Supreme Court of Ohio Clerk of Court - Filed February 16, 2016 - Case No. 2014-1836

In the
Supreme Court of Ohio

Patton R. Corrigan, Appellant, vs. Joseph. W. Testa, Tax Commissioner of Ohio Appellee.	:	Case No. 2014-1836 On Appeal from the Ohio Board of Tax Appeals BTA Case No. 2012-3244

APPELLANT'S LIST OF ADDITIONAL AUTHORITIES TO BE RELIED UPON DURING ORAL ARGUMENT

J. DONALD MOTTLEY (0055164)
Taft Stettinius & Hollister LLP
65 E. State Street,
Columbus, OH 43215
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
mottley@taftlaw.com

Counsel for Appellant
Patton R. Corrigan

MICHAEL DEWINE (0009181)
Ohio Attorney General
BARTON A. HUBBARD* (0023141)
**Counsel of Record*
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 466-2941
Facsimile: (866) 513-0356
barton.hubbard@ohioattorneygeneral.gov

NOTICE PURSUANT TO S.CT.PRAC.R. 17.08

Pursuant to S.Ct.Prac. R. 17.08, Appellant, Patton R. Corrigan, hereby notifies the Court that he intends to rely during oral argument upon the following authorities which are not cited in the briefs filed with the Court:

Cases

Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015)

F.W. Woolworth Co. v. Taxation and Revenue Department of the State of NewMexico, 459 U.S. 961 (1982)

American Home Products v. Limbach, 49 Ohio St.3d 158, 495 N.E.2d 948 (1986)

Hillenmeyer v. Cleveland Bd. of Rev., 144 Ohio St.3d 165, 2015-Ohio-1623

Kemppel v. Zaino, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001)

R.H. Macy & Co. v. Lindley, 25 Ohio St.3d 218, 551 N.E.2d 201 (1990)

Saturday v. Cleveland Bd. of Rev., 142 Ohio St.3d 528, 2015-Ohio-1625

Statutes

26 U.S.C. (Internal Revenue Code) 7704*

R.C. 1701.59*

R.C. 1705.25*

R.C. 1705.281*

R.C. 1705.282*

R.C. 1705.29*

* Copy attached to this pleading.

Respectfully submitted,

/s J. Donald Mottley

J. DONALD MOTTLEY (0055164)
Taft Stettinius & Hollister LLP
65 E. State Street
Columbus, OH 43215
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
motley@taftlaw.com

Counsel for Appellant,
Patton R. Corrigan

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing APPELLANT'S LIST OF ADDITIONAL AUTHORITIES TO BE RELIED UPON DURING ORAL ARGUMENT, including attachments, was served, via email attachment, this 16th day of February, 2016, upon the following:

BARTON A. HUBBARD (0023141)
Assistant Attorney General
Counsel for Appellee,
Joseph W. Testa,
Tax Commissioner of Ohio
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
barton.hubbard@ohioattorneygeneral.gov

EDWARD J. BERNERT (0025808)
Counsel for Amicus Curiae, The Ohio Chamber of Commerce
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
ebernert@bakerlaw.com

/s J. Donald Mottley
J. DONALD MOTTLEY
Counsel for Appellant

NOTICE PURSUANT TO S.CT.PRAC.R. 17.08

Pursuant to S.Ct.Prac. R. 17.08, Appellant, Patton R. Corrigan, hereby notifies the Court that he intends to rely during oral argument upon the following authorities which are not cited in the briefs filed with the Court:

Cases

Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015)

F.W. Woolworth Co. v. Taxation and Revenue Department of the State of New Mexico, 459 U.S. 961 (1982)

American Home Products v. Limbach, 49 Ohio St.3d 158, 495 N.E.2d 948 (1986)

Hillenmeyer v. Cleveland Bd. of Rev., 144 Ohio St.3d 165, 2015-Ohio-1623

Kemppel v. Zaino, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001)

R.H. Macy & Co. v. Lindley, 25 Ohio St.3d 218, 551 N.E.2d 201 (1990)

Saturday v. Cleveland Bd. of Rev., 142 Ohio St.3d 528, 2015-Ohio-1625

Statutes

26 U.S.C. (Internal Revenue Code) 7704*

R.C. 1701.59*

R.C. 1705.25*

R.C. 1705.281*

R.C. 1705.282*

R.C. 1705.29*

* Copy attached to this pleading.

26 USC 7704: Certain publicly traded partnerships treated as corporations
Text contains those laws in effect on February 15, 2016

From Title 26-INTERNAL REVENUE CODE
Subtitle F-Procedure and Administration
CHAPTER 79-DEFINITIONS

Jump To:
Source Credit
References In Text
Amendments
Effective Date

§7704. Certain publicly traded partnerships treated as corporations

(a) General rule

For purposes of this title, except as provided in subsection (c), a publicly traded partnership shall be treated as a corporation.

(b) Publicly traded partnership

For purposes of this section, the term "publicly traded partnership" means any partnership if-

(1) interests in such partnership are traded on an established securities market, or

(2) interests in such partnership are readily tradable on a secondary market (or the substantial equivalent thereof).

(c) Exception for partnerships with passive-type income

(1) In general

Subsection (a) shall not apply to any publicly traded partnership for any taxable year if such partnership met the gross income requirements of paragraph (2) for such taxable year and each preceding taxable year beginning after December 31, 1987, during which the partnership (or any predecessor) was in existence. For purposes of the preceding sentence, a partnership shall not be treated as being in existence during any period before the 1st taxable year in which such partnership (or a predecessor) was a publicly traded partnership.

(2) Gross income requirements

A partnership meets the gross income requirements of this paragraph for any taxable year if 90 percent or more of the gross income of such partnership for such taxable year consists of qualifying income.

(3) Exception not to apply to certain partnerships which could qualify as regulated investment companies

This subsection shall not apply to any partnership which would be described in section 851(a) if such partnership were a domestic corporation. To the extent provided in regulations, the preceding sentence shall not apply to any partnership a principal activity of which is the buying and selling of commodities (not described in section 1221(a)(1)), or options, futures, or forwards with respect to commodities.

(d) Qualifying income

For purposes of this section-

(1) In general

Except as otherwise provided in this subsection, the term "qualifying income" means-

(A) interest,

(B) dividends,

(C) real property rents,

(D) gain from the sale or other disposition of real property (including property described in section 1221(a)(1)),

(E) income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber), industrial source carbon dioxide, or the transportation or storage of any fuel described in subsection (b), (c), (d), or (e) of section 6426, or any alcohol fuel defined in section 6426(b)(4)(A) or any biodiesel fuel as defined in

section 40A(d)(1),

(F) any gain from the sale or disposition of a capital asset (or property described in section 1231(b)) held for the production of income described in any of the foregoing subparagraphs of this paragraph, and

(G) in the case of a partnership described in the second sentence of subsection (c)(3), income and gains from commodities (not described in section 1221(a)(1)) or futures, forwards, and options with respect to commodities.

For purposes of subparagraph (E), the term "mineral or natural resource" means any product of a character with respect to which a deduction for depletion is allowable under section 611; except that such term shall not include any product described in subparagraph (A) or (B) of section 613(b)(7).

(2) Certain interest not qualified

Interest shall not be treated as qualifying income if-

(A) such interest is derived in the conduct of a financial or insurance business, or

(B) such interest would be excluded from the term "interest" under section 856(f).

(3) Real property rent

The term "real property rent" means amounts which would qualify as rent from real property under section 856(d) if-

(A) such section were applied without regard to paragraph (2)(C) thereof (relating to independent contractor requirements), and

(B) stock owned, directly or indirectly, by or for a partner would not be considered as owned under section 318(a)(3)(A) by the partnership unless 5 percent or more (by value) of the interests in such partnership are owned, directly or indirectly, by or for such partner.

(4) Certain income qualifying under regulated investment company or real estate trust provisions

The term "qualifying income" also includes any income which would qualify under section 851(b)(2)(A) or 856(c)(2).

(5) Special rule for determining gross income from certain real property sales

In the case of the sale or other disposition of real property described in section 1221(a)(1), gross income shall not be reduced by inventory costs.

(e) Inadvertent terminations

If-

(1) a partnership fails to meet the gross income requirements of subsection (c)(2),

(2) the Secretary determines that such failure was inadvertent,

(3) no later than a reasonable time after the discovery of such failure, steps are taken so that such partnership once more meets such gross income requirements, and

(4) such partnership agrees to make such adjustments (including adjustments with respect to the partners) or to pay such amounts as may be required by the Secretary with respect to such period,

then, notwithstanding such failure, such entity shall be treated as continuing to meet such gross income requirements for such period.

(f) Effect of becoming corporation

As of the 1st day that a partnership is treated as a corporation under this section, for purposes of this title, such partnership shall be treated as-

(1) transferring all of its assets (subject to its liabilities) to a newly formed corporation in exchange for the stock of the corporation, and

(2) distributing such stock to its partners in liquidation of their interests in the partnership.

(g) Exception for electing 1987 partnerships

(1) In general

Subsection (a) shall not apply to an electing 1987 partnership.

(2) Electing 1987 partnership

For purposes of this subsection, the term "electing 1987 partnership" means any publicly traded partnership if-

(A) such partnership is an existing partnership (as defined in section 10211(c)(2) of the Revenue Reconciliation Act of 1987),

(B) subsection (a) has not applied (and without regard to subsection (c)(1) would not have applied) to

such partnership for all prior taxable years beginning after December 31, 1987, and before January 1, 1998, and

(C) such partnership elects the application of this subsection, and consents to the application of the tax imposed by paragraph (3), for its first taxable year beginning after December 31, 1997.

A partnership which, but for this sentence, would be treated as an electing 1987 partnership shall cease to be so treated (and the election under subparagraph (C) shall cease to be in effect) as of the 1st day after December 31, 1997, on which there has been an addition of a substantial new line of business with respect to such partnership.

(3) Additional tax on electing partnerships

(A) Imposition of tax

There is hereby imposed for each taxable year on the income of each electing 1987 partnership a tax equal to 3.5 percent of such partnership's gross income for the taxable year from the active conduct of trades and businesses by the partnership.

(B) Adjustments in the case of tiered partnerships

For purposes of this paragraph, in the case of a partnership which is a partner in another partnership, the gross income referred to in subparagraph (A) shall include the partnership's distributive share of the gross income of such other partnership from the active conduct of trades and businesses of such other partnership. A similar rule shall apply in the case of lower-tiered partnerships.

(C) Treatment of tax

For purposes of this title, the tax imposed by this paragraph shall be treated as imposed by chapter 1 other than for purposes of determining the amount of any credit allowable under chapter 1 and shall be paid by the partnership. Section 6655 shall be applied to such partnership with respect to such tax in the same manner as if the partnership were a corporation, such tax were imposed by section 11, and references in such section to taxable income were references to the gross income referred to in subparagraph (A).

(4) Election

An election and consent under this subsection shall apply to the taxable year for which made and all subsequent taxable years unless revoked by the partnership. Such revocation may be made without the consent of the Secretary, but, once so revoked, may not be reinstated.

(Added Pub. L. 100–203, title X, §10211(a), Dec. 22, 1987, 101 Stat. 1330–403 ; amended Pub. L. 100–647, title II, §2004(f)(1), (3)–(5), Nov. 10, 1988, 102 Stat. 3602 , 3603; Pub. L. 105–34, title IX, §964(a), Aug. 5, 1997, 111 Stat. 892 ; Pub. L. 105–206, title VI, §6009(b)(1), July 22, 1998, 112 Stat. 812 ; Pub. L. 106–170, title V, §532(c)(2)(V)–(Y), Dec. 17, 1999, 113 Stat. 1931 ; Pub. L. 108–357, title III, §331(e), Oct. 22, 2004, 118 Stat. 1476 ; Pub. L. 110–343, div. B, title I, §116(a), title II, §208(a), Oct. 3, 2008, 122 Stat. 3831 , 3840.)

REFERENCES IN TEXT

Section 10211(c)(2) of the Revenue Reconciliation Act of 1987, referred to in subsec. (g)(2)(A), probably means section 10211(c)(2) of the Revenue Act of 1987, title X of Pub. L. 100–203, which is set out as a note below.

AMENDMENTS

2008-Subsec. (d)(1)(E). Pub. L. 110–343, §208(a), substituted ", industrial source carbon dioxide, or the transportation or storage of any fuel described in subsection (b), (c), (d), or (e) of section 6426, or any alcohol fuel defined in section 6426(b)(4)(A) or any biodiesel fuel as defined in section 40A(d)(1)" for "or industrial source carbon dioxide".

Pub. L. 110–343, §116(a), inserted "or industrial source carbon dioxide" before comma at end.

2004-Subsec. (d)(4). Pub. L. 108–357 substituted "section 851(b)(2)(A)" for "section 851(b)(2)".

1999-Subsecs. (c)(3), (d)(1)(D), (G), (5). Pub. L. 106–170 substituted "section 1221(a)(1)" for "section 1221(1)".

1998-Subsec. (g)(3)(C). Pub. L. 105–206 inserted at end "and shall be paid by the partnership. Section 6655 shall be applied to such partnership with respect to such tax in the

same manner as if the partnership were a corporation, such tax were imposed by section 11, and references in such section to taxable income were references to the gross income referred to in subparagraph (A)".

1997-Subsec. (g). Pub. L. 105–34 added subsec. (g).

1988-Subsec. (c)(1). Pub. L. 100–647, §2004(f)(3), inserted at end "For purposes of the preceding sentence, a partnership shall not be treated as being in existence during any period before the 1st taxable year in which such partnership (or a predecessor) was a publicly traded partnership."

Subsec. (d)(1). Pub. L. 100–647, §2004(f)(4), inserted at end "For purposes of subparagraph (E), the term 'mineral or natural resource' means any product of a character with respect to which a deduction for depletion is allowable under section 611; except that such term shall not include any product described in subparagraph (A) or (B) of section 613(b)(7)."

Subsec. (d)(3). Pub. L. 100–647, §2004(f)(5), amended par. (3) generally. Prior to amendment, par. (3) read as follows: "The term 'real property rent' means amounts which would qualify as rent from real property under section 856(d) if such section were applied without regard to paragraph (2)(C) thereof (relating to independent contractor requirements)."

Subsec. (e)(4). Pub. L. 100–647, §2004(f)(1), inserted "or to pay such amounts" before "as may be required".

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–343, div. B, title I, §116(b), Oct. 3, 2008, 122 Stat. 3831 , provided that: "The amendment made by this section [amending this section] shall take effect on the date of the enactment of this Act [Oct. 3, 2008], in taxable years ending after such date."

Pub. L. 110–343, div. B, title II, §208(b), Oct. 3, 2008, 122 Stat. 3840 , provided that: "The amendment made by this section [amending this section] shall take effect on the date of the enactment of this Act [Oct. 3, 2008], in taxable years ending after such date."

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–357 applicable to taxable years beginning after Oct. 22, 2004, see section 331(h) of Pub. L. 108–357, set out as a note under section 469 of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106–170 applicable to any instrument held, acquired, or entered into, any transaction entered into, and supplies held or acquired on or after Dec. 17, 1999, see section 532(d) of Pub. L. 106–170, set out as a note under section 170 of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–206, title VI, §6009(b)(2), July 22, 1998, 112 Stat. 812 , provided that: "The second sentence of section 7704(g)(3)(C) of the 1986 Code (as added by paragraph (1)) shall apply to taxable years beginning after the date of the enactment of this Act [July 22, 1998]."

EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105–34, title IX, §964(b), Aug. 5, 1997, 111 Stat. 893 , provided that: "The amendment made by this section [amending this section] shall apply to taxable years beginning after December 31, 1997."

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective, except as otherwise provided, as if included in the provisions of the Revenue Act of 1987, Pub. L. 100–203, title X, to which such amendment relates, see section 2004(u) of Pub. L. 100–647, set out as a note under section 56 of this title.

EFFECTIVE DATE

Pub. L. 100–203, title X, §10211(c), Dec. 22, 1987, 101 Stat. 1330–405 , as amended by Pub. L. 100–647, title II, §2004(f)(2), Nov. 10, 1988, 102 Stat. 3602 , provided that:

"(1) In general.-The amendments made by this section [enacting this section] shall apply-

"(A) except as provided in subparagraph (B), to taxable years beginning after December 31, 1987, or

"(B) in the case of an existing partnership, to taxable years beginning after December 31, 1997.

"(2) Existing partnership.-For purposes of this subsection-

"(A) In general.-The term 'existing partnership' means any partnership if-

"(i) such partnership was a publicly traded partnership on December 17, 1987,

"(ii) a registration statement indicating that such partnership was to be a publicly traded partnership was filed with the Securities and Exchange Commission with respect to such partnership on or before such date, or

"(iii) with respect to such partnership, an application was filed with a State regulatory commission on or before such date seeking permission to restructure a portion of a corporation as a publicly traded partnership.

"(B) Special rule where substantial new line of business added after december 17, 1987.-A partnership which, but for this subparagraph, would be treated as an existing partnership shall cease to be treated as an existing partnership as of the 1st day after December 17, 1987, on which there has been an addition of a substantial new line of business with respect to such partnership.

"(C) Coordination with passive-type income requirements.-In the case of an existing partnership, paragraph (1) of section 7704(c) of the Internal Revenue Code of 1986 (as added by this section) shall be applied by substituting for 'December 31, 1987' the earlier of-

"(i) December 31, 1997, or

"(ii) the day (if any) as of which such partnership ceases to be treated as an existing partnership by reason of subparagraph (B)."

1701.59 Authority of directors - bylaws.

(A) Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations. The selection of a time frame for the achievement of corporate goals shall be the responsibility of the directors.

(B) A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director 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. A director serving on a committee of directors is acting as a director.

(C) In performing a director's duties, a director 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 director reasonably believes are reliable and competent in the matters prepared or presented;

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

(3) A committee of the directors upon which the director does not serve, duly established in accordance with a provision of the articles or the regulations, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

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

(1) A director shall not be found to have violated the director's duties under division (B) of this section unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director 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, in any action brought against a director, including actions involving or affecting any of the following:

(a) A change or potential change in control of the corporation, including a determination to resist a change or potential change in control made pursuant to division (F)(7) of section 1701.13 of the Revised Code;

(b) A termination or potential termination of the director's service to the corporation as a director;

(c) The director's service in any other position or relationship with the corporation.

(2) A director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the persons described in divisions (C)(1) to (3) of this section to be unwarranted.

(3) Nothing contained in this division limits relief available under section 1701.60 of the Revised Code.

(E) A director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director'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. Nothing contained in this division affects the liability of directors under section 1701.95 of the Revised Code or limits relief available under section 1701.60 of the Revised Code. This division does not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this division that the provisions of this division do not apply to the corporation.

(F) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following:

(1) The interests of the corporation's employees, suppliers, creditors, and customers;

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(G) Nothing contained in division (D) or (E) of this section affects the duties of either of the following:

(1) A director who acts in any capacity other than the director's capacity as a director;

(2) A director of a corporation that does not have issued and outstanding shares that are listed on a national securities exchange or are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association, who votes for or assents to any action taken by the directors of the corporation that, in connection with a change in control of the corporation, directly results in the holder or holders of a majority of the outstanding shares of the corporation receiving a greater consideration for their shares than other shareholders.

Amended by 129th General AssemblyFile No.72, HB 48, §1, eff. 5/4/2012.

Effective Date: 03-17-2000

1705.25 Authority of managers.

(A) If the management of a limited liability company is reserved to its members, all of the following apply:

(1) Every member is an agent of the company for the purpose of its business, and the act of every member, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the member so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.

(2) Unless the act is authorized by the other members, an act of a member that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

(3) Unless authorized by the other members or unless the other members have abandoned the business, one or more but less than all of the members of a limited liability company have no authority to do any of the following:

(a) Assign the property of the company in trust for creditors or on the assignee's promise to pay the debts of the company;

(b) Dispose of the good will of the business of the company;

(c) Do any other act that would make it impossible to carry on the ordinary business of the company;

(d) Confess a judgment;

(e) Submit a claim or liability of the company to arbitration or reference.

(B) Except as provided in the operating agreement, if the management of a limited liability company is not reserved to its members, all of the following apply:

(1) Every manager is an agent of the company for the purpose of its business, and the act of every manager, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the manager so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.

(2) Unless it is authorized by the members, an act of a manager that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

(3) Unless authorized by the members or unless the limited liability company has dissolved, managers of the company have no authority to engage in any of the conduct listed in divisions (A)(3)(a) to (e) of this section.

(C) Except as otherwise provided in the operating agreement, a person who is both a manager and a member of a limited liability company has the rights and powers of a manager, is subject to the restrictions and liabilities of a manager, and, to the extent of his membership interest, has the rights and powers of a member and is subject to the restrictions and liabilities of a member.

Effective Date: 07-01-1994

1705.281 Members duties to LLC and other members.

(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 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 member may lend money to and transact other business with the limited liability company and as to each loan or transaction the rights and obligations of the member 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.

Added by 129th General AssemblyFile No.72, HB 48, §1, eff. 5/4/2012.

Note:

Committee Comment (2012)*

> This section defines the fiduciary duties owed by members to each other and to the limited liability company. Unless the operating agreement or other agreement creates additional duties, this is a complete and exclusive statement of the fiduciary duties of members. Defining default fiduciary duties by statute is consistent with Ohio corporate and partnership law. The language of this section is based on the comparable provision of Ohio's partnership law, § 1776.44. Subject to the limits of § 1705.081(B), these duties may be modified. Modifications are not required to be in

writing. *See Committee Comments (2012)* following Sections 1705.161 and 1705.282 ; *see also, Committee Comment (2012)* following Section 1705.29.

*Comments on 129th General Assembly, HB 48, from the Ohio State Bar Association Corporation Law Committee

1705.282 Duties of member manager.

(A) A manager of a limited liability company who was appointed in writing and has agreed in writing to serve as a manager and who is also a member or who is serving as the representative of a member owes to the limited liability company and the other members the duties of a manager.

(B) Except as otherwise provided in division (A) of this section, a manager of a limited liability company who is a member 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.

Added by 129th General AssemblyFile No.72, HB 48, §1, eff. 5/4/2012.

Note:

Committee Comment (2012)*

> This section defines the default rules for the duties owed by a member or member's representative who is serving as a manager. It does not alter the duties owed by a member in the member's capacity as a member. This section determines whether the default rule for a particular manager will be found in § 1705.29 or § 1705.281 ; whichever section applies, its provisions will state all the fiduciary duties, subject only to modification as permitted by § 1705.081(B) or additional duties created by the articles or the operating agreement.
>
> Division (A) establishes the rule that a member or a representative of a member who is appointed in writing and agrees in writing to serve as a manager owes the same duties as would be owed by any other manager. The general statement of those duties is in § 1705.29, but a manager's duties may be modified in writing within the limits set out in § 1705.081(B). When the writings required by division (A) of Section 1705.282 are not present, division (B) applies to set the default rule for the duties of the person serving as a manager. Under division (B), the default duties for a member or member's representative acting as a manager are the duties owed by the member. Those duties are set out in § 1705.281 but may be modified within the limits set out in § 1705.081(B). Variations of those duties are not required to be in writing.

*Comments on 129th General Assembly, HB 48, from the Ohio State Bar Association Corporation Law Committee

1705.29 Managers - powers and duties.

(A) If the operating agreement of a limited liability company provides for managers, then the business of the company shall be exercised by or under the direction of its managers, except to the extent applicable law or the operating agreement provides otherwise.

(B) If a manager's duties are not governed by division (B) of section 1705.282 of the Revised Code, then the only fiduciary duties a manager owes to the limited liability company are the duties to act in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the company, and with the care that an ordinarily prudent person in a similar position would use under similar circumstances.

(C) For purposes of division (B) of this section:

(1) A manager of a limited liability company shall not be found to have violated division (B) of this section unless it is proved, by clear and convincing evidence, in any action brought against the manager, including, but not limited to, an action involving or affecting a termination or potential termination of service to the company as a manager or service in any other position or relationship with the company, that the manager has not acted in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the company, or with the care that an ordinarily prudent person in a similar position would use under similar circumstances.

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

(3) Nothing in division (C) of this section limits relief available under section 1705.31 of the Revised Code.

(D) A manager of a limited liability company is liable in damages for any action that the manager takes or fails to take as a manager only if it is proved, by clear and convincing evidence, in a court with jurisdiction that the manager's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the company or undertaken with reckless disregard for the best interests of the company. Nothing contained in this division limits the relief available under section 1705.31 of the Revised Code. This division does not apply if and only to the extent that, at the time of the act or omission of a manager that is the subject of complaint, the articles of organization or the operating agreement of the company state by specific reference to this division that its provisions do not apply to the company.

Amended by 129th General AssemblyFile No.72, HB 48, §1, eff. 5/4/2012.

Effective Date: 07-01-1994

Note:

Committee Comment (2012)*

> The modifications to Division (B) clarify that the only fiduciary duties of a manager who is not subject to § 1705.282(B) are the duties set forth in Division (B) of this

section. The other modification is to be clear that the standard of § 1705.29(B) only applies when the manager is not subject to the standard of § 1705.282(B). This change makes this section part of a set of provisions that define, by statute, all the fiduciary duties owed by members and managers. *See*§§ 1705.281, 1705.282 . If done in writing, the duties of this section may be modified within the limits set out in § 1705.081(B).

*Comments on 129th General Assembly, HB 48, from the Ohio State Bar Association Corporation Law Committee