

As Passed by the Senate

131st General Assembly

Regular Session

2015-2016

S. B. No. 181

Senators Obhof, Schiavoni

Cosponsors: Senators Bacon, Eklund, Seitz, LaRose, Beagle, Brown, Burke, Coley, Hughes, Jones, Lehner, Manning, Oelslager, Patton, Sawyer, Tavares, Thomas, Yuko

A BILL

To amend sections 1701.56, 1701.64, 1705.081, 1705.161, 1705.281, 1705.30, and 1705.48 and to enact sections 1701.641, 1705.031, 1705.291, and 1705.292 of the Revised Code to prescribe the fiduciary duties of corporate and limited liability company officers, to specify that officers are not required for limited liability companies, to permit a written waiver or elimination of the fiduciary duties of limited liability company members, managers, or officers, to clarify when a limited liability company manager's or officer's duties can be the same as a member's duties, to declare the policy of the Limited Liability Company Law generally to give maximum effect to freedom of contract, and to make other changes regarding corporations and limited liability companies.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1701.56, 1701.64, 1705.081, 1705.161, 1705.281, 1705.30, and 1705.48 be amended and sections 1701.641, 1705.031, 1705.291, and 1705.292 of the Revised Code be enacted to read as follows:

Sec. 1701.56. (A) Except as provided in division (B) of this section and section 1701.911 of the Revised Code:

(1) The number of directors may be fixed by the articles or the regulations, but the number so fixed shall not be less than one.

(2) Unless the articles or the regulations fix the number of directors or provide the manner in which such number may be fixed or changed by the shareholders, the number may be fixed or changed to a number not less than one at a meeting of the shareholders called for the purpose of electing directors at which a quorum is present, by the affirmative vote of the holders of a majority of the shares which are represented at the meeting and entitled to vote on the proposal. In addition to the authority of the shareholders to fix or change the number of directors and the manner in which such number may be fixed or changed, the articles or the regulations may authorize the directors to change the number of directors, may specify the manner in which the directors are to change the number of directors and limitations upon the ~~directors~~directors' use of this authority, and may authorize the directors who are in office to fill any director's office that is created by an increase in the number of directors. No reduction in the number of directors shall of itself have the effect of shortening the term of any incumbent director.

(3) The directors shall be natural persons of at least eighteen years of age and shall have such qualifications, if

any, as are stated in the articles or the regulations. 48

(4) The directors may elect a chairperson of the board who shall be a director. Unless otherwise provided in the articles or regulations or in a resolution of the directors, the chairperson of the board is not an officer of the corporation. 49
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(B) The court of common pleas of the county in which a corporation maintains its principal office may, pursuant to division (A) of section 1701.911 of the Revised Code, order the appointment of a provisional director for the corporation without regard to the number or qualifications of directors stated in the articles or regulations of the corporation. 53
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Sec. 1701.64. (A) The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, ~~a chairman of the board,~~ one or more vice-presidents, and such other officers and assistant officers as may be deemed necessary. The officers shall be elected by the directors. ~~The chairman of the board shall be a director. Unless the articles or the regulations otherwise provide, none~~ None of the other officers need be a director unless the articles or the regulations otherwise provide or the directors determine that there is to be a chairperson of the board who is to be an officer. Any two or more offices may be held by the same person, but no officer shall execute, acknowledge, or verify any instrument in more than one capacity if such instrument is required by law or by the articles, the regulations, or the bylaws to be executed, acknowledged, or verified by two or more officers. Unless the articles or the regulations otherwise provide, all officers shall be elected annually. 59
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(B) Unless the articles or the regulations otherwise provide, and subject to the exceptions, applicable during an 76
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emergency, as that term is defined in section 1701.01 of the Revised Code, for which provision is made in division (F) of section 1701.11 of the Revised Code:

(1) All officers, as between themselves and the corporation, shall respectively have such authority and perform such duties as are determined by the directors;

(2) Any officer may be removed, with or without cause, by the directors without prejudice to the contract rights of such officer. The election or appointment of an officer for a given term, or a general provision in the articles, the regulations, or the bylaws with respect to term of office, shall not be deemed to create contract rights;

(3) The directors may fill any vacancy in any office occurring from whatever reason.

Sec. 1701.641. (A) Unless the articles, the regulations, or a written agreement with an officer establishes additional fiduciary duties, the only fiduciary duties of an officer are the duties to the corporation set forth in division (B) of this section.

(B) An officer shall perform the officer's duties to the corporation in good faith, in a manner the officer reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing an officer's duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by any of the following:

(1) One or more directors, officers, or employees of the

corporation who the officer reasonably believes are reliable and 107
competent in the matters prepared or presented; 108

(2) Counsel, public accountants, or other persons as to 109
matters that the officer reasonably believes are within the 110
person's professional or expert competence. 111

(C) For purposes of this section, both of the following 112
apply: 113

(1) In any action brought against an officer, the officer 114
shall not be found to have violated the officer's duties under 115
division (B) of this section unless it is proved by clear and 116
convincing evidence that the officer has not acted in good 117
faith, in a manner the officer reasonably believes to be in or 118
not opposed to the best interests of the corporation, or with 119
the care that an ordinarily prudent person in a like position 120
would use under similar circumstances. 121

(2) An officer shall not be considered to be acting in 122
good faith if the officer has knowledge concerning the matter in 123
question that would cause reliance on information, opinions, 124
reports, or statements that are prepared or presented by any of 125
the persons described in division (B)(1) or (2) of this section 126
to be unwarranted. 127

(D) An officer shall be liable in damages for a violation 128
of the officer's duties under division (B) of this section only 129
if it is proved by clear and convincing evidence in a court of 130
competent jurisdiction that the officer's action or failure to 131
act involved an act or omission undertaken with deliberate 132
intent to cause injury to the corporation or undertaken with 133
reckless disregard for the best interests of the corporation. 134
This division does not apply if, and only to the extent that, at 135

the time of an officer's act or omission that is the subject of 136
the complaint, either of the following is true: 137

(1) The articles or the regulations of the corporation 138
state by specific reference to division (D) of this section that 139
the provisions of this division do not apply to the corporation. 140

(2) A written agreement between the officer and the 141
corporation states by specific reference to division (D) of this 142
section that the provisions of this division do not apply to the 143
officer. 144

(E) Nothing in this section affects the duties of an 145
officer who acts in any capacity other than the officer's 146
capacity as an officer. Nothing in this section affects any 147
contractual obligations of an officer to the corporation. 148

Sec. 1705.031. The provisions of sections 1705.01 to 149
1705.52 and section 1705.61 of the Revised Code apply to all 150
limited liability companies formed under this chapter whether 151
the limited liability company has one or more members or whether 152
it is formed by a filing under section 1705.04 of the Revised 153
Code or by merger, consolidation, or conversion. 154

Sec. 1705.081. (A) Except as otherwise provided in 155
~~division~~divisions (B) and (C) of this section, an operating 156
agreement governs relations among members and between members, 157
any managers, and the limited liability company. A limited 158
liability company is bound by the operating agreement of its 159
member or members whether or not the limited liability company 160
executes the operating agreement. To the extent the operating 161
agreement does not otherwise provide, this chapter governs 162
relations among the members and between the members, any 163
managers, and the limited liability company. 164

(B) ~~The~~ Except as otherwise provided in division (C) of 165
this section, the operating agreement may not do any of the 166
following: 167

(1) Vary the rights and duties under section 1705.04 of 168
the Revised Code; 169

(2) Unreasonably restrict the right of access to books and 170
records under section 1705.22 of the Revised Code; 171

(3) Eliminate the duty of loyalty under division ~~(C)~~ (B) 172
of section 1705.161 of the Revised Code or division (B) of 173
section 1705.281 of the Revised Code, but the operating 174
agreement may identify activities that do not violate the duty 175
of loyalty, and all of the members or a number or percentage of 176
members specified in the operating agreement may authorize or 177
ratify, after full disclosure of all material facts, a specific 178
act or transaction that otherwise would violate the duty of 179
loyalty; 180

(4) Eliminate the duty of care under division ~~(C)~~ (B) of 181
section 1705.161 of the Revised Code or division (C) of section 182
1705.281 of the Revised Code, but the operating agreement may 183
prescribe the standards by which the duty is to be measured; 184

(5) Eliminate the obligation of good faith and fair 185
dealing under division (D) of section 1705.281 of the Revised 186
Code, but the operating agreement may prescribe the standards by 187
which the performance of the obligation is to be measured; 188

(6) Eliminate the duties of a manager under division (B) 189
of section 1705.29 of the Revised Code, but the articles or the 190
operating agreement may provide that a manager who is a member 191
of the limited liability company or who is serving as the 192
representative of a member owes to the limited liability company 193

and the other members only the duties that would be owed by the 194
member or may prescribe in writing the standards by which 195
performance is to be measured or identify activities that do not 196
violate the manager's duties; 197

(7) Eliminate the duties of an officer under section 198
1705.292 of the Revised Code, but the articles or the operating 199
agreement may provide that an officer who is a member of the 200
limited liability company or who is serving as the 201
representative of a member owes to the limited liability company 202
and the other members only the duties that would be owed by the 203
member or may prescribe in writing the standards by which 204
performance is to be measured or specify activities that do not 205
violate the officer's duties; 206

(8) Vary the requirement to wind up the limited liability 207
company's business in cases specified in division (A) or (B) of 208
section 1705.47 of the Revised Code; 209

~~(8)~~ (9) Restrict the rights of third parties under this 210
chapter. 211

(C) A written agreement, including a written operating 212
agreement, that modifies, waives, or eliminates the duty of 213
loyalty, the duty of care, or both for one or more members, 214
managers, or officers shall be given effect. 215

(D) It is the policy of this chapter, subject to the 216
limitations of divisions (B) and (C) of this section, to give 217
maximum effect to the principle of freedom of contract and to 218
the enforceability of operating agreements. Except as provided 219
in divisions (B) and (C) of this section, the default rules 220
relating to the rights and obligations between and among the 221
members, managers, and officers of a limited liability company 222

set forth in sections 1705.01 to 1705.52 and section 1705.61 of 223
the Revised Code may be modified by the operating agreement or 224
by the articles of organization. 225

Sec. 1705.161. (A) Upon a member's withdrawal from a 226
limited liability company, the member's right to participate in 227
the management and conduct of the limited liability company's 228
business terminates. 229

~~(B) Upon a member's withdrawal, the member's duty of~~ 230
~~loyalty under division (B) (3) of section 1705.281 of the Revised~~ 231
~~Code terminates.~~ 232

~~(C) Upon a member's withdrawal, a member's duty of loyalty~~ 233
~~under ~~divisions~~ division (B) ~~(1) and (2)~~ of section 1705.281 of~~ 234
~~the Revised Code and duty of care under division (C) of section~~ 235
~~1705.281 of the Revised Code continue only with regard to~~ 236
~~matters arising and events occurring before the member's~~ 237
~~withdrawal.~~ 238

Sec. 1705.281. (A) The only fiduciary duties a member owes 239
to a limited liability company and the other members are the 240
duty of loyalty and the duty of care set forth in divisions (B) 241
and (C) of this section. 242

(B) A member's duty of loyalty to the limited liability 243
company and the other members is limited to the following: 244

(1) To account to the limited liability company and hold 245
as trustee for the limited liability company any property, 246
profit, or benefit derived by the member in the conduct and 247
winding up of the limited liability company's business or 248
derived from a use by the member of the limited liability 249
company's property, including the appropriation of a limited 250
liability company opportunity; 251

(2) ~~To~~ Either to satisfy the requirements of division (A) 252
(1) (a), (b), or (c) of section 1705.31 of the Revised Code or 253
else to refrain from dealing with the limited liability company 254
in the conduct or winding up of the limited liability company's 255
business as or on behalf of a party having an interest adverse 256
to the limited liability company. 257

~~(3) To refrain from competing with the limited liability~~ 258
~~company in the conduct of the limited liability company's~~ 259
~~business before the dissolution of the limited liability~~ 260
~~company.~~ 261

(C) A member's duty of care to the limited liability 262
company in the conduct and winding up of the limited liability 263
company's business is limited to refraining from engaging in 264
grossly negligent or reckless conduct, intentional misconduct, 265
or a knowing violation of law. 266

(D) A member shall discharge duties to the limited 267
liability company and the other members pursuant to this chapter 268
or under the operating agreement and shall exercise any rights 269
consistent with the obligation of good faith and fair dealing. 270

(E) A member does not violate a duty or obligation under 271
this chapter or under the operating agreement merely because the 272
member's conduct furthers the member's own interest. 273

(F) ~~A~~ If a member may lend money to and transact other 274
~~business with the limited liability company and as to each loan~~ 275
has satisfied the requirements of division (A) (1) (a), (b), or 276
(c) of section 1705.31 of the Revised Code with respect to a 277
contract, action, or transaction, the rights and obligations of 278
the member with respect to that contract, action, or transaction 279
are the same as those of a person who is not a member, subject 280

to other applicable law. 281

(G) This section applies to a person winding up the 282
limited liability company's business as the personal or legal 283
representative of the last surviving member as if the person 284
were a member. 285

Sec. 1705.291. A limited liability company may have 286
officers. No officers are required for a limited liability 287
company. 288

Sec. 1705.292. (A) Unless either a written operating 289
agreement for the limited liability company or a written 290
agreement with an officer establishes additional fiduciary 291
duties or the duties of an officer have been modified, waived, 292
or eliminated as contemplated by section 1705.081 of the Revised 293
Code, the only fiduciary duties of an officer to the limited 294
liability company or its members are the following: 295

(1) If the individual is a member of the limited liability 296
company or serving as the representative of a member and the 297
individual is not a manager of the limited liability company, 298
then the individual owes the duties that would be owed by a 299
member. 300

(2) If the individual is a member of the limited liability 301
company or serving as the representative of a member and the 302
individual is a manager of the limited liability company and in 303
that capacity owes the duties that would be owed by a member, 304
then the individual owes the duties that would be owed by a 305
member. 306

(3) If divisions (A) (1) and (2) of this section do not 307
apply, the individual owes to the limited liability company the 308
duties of an officer set forth in division (B) of this section. 309

(B) An officer of a limited liability company shall 310
perform the officer's duties in good faith, in a manner the 311
officer reasonably believes to be in or not opposed to the best 312
interests of the limited liability company, and with the care 313
that an ordinarily prudent person in a like position would use 314
under similar circumstances. 315

(C) For purposes of division (B) of this section, both of 316
the following apply: 317

(1) An officer of a limited liability company shall not be 318
found to have violated the officer's duties under this section 319
unless it is proved by clear and convincing evidence in any 320
action brought against the officer that the officer has not 321
acted in good faith, in a manner the officer reasonably believes 322
to be in or not opposed to the best interests of the limited 323
liability company, or with the care that an ordinarily prudent 324
person in a like position would use under similar circumstances. 325

(2) An officer shall not be considered to be acting in 326
good faith if the officer has knowledge concerning the matter in 327
question that would cause reliance on information, opinions, 328
reports, or statements that are prepared or presented by any of 329
the persons described in section 1705.30 of the Revised Code to 330
be unwarranted. 331

(D) An officer shall be liable in damages for a violation 332
of the officer's duties under division (B) of this section only 333
if it is proved by clear and convincing evidence in a court of 334
competent jurisdiction that the officer's action or failure to 335
act involved an act or omission undertaken with deliberate 336
intent to cause injury to the limited liability company or 337
undertaken with reckless disregard for the best interests of the 338
company. This division does not apply if, and only to the extent 339

that, at the time of an officer's act or omission that is the 340
subject of complaint, either of the following is true: 341

(1) The articles or the operating agreement of the limited 342
liability company state by specific reference to division (D) of 343
this section that the provisions of this division do not apply 344
to the limited liability company. 345

(2) A written agreement between the officer and the 346
limited liability company states by specific reference to 347
division (D) of this section that the provisions of this 348
division do not apply to the officer. 349

(E) Nothing in this section affects the duties of an 350
officer who acts in any capacity other than the officer's 351
capacity as an officer. Nothing in this section affects any 352
contractual obligations of an officer to the limited liability 353
company. 354

Sec. 1705.30. In performing his the duties to or 355
exercising his the authority on behalf of a limited liability 356
company, a member ~~or~~, manager, or officer of a limited 357
liability company is entitled to rely on information, opinions, 358
reports, or statements, including, but not limited to, financial 359
statements and other financial data, that are prepared or 360
presented by any of the following persons: 361

(A) One or more members, managers, officers, or employees 362
of the company who the member ~~or~~, manager, or officer 363
reasonably believes are reliable and competent in the matters 364
prepared or presented; 365

(B) Counsel, public accountants, or other persons as to 366
matters that the member ~~or~~, manager, or officer reasonably 367
believes are within the person's professional or expert 368

competence. 369

Sec. 1705.48. Except as otherwise provided by this chapter 370
or any other provision of the Revised Code, including, but not 371
limited to, sections 3734.908, 5739.33, 5743.57, 5747.07, and 372
5753.02 of the Revised Code, all of the following apply: 373

(A) The debts, obligations, and liabilities of a limited 374
liability company, whether arising in contract, tort, or 375
otherwise, are solely the debts, obligations, and liabilities of 376
the limited liability company. 377

(B) ~~Neither the members of the limited liability company~~ 378
~~nor any managers~~ No member, manager, or officer of the a limited 379
liability company ~~are~~ is personally liable to satisfy any 380
judgment, decree, or order of a court for, or ~~are~~ is personally 381
liable to satisfy in any other manner, a debt, obligation, or 382
liability of the company solely by reason of being a member ~~or,~~ 383
manager, or officer of the limited liability company. 384

(C) The failure of a limited liability company or any of 385
its members, managers, or officers to observe any formalities 386
relating to the exercise of the limited liability company's 387
powers or the management of its activities is not a factor to 388
consider in, or a ground for, imposing liability on the members, 389
managers, or officers for the debts, obligations, or other 390
liabilities of the company. 391

(D) Nothing in this chapter affects any personal liability 392
of ~~a any~~ member ~~of a limited liability company or,~~ any manager, 393
or any officer of a limited liability company for the member's 394
~~or,~~ manager's, or officer's own actions or omissions. 395

~~(D)~~ (E) This chapter does not affect any statutory or 396
common law of this or another state that pertains to the 397

relationship between an individual who renders a professional 398
service and a recipient of that service, including, but not 399
limited to, any contract or tort liability arising out of acts 400
or omissions committed or omitted during the course of rendering 401
the professional service. 402

Section 2. That existing sections 1701.56, 1701.64, 403
1705.081, 1705.161, 1705.281, 1705.30, and 1705.48 of the 404
Revised Code are hereby repealed. 405