and it received unanimous approval from the OSBA's Council of Delegates, which is a body comprised of 133 attorneys from around the state that is charged with approving the proposals that are developed by the OSBA.

The original Ohio Limited Liability Act was enacted in 1994. Since that time the utility and prominence of the limited liability company as a business entity has developed significantly. Although changes have been made over the years to the Ohio LLC Act in an effort to improve clarity and to keep it current, Ohio is one of the few states whose original limited liability company act has not seen a comprehensive revision. The proposed Revised Ohio LLC Act provides greater consistency and clarity and includes modern advancements that small business owners and sophisticated investors require to do business. We believe that the end result is one of the most modern limited liability company acts in the country.

Senate Bill 276 Act effects a complete restatement of the Ohio LLC Act. Senate Bill 276 is based on the Revised Prototype Limited Liability Company Act published by the American Bar Association's Committee of LLCs, Partnerships and Unincorporated Entities (the "Prototype Act"), modified to take into consideration certain familiar aspects of the current Ohio LLC Act, the methodology used by the Ohio state legislature in adopting the Revised Uniform Partnership Act in 2008, and the impact on other Ohio statutes and policies and procedures, including those of the Ohio Secretary of State.

Although Senate Bill 276 has been primarily drafted by the Limited Liability Company Subcommittee of the Corporation Law Committee, input and feedback has been provided by a number of other OSBA committees, including the Estate Planning, Trust and Probate Law Section and the Corporate Counsel Section. In addition, significant effort was made to coordinate the language with the Ohio Secretary of State's office.

A summary of certain material considerations in developing the Revised Ohio LLC Act are described below:

1. Terminology.

Most modern limited liability company acts, including the Prototype Act, use the terminology certificate of formation, limited liability company agreement, limited liability company interests, registered office and registered agent. Senate Bill 276 retains the terminology used in the Ohio LLC Act to reduce confusion by businesses and practitioners familiar with the current terminology, considering that many existing limited liability companies may continue with their current operating agreement and other organizational documents in effect. They will benefit from the consistency in this terminology. The consistent terminology also is likely to benefit the Secretary of State's office by eliminating a potentially confusing and unnecessary transition to new terminology. Certain terminology has been updated in order to signify a slightly different meaning than current terminology, or where the terminology has been adopted in similar Ohio business entity statutes.

2. Consolidation of Provisions on Limited Liability Company Agreement Override.

Consistent with the current Ohio LLC Act (Section 1705.081) and the Prototype Act (Section 110), Senate Bill 276 places in one section (Section 1706.10) the various provisions that are not permitted to be modified by the operating agreement. This centralization allows for the elimination of the phrase "unless otherwise provided in the limited liability company agreement" or similar phrases throughout the Revised Ohio LLC Act and the ambiguity that results in the absence of express override language. Therefore, all provisions within the Senate Bill 276 are "default" provisions that may be modified by the operating agreement unless modifications are prohibited under Section 1706.10.

3. Elimination of Manager-Managed and Member-Managed Dichotomy and Statutory Actual and Apparent Authority.

Consistent with the Prototype Act, SB 276 eliminates the member-managed and manager-managed bifurcation of management structures and the statutorily conferred actual and apparent authority of members and managers in those paradigms. Instead, the Revised Ohio LLC Act (Section 1706.31) provides that a person's actual or apparent authority to bind the limited liability company will be determined with reference to the operating agreement, decisions of the members in accordance with the operating agreement or the default rules of the Revised Ohio LLC Act. This approach is more consistent with the flexibility legal practitioners and the public have applied to structuring the governance and operation of limited liability companies. This structure also departs from the strictly bifurcated organization contemplated by the current Ohio LLC Act. Instead, SB 276 reflects the flexibility required to accommodate the wide variety of structures that provide for managers, officers, boards of directors, managing members, etc.

4. Fiduciary Duties or Standards of Conduct.

Consistent with the current Ohio LLC Act and certain other Ohio business entity statutes, Senate Bill 276 provides for exclusive statutory default fiduciary duties for members and managers. This is a significant departure from the Prototype Act which does not provide for statutory default

fiduciary duties, relying on the premise that common law provides an adequate basis for applying the obligations associated with members and agents of a limited liability company.

5. Series Limited Liability Companies.

The Revised Ohio LLC Act permits a limited liability company to establish, by way of its operating agreement, one or more designated series of assets and liabilities with which certain subjects of members might be associated. Series provisions were provided throughout the Revised Ohio LLC Act in an effort to acknowledge a number of jurisdictions that have added so called “series” limited liability companies to their statutes. The series provisions are based on those provided in the Prototype Act. Series provisions are contained primarily in Article 11 but also are included throughout the Revised Ohio LLC Act.

The Senate Judiciary Committee accepted two amendments, both of which are supported by the OSBA. The first amendment changes the offense of signing and filing a false record from perjury to falsification. The second amendment ensures that the fee for filing a service of process form remains the same.

Thank you for the opportunity to testify in support of this bill. I would be happy to answer any questions.