

# AN ACT

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.

(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.

(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.

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.

(B) Unless the articles or the regulations otherwise provide, and subject to the exceptions, applicable during an 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 competent in the matters prepared or presented;

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

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

(1) In any action brought against an officer, the officer shall not be found to have violated the officer's duties under division (B) of this section unless it is proved by clear and convincing evidence

that the officer has not acted in good faith, in a manner the officer reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) Eliminate the duties of a manager under division (B) of section 1705.29 of the Revised Code, but the articles or the operating agreement may provide that a manager who is a member of the limited liability company or who is serving as the representative of a member owes to the limited liability company and the other members only the duties that would be owed by the member or may prescribe in writing the standards by which performance is to be measured or identify activities that do not violate the manager's duties;

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

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

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

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

(D) It is the policy of this chapter, subject to the limitations of divisions (B) and (C) of this section, to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. Except as provided in divisions (B) and (C) of this section, the default rules relating to the rights and obligations between and among the members, managers, and officers of a limited liability company set forth in sections 1705.01 to 1705.52 and section 1705.61 of the Revised Code may be modified by the operating agreement or by the articles of organization.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) If divisions (A)(1) and (2) of this section do not apply, the individual owes to the limited

liability company the duties of an officer set forth in division (B) of this section.

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

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

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

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

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

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

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

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

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

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

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

Sec. 1705.48. Except as otherwise provided by this chapter or any other provision of the Revised Code, including, but not limited to, sections 3734.908, 5739.33, 5743.57, 5747.07, and

5753.02 of the Revised Code, all of the following apply:

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

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

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

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

~~(D)~~ (E) This chapter does not affect any statutory or common law of this or another state that pertains to the relationship between an individual who renders a professional service and a recipient of that service, including, but not limited to, any contract or tort liability arising out of acts or omissions committed or omitted during the course of rendering the professional service.

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

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_\_\_

Approved \_\_\_\_\_, 20\_\_\_\_

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*Governor.*



S. B. No. 181

131st G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

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*Director, Legislative Service Commission.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the \_\_\_\_ day of \_\_\_\_\_, A. D. 20 \_\_\_\_.

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*Secretary of State.*

File No. \_\_\_\_\_ Effective Date \_\_\_\_\_