

# Indiana Nonprofit Corporation Act

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## INTRODUCTION

The new Indiana Nonprofit Corporation Act (INCA)<sup>1</sup> was the most significant development in Indiana corporation law during the survey period. The INCA supersedes the Indiana Not-for-Profit Corporation Act of 1971 (1971 Act).<sup>2</sup> This Article will compare the INCA with the 1971 Act, the Revised Model Nonprofit Corporation Act (Model Act)<sup>3</sup> promulgated by the Business Law Section of the American Bar Association, and the Indiana Business Corporation Law (IBCL).<sup>4</sup>

Although business, or for-profit corporations, have greater financial impact on the economic status of Americans as investors, business owners, workers, and consumers of goods and services, nonprofit organizations may play a more important role in our lives.<sup>5</sup> Nonprofit organizations include churches, political organizations and parties, fraternal organizations, trade associations, labor unions, condominium associations, neighborhood civic leagues,<sup>6</sup> a substantial majority of large American hospitals, and any number of worthwhile charities. Many of these nonprofit organizations are incorporated.

Corporation law underwent many reforms during the 1980s. The ABA Business Law Section promulgated the Revised Model Business Corporation Act (RMBCA) in 1984.<sup>7</sup> The RMBCA was the basis for

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1. IND. CODE §§ 23-17-1-1 to -30-4 (Supp. 1991).

2. IND. CODE §§ 23-7-1.1-1 to -66 (repealed 1991).

3. MODEL NONPROFIT CORP. ACT §§ 1.01 - 17.07 (1988). The Model Act was promulgated in 1987. See generally Elizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251 (1989). Professor Moody chaired the Subcommittee on the Model Nonprofit Corporation Act during most of the final drafting stage.

4. IND. CODE §§ 23-1-17-1 to -54-3 (1988).

5. See Howard L. Oleck, *Mixtures of Profit and Nonprofit Corporation Purposes and Operations*, 16 N. KY. L. REV. 225, 227-30 (1989) [hereinafter Oleck, *Mixtures*]. The terms "nonprofit" and "not-for-profit" are synonymous, although nonprofit is more commonly used today.

6. Americans are great joiners. Professor Oleck quotes Alexis de Tocqueville's observation that Americans are "forever forming associations" for "trade, political, literary and religious interests." *Id.* at 228 n.17 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1966)).

7. See MODEL BUSINESS CORP. ACT ANN. (1985). See generally 17 PAUL J. GALANTI, *INDIANA PRACTICE — BUSINESS ORGANIZATIONS* § 8.1 (1991).

the IBCL, but the two statutes differ in many significant respects.<sup>8</sup> This wave of business corporation law reform, coupled with developments relating to nonprofit corporations, prompted the promulgation of the Model Act in 1987.<sup>9</sup> The introduction to the Model Act notes the deficiencies of its predecessor, the 1964 Model Nonprofit Corporation Act. Among other things, the 1964 statute did not: (1) contain standards of care or loyalty for directors and officers of nonprofit corporations; (2) provide statutory immunity or protection for directors who acted properly in managing the affairs of the corporation when their stewardship was challenged; (3) provide conflict of interest rules; and (4) deal with such significant matters as derivative suits, transfers and purchases of memberships, or the resignation or termination of memberships.<sup>10</sup> The earlier statute was also silent on such significant matters as nonprofit corporations controlled by "delegates," and it did not deal adequately with self-perpetuating boards of directors or the delegation of authority by directors.<sup>11</sup>

The same observations could be applied to the 1971 Act. Although the statute was updated from time to time,<sup>12</sup> Indiana nonprofit organizations, like those in most states, needed a modern, flexible, state of the art statute representing current thinking about the law of nonprofit corporations. The INCA is such a statute. However, the statute is not immune from criticism, and in some respects, it deserves persons who are "members" of Indiana nonprofit corporations or who are benefited or served by one such organization.

### I. DRAFTING THE INCA

There was a clear need to make the laws regulating nonprofit corporations more flexible with respect to the rights, duties, and obligations of both members and managers. To some degree, the Model Act can be criticized for unduly favoring the interests of the managers of nonprofit corporations over the interests of members or those who are served by or are the beneficiaries of such organizations.<sup>13</sup> However, the Model Act's drafters struck a better balance between the interests of the various constituencies than did the INCA's drafters.

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8. See 17 GALANTI, *supra* note 7, § 8.1, at 458-59.

9. See MICHAEL G. HONE, INTRODUCTION TO REVISED MODEL NONPROFIT CORPORATION ACT xiii, xix (1988).

10. *Id.*

11. *Id.* at xx.

12. See 20 GALANTI, *supra* note 7, § 53.1. See generally John T. Baker, *Regulation of Not-For-Profit Corporations in Indiana*, 18 IND. L. REV. 777 (1985).

13. See Oleck, *Mixtures*, *supra* note 5, at 234-38, 244-46.

The problem, to the extent there really is a problem, arises because both statutes were drafted by "business lawyers."<sup>14</sup> This statement is not meant to disparage "business lawyers," but to question the wisdom of having lawyers responsible for the current generation of business corporation statutes also responsible for the statutes regulating "non-business" corporations.<sup>15</sup>

The observation that in contemporary American culture purely for-profit organizations might engage in nonprofit operations, and nonprofit organizations often engage in profit-generating operations to supplement donations or other sources of funds, might seem to justify having common drafters of both types of corporation statutes or even having the same statute apply to both business and nonprofit corporations. However, recent business corporation statutes such as the IBCL free corporate management from many traditional statutory constraints on conducting business affairs, with a concomitant lessening of their accountability to shareholders.<sup>16</sup> These statutes serve the needs of American businesses engaged in fierce global competition. However, it is not clear that the same approach is appropriate when applied to the relations between managers of nonprofit corporations and the members, contributors,

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14. The Model Act was drafted by a subcommittee of the ABA's Business Law Section. The INCA was drafted by the Indiana Corporation Law Survey Commission which is charged with considering recommendations concerning amendments to both the IBCL and the INCA. See IND. CODE § 23-1-54-3 (1988). See generally 17 GALANTI, *supra* note 7, § 8.16.

15. See Oleck, *Mixtures*, *supra* note 5, at 243-44. See also Harry G. Henn & Jeffery H. Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California Here We Come!*, 66 CORNELL L. REV. 1103, 1107 (1971). Professor Oleck in his treatise on nonprofit organizations, asserted that a committee not dominated by "corporate, finance, and business lawyers" might be the best source of a final draft of a nonprofit corporation statute. HOWARD L. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* 1189-90 (4th ed. 1980). He renewed this call in his commentary on the Revised Model Nonprofit Corporation Act. Oleck, *Mixtures*, *supra* note 5, at 243. He also posits that proper planning of a nonprofit corporation statute would "envisage stern supervision by public officials of nonprofit organizations, because of the certainty that privileged status — which nonprofit organizations have — will attract unprincipled exploiters who want the privileges but who do not intend to accept the concomitant burdens of public duty and *pro bono* selflessness." *Id.* at 244. He favors a nonprofit corporation statute drafted by a committee composed of theologians, anthropologists, psychologists, and persons from other nonlegal disciplines, with corporation and business lawyers relegated to a supporting tier. *Id.*

16. Moody, *supra* note 3, at 264-65, states that as a result of comments received on the Exposure Draft of the Model Act, optional § 2.02(b)(5) was added to the statute. This section allows provisions in the articles eliminating or limiting personal liability of directors to a nonprofit corporation or its members. This provision derives from § 102(b)(7) of the Delaware Corporation Act which allows similar provisions limiting liability of directors of business corporations. DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

supporters, or beneficiaries of such organizations. In fact, the nature of nonprofit corporations calls for more, rather than less, accountability from their stewards.<sup>17</sup> Even if potential personal liability of directors and officers justifies some relaxation of the standards for the managers of nonprofit corporations, there is some question whether the standards should be relaxed to the extent of modern nonprofit corporation statutes.<sup>18</sup>

Professor Oleck and others have argued that the standards should be raised, not lowered, and that business lawyers should not be the final arbiters of the law pertaining to "altruistic, voluntaristic, *pro bono* organizations—organizations whose purposes are supposed to be selfless, spiritual, and in the public service."<sup>19</sup> In the past, such organizations were subjected to different forms of regulation because of the fundamental differences between the goals and objectives of such organizations and those of business enterprises.<sup>20</sup> Nonprofit organizations were governed by rules appropriate to moral, social, political, charitable, or cultural purposes, rather than by rules appropriate for profit oriented enterprises. Whatever merits this argument enjoys, it is, however, a minority view, and business lawyers will continue to draft and revise nonprofit corporation statutes for the foreseeable future.

The Model Act's drafters decided early to track and parallel the RMBCA as much as possible unless the nature of nonprofit corporations or public policy reasons dictated otherwise.<sup>21</sup> Even a cursory glance at the INCA shows that its drafters followed the same approach, except that the INCA tracks the IBCL. This is important, because although the RMBCA attempts to strike a fair balance between management

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17. There is little support for the proposition that the directors of nonprofit corporations should be held to the standard expected of "trustees," an argument rejected by the court in *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (S.D.N.Y. 1974). However, many commentators have urged that the directors of charitable or public benefit corporations should be held to a higher fiduciary standard than the directors of nonprofit mutual benefit corporations such as fraternities. See *Baker*, *supra* note 12, at 818-19. The recent controversy over the salary and perquisites enjoyed by the president of the National United Way Organization, unfortunately, gives considerable substance to this concern.

18. See *Oleck*, *Mixtures*, *supra* note 5, at 244-46. A major reason for incorporating nonprofit organizations is to lessen or eliminate personal liability of members of the group for acts furthering the purposes of the organization. See generally 20 *GALANTI*, *supra* note 7, § 53.1; *Baker*, *supra* note 12, at 780.

19. See *Oleck*, *Mixtures*, *supra* note 5, at 243-44. See also *Henn & Boyd*, *supra* note 15, at 1107.

20. See *Oleck*, *Mixtures*, *supra* note 5, at 225.

21. See *HONE*, *supra* note 9, at xx. The numbering of Model Act sections, in fact, follow the analogous RMBCA provisions, even when the two statutes are substantively different.

interests and shareholder interests, the IBCL is more solicitous of management, particularly in publicly-held corporations.<sup>22</sup> Wholesale adoption of the IBCL philosophy therefore makes some substantive provisions of the INCA problematic compared to the more balanced, comparable provisions of the Model Act.

The IBCL does furnish an easy "model" or "form book" for drafting an Indiana nonprofit corporation statute, and the similarity between the two statutes simplifies the work of Indiana attorneys in that they do not have to be familiar with two statutes with disparate substantive provisions and structure. Ease of drafting should not, however, be a major consideration in fashioning an important statute. Furthermore, Indiana attorneys can easily master two distinct corporation statutes.

This criticism does not gainsay the wisdom of using a modern business corporation statute such as the IBCL as a guide in drafting the "mechanical" aspects of a nonprofit corporation statute. Modern business corporation statutes simplify the incorporation process,<sup>23</sup> and there is no reason that the process should be significantly more difficult for nonprofit corporations. It is important, however, that the process differ in one major respect. Both the Model Act<sup>24</sup> and the INCA<sup>25</sup> recognize that not all nonprofit corporations are alike, and that they may require individualized provisions in the articles of incorporation. These requirements force incorporators to consider and evaluate the nature and essence of the nonprofit corporation being formed at the outset.<sup>26</sup>

## II. COMPARATIVE ANALYSIS OF THE INCA

### A. *The Three Types of Nonprofit Corporation*

Nonprofit corporations fall into three basic categories reflecting the variety of activities in which such corporations engage.<sup>27</sup> There are public benefit corporations, mutual benefit corporations, and religious corporations.<sup>28</sup> Public benefit corporations operate for public or charitable

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22. See 17 GALANTI, *supra* note 7, § 8.1.

23. See *id.* § 10.1.

24. MODEL NONPROFIT CORP. ACT § 2.02(a)(2) (1988). See *id.* § 2.02 official cmt. See generally HONE, *supra* note 9, at xxi-xxxii.

25. IND. CODE § 23-17-3-2(a) (Supp. 1991).

26. See HONE, *supra* note 9, at xxxi-xxxii.

27. See *id.* at xxi-xxx. See also MOODY, *supra* note 3, at 259-60, 266-67.

28. The statutes recognize one subcategory of nonprofit corporations by including provisions relating to private foundations as defined in the Internal Revenue Code. IND. CODE § 23-17-25-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 1.50 (1988).

purposes and hold themselves out as "doing good works, benefiting society or improving the human condition."<sup>29</sup> Mutual benefit corporations benefit their members or groups of people they serve or represent.<sup>30</sup> Religious corporations are those operating primarily or exclusively for religious purposes.<sup>31</sup> The Model Act and the INCA apply different rules to the three types of corporations. Consequently, the articles of incorporation must specify whether the corporation will be a public benefit corporation, a mutual benefit corporation, or a religious corporation.<sup>32</sup>

Allowing the organizers of a nonprofit corporation to designate the type of organization being formed is a major change from prior nonprofit corporation law.<sup>33</sup> However, incorporators are not free to choose any category they desire. For example, public benefit or religious corporations cannot follow the rules for mutual benefit corporations and obtain tax-exempt status. A mutual benefit corporation may make distributions to its members upon dissolution,<sup>34</sup> but a corporation cannot make distributions to its members upon dissolution and obtain tax-exempt status under Internal Revenue Code section 501(c)(3).<sup>35</sup>

The INCA and the Model Act both define three types of corporations, but their language differs.<sup>36</sup> In the INCA, a mutual benefit corporation means a domestic corporation that is formed as a mutual benefit corporation under the Act, designated as a mutual benefit corporation by another law, or is not a public benefit corporation or religious corporation.<sup>37</sup> The INCA defines a public benefit corporation as a domestic corporation that: (1) is formed as a public benefit corporation under the Act, designated a public benefit corporation by another law, is recognized as tax exempt under section 501(c)(3) of the Internal Revenue Code, or is otherwise organized for a public or charitable purpose; (2) is restricted in the distribution of assets on dissolution to similar or religious corporations; and (3) is not a religious corporation.<sup>38</sup> The INCA

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29. See HONE, *supra* note 9, at xxiv-xxviii.

30. See *id.* at xxviii-xxix.

31. Religious corporations are regulated less than other nonprofit corporations because of First Amendment issues. IND. CODE § 23-17-30-2 (Supp. 1991). See HONE, *supra* note 9, at xxix-xxx.

32. IND. CODE § 23-17-3-2(2) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.02(a)(2) (1988).

33. Nonprofit corporation statutes generally tended to apply a uniform set of rules to all nonprofit corporations. HONE, *supra* note 9, at xxi-xxii.

34. IND. CODE § 23-17-22-5(a)(7) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 14.06(a)(7) (1988).

35. See I.R.C. § 501(c)(3) (1988 & Supp. I 1989).

36. IND. CODE §§ 23-17-2-19, -23, -25 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 1.40(23), (28), (30) (1988).

37. IND. CODE § 23-17-2-19 (Supp. 1991).

38. *Id.* § 23-17-2-23.

defines a religious corporation as a domestic corporation formed as a religious corporation under the statute, designated as a religious corporation by another law, or organized primarily or exclusively for religious purposes.<sup>39</sup> The Model Act defines the three types of nonprofit corporations in terms of whether they are formed as such<sup>40</sup> or if in existence on the effective date of the statute in an adopting state, they are treated as such.<sup>41</sup>

### B. Management Accountability

Until recently, nonprofit corporation statutes did not establish standards of conduct for, or provide a means for ensuring the accountability of, the managers of nonprofit corporations.<sup>42</sup> Conversely, the statutes did not provide adequate protection to managers against the expenses attendant to litigation challenging their stewardship. As a result, the Model Act establishes general standards of conduct for directors similar to the standards for directors of business corporations under the RMBCA.<sup>43</sup> The INCA also provides standards of conduct for the directors of nonprofit corporations, but these standards are based on the provisions of the IBCL, so they are more favorable to the directors than the provisions of the Model Act.

Both statutes spell out the duties of directors.<sup>44</sup> The Model Act provides that directors are not liable to the corporation, any member, or any other person for any action or inaction as a director, if the director acted in compliance with the standards established by the statute.<sup>45</sup> The INCA incorporates IBCL section 23-1-35-1(e)(2) to impose liability on a director of a nonprofit corporation only if the director's "breach or failure to perform constitutes willful misconduct or recklessness."<sup>46</sup> The author, although recognizing the directors and officers liability crisis of the 1980s, believes the IBCL sets too low a standard for the directors of business corporations.<sup>47</sup>

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39. *Id.* § 23-17-2-25.

40. MODEL NONPROFIT CORP. ACT § 1.40(23), (28), (30) (1988).

41. *Id.* § 17.07.

42. See HONE, *supra* note 9, at xxxv-xxxvii. Professor Moody states that more attention was lavished on the Model Act provisions relating to directors than any other chapter. Moody, *supra* note 3, at 274-76.

43. MODEL BUSINESS CORP. ACT ANN. § 8.30 (1985).

44. IND. CODE § 23-17-13-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 8.30 (1988).

45. MODEL NONPROFIT CORP. ACT § 8.30(d) (1988). The Model Act contains an optional section permitting the articles of incorporation to limit or eliminate personal liability of directors.

46. IND. CODE § 23-17-13-1(d)(2) (Supp. 1991).

47. See 18 GALANTI, *supra* note 7, § 25.2. See generally J. Steven Rawlings, *Liability*

To whatever extent this view is valid, the standard of the business world is too lenient for many, if not most, nonprofit corporations. The IBCL standard might be appropriate for the directors of mutual benefit corporations in which the members maintain a degree of control over the directors akin to that enjoyed in theory by corporate shareholders. However, the standard is less appropriate, if not inappropriate, when applied to public benefit corporations and religious corporations encompassing a substantial degree of public trust and confidence. Such corporations may not have members who can police directors, and unlike the Model Act, the INCA limits the attorney general's oversight powers.<sup>48</sup>

The INCA is also more liberal with respect to the liability of directors for unlawful distributions than is the Model Act. The INCA tracks the IBCL, which imposes liability on directors for unlawful distributions only if their actions constitute wilful misconduct or recklessness.<sup>49</sup> Liability under the Model Act is possible if a director voting for or assenting to an unlawful distribution fails to discharge her duties in compliance with the standards of the statute.<sup>50</sup> Liability under the INCA for an unlawful distribution requires not only failure of the director to satisfy her statutory duty, but also wilful misconduct or recklessness.<sup>51</sup>

Both the INCA and the Model Act have extensive provisions relating to officers of nonprofit corporations.<sup>52</sup> The role of officers of nonprofit corporations might differ from the role of their counterparts in business corporations. For example, it is not uncommon for the title "president" of a nonprofit corporation to be bestowed on a major donor, while the day-to-day activities of the organization are run by an employee designated executive director or some similar title.<sup>53</sup> The INCA differs from the Model Act in two major respects. Following the IBCL pattern, the drafters deleted the Model Act provisions setting standards for officers.<sup>54</sup> The IBCL drafters thought that officer standards were inconsistent with the basic concept that officers are chosen by, report to, and are subject

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*of Officers and Directors: Extending the Safe Harbor to Nonprofit Corporate Statutory Law*, 16 N. KY. L. REV. 345 (1989); Daniel E. Tobergte, *Regulating the Nonprofit Corporation*, 16 N. KY. L. REV. 325 (1989).

48. See *infra* notes 110-13 and accompanying text.

49. IND. CODE § 23-17-13-4 (Supp. 1991).

50. MODEL NONPROFIT CORP. ACT §§ 8.30(d), 8.33 (1988).

51. IND. CODE § 23-17-13-4(a) (Supp. 1991). A director held liable for an unlawful distribution is entitled to contribution from other directors and from each person who received the distribution whether or not the person knew the distribution was improper. *Id.* § 23-17-13-4(b).

52. IND. CODE §§ 23-17-14-1 to -4 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 8.40-8.45 (1988).

53. See MODEL NONPROFIT CORP. ACT § 8.40 official cmt. (1988).

54. *Id.* § 8.42.



to the direction of the board of directors.<sup>55</sup> The drafters of the RMBCA<sup>56</sup> and the Model Act<sup>57</sup> found no such inconsistency and concluded that having a statutory standard of conduct for officers would provide guidance to nondirector officers exercising discretionary authority. The omission of the officer-conduct standard might be significant because the Model Act expressly recognizes the right of officers of religious corporations to rely on information and reports prepared by religious authorities.<sup>58</sup> The conduct of officers of Indiana nonprofit corporations will be judged by common-law agency and contract principles,<sup>59</sup> and it is not clear how far courts will go in allowing reliance on such reports. Hopefully, they will allow such reliance because it is unlikely that the INCA drafters intended to tighten the standards imposed on officers of nonprofit corporations by omitting statutory standards.

The INCA also deleted a Model Act provision whereby a contract signed by certain officers is not invalid as to the corporation because of lack of authority of the signing officers, absent actual knowledge as to the lack of authority of the other party to the contract.<sup>60</sup> The Model Act provision is a safe harbor, intended to protect third parties who rely on the signatures of the specified officers acting on behalf of a nonprofit corporation when authority of officers may be less than clear.<sup>61</sup> Under the INCA, third parties will have to rely on the common-law concept of apparent authority when, in fact, there is no actual authority.

### C. Officer Indemnification

The introductory comment to the indemnification provisions of the Model Act states that such provisions "as in all modern corporation enactments, are central to the Act."<sup>62</sup> There was considerable confusion and uncertainty whether nonprofit corporations could or should indemnify officers and directors from personal liability.<sup>63</sup> Some courts went so far as to hold that there was no right to indemnification in the absence of statutory authority.<sup>64</sup> The basic issue did not present a problem in Indiana because the 1971 Act authorized not-for-profit corporations

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55. IND. CODE § 23-1-36-2 official cmts. (1988).

56. See MODEL BUSINESS CORP. ACT ANN. § 8.42 official cmt. (1985).

57. See MODEL NONPROFIT CORP. ACT § 8.42 official cmt. (1988).

58. *Id.* § 8.42(b)(3).

59. See IND. CODE § 23-1-36-2 official cmts. (1988).

60. MODEL NONPROFIT CORP. ACT § 8.45 (1988).

61. See *id.* § 8.45 official cmt.

62. See *id.* subch. E, introductory cmt., at 239.

63. *Id.*

64. *Texas Soc'y v. Fort Bend Chapter*, 590 S.W.2d 156 (Tex. Civ. App. 1979).

to indemnify directors, officers, and agents<sup>65</sup> and to purchase director and officer liability insurance.<sup>66</sup> Initially, the indemnification provisions of the 1971 Act were based on the comparable provisions of the Indiana General Corporation Act, which preceded the IBCL.<sup>67</sup> They were amended in 1989 to track the indemnification provisions of the IBCL.<sup>68</sup> This pattern is continued in the INCA. Consequently, the indemnification provisions of the INCA are broader than the indemnification provisions of the Model Act, just as the indemnification provisions of the IBCL are broader than those of the RMBCA.

In discussing the indemnification provisions of the Model Act, Professor Hone notes that the problems that prompted broadened indemnification provisions in business corporation statutes now face nonprofit corporations.<sup>69</sup> However, the differences between business and nonprofit corporations justify different statutory indemnification rights. The power of shareholders of business corporations to sanction directors whose conduct is wrongful or carried out in bad faith justifies broad indemnification provisions. By contrast, more stringent statutory constraints must be imposed on corporate authority to indemnify directors and officers for those nonprofit corporations without members. To allow directors of nonprofit corporations total exoneration from the consequences of improper conduct "would violate tenets of public morality and trust."<sup>70</sup>

The Model Act balances the necessary protection of corporate officials, the nonprofit corporation itself, and the public by giving mandatory indemnification to directors in certain situations<sup>71</sup> and by limiting indemnification when the director or officer has breached a duty to the corporation.<sup>72</sup> The Model Act requires court approval for indemnification of directors in derivative actions and limits indemnification to the reasonable expenses incurred.<sup>73</sup> The Model Act also requires court approval for indemnification of a director found liable for having improperly received a personal benefit.<sup>74</sup>

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65. IND. CODE § 23-7-1.1-4(b)(9) (repealed 1991).

66. *Id.* § 23-7-1.1-4(b)(10) (repealed 1991).

67. *Id.* § 23-1-2-2(b)(9), (10) (repealed 1991).

68. *Id.* §§ 23-7-1.1-69 to -77 (repealed). See generally 19 GALANTI, *supra* note 7, ch. 26.

69. See MODEL NONPROFIT CORP. ACT subch. E, introductory cmt., at 239-40 (1988).

70. *Id.* at 240.

71. *Id.* § 8.52.

72. *Id.* § 8.51(d).

73. *Id.* § 8.54.

74. *Id.* § 8.54(2). If the director is adjudged liable, indemnification is also limited to reasonable expenses incurred.

The INCA followed the IBCL and eliminated these constraints. As a result, court approval is not required for indemnification of a director of a nonprofit corporation who has been held liable for receiving an improper personal benefit.<sup>75</sup> A director who can satisfy disinterested directors, a committee of directors, special legal counsel, or the corporation's members that he, although liable, met the INCA's director standards of conduct, is eligible for indemnification.<sup>76</sup> The INCA tracks the Model Act in requiring a nonprofit corporation to notify members in writing with or before the notice of the next annual meeting if it indemnifies or advances expenses to a director in connection with "a proceeding by or in the right of the corporation."<sup>77</sup> That requirement might impose limits on liberal indemnification of directors of nonprofit corporations with members, but has no impact on a nonprofit corporation run by a self-perpetuating board of directors. This is a situation in which simply adopting IBCL indemnification provisions disserves the public interest.

#### D. Conflicts of Interest

The Model Act also contains extensive conflict of interest provisions applicable to directors of nonprofit corporations.<sup>78</sup> The standards vary depending on the type of corporation. Directors of mutual benefit corporations are held to the RMBCA conflict of interest standard because such corporations are most like business corporations.<sup>79</sup> A higher standard than the business judgment rule was adopted for the directors of public benefit corporations and religious corporations because the public perceives that such corporations are trustworthy.<sup>80</sup> The drafters of the Model Act noted that contributors to public benefit corporations expect that their money will be used for the public good and not to benefit individual directors.<sup>81</sup> The Model Act's higher standard for directors of public benefit corporations ensures that this expectation is fulfilled.<sup>82</sup>

The drafters of the INCA rejected this distinction in setting standards for directors. The INCA applies the conflict of interest standard of the IBCL to the directors of *all three types* of nonprofit corporations.<sup>83</sup>

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75. See generally 18 GALANTI, *supra* note 7, §§ 26.3, 26.5.

76. IND. CODE § 23-17-16-12 (Supp. 1991).

77. *Id.* § 23-17-27-7; MODEL NONPROFIT CORP. ACT § 16.21 (1988).

78. MODEL NONPROFIT CORP. ACT § 8.31 (1988).

79. HONE, *supra* note 9, at xxxvi (1988).

80. *Id.* at xxxvi-xxxvii.

81. *Id.* at xxvi.

82. *Id.*

83. IND. CODE § 23-17-13-2 (Supp. 1991). The actual wording of this section does differ from the language of the comparable IBCL provision, IND. CODE § 23-1-35-2 (1988). See generally 18 GALANTI, *supra* note 7, § 25.5 (1991).

Thus, any conflict of interest transaction is not void or voidable if: (1) it is approved by a disinterested majority of directors when the corporation has no members; (2) is approved by the members when the corporation has members; or (3) when the transaction is fair and reasonable to the corporation.<sup>84</sup> To avoid a situation which, at a minimum, would create the appearance of impropriety, the Model Act provides an option for a corporation to obtain judicial or attorney general approval of a conflict of interest transaction for public benefit corporations and religious corporations.<sup>85</sup>

The Model Act contains an optional provision intended to ensure that a majority of the directors of public benefit corporations do not have a built-in conflict of interest by limiting the number of directors who are financially interested persons.<sup>86</sup> The drafters made the provision optional because many committee members felt it would impose an undue burden on such corporations without effectively preventing intentional abuses.<sup>87</sup> The INCA's drafters did not adopt this provision.

#### *E. Oversight Authority*

The drafters of the Model Act realized that previous nonprofit corporation statutes lacked effective oversight authority, particularly with respect to public benefit corporations.<sup>88</sup> The directors of a nonprofit corporation might be unwilling to sue a fellow director, and there might not be adequate incentive for members of public benefit corporations, if the corporation has members, to exercise whatever oversight powers they possess to hold directors accountable for the expenditure of corporate funds.

The response of the Model Act's drafters to this deficiency was to give the attorney general of an adopting state broad oversight powers over public benefit corporations. This provision, which represents a major departure from prior nonprofit corporation statutes, protects the interests of persons connected with public benefit corporations, such as financial donors.<sup>89</sup>

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84. IND. CODE § 23-17-13-2 (Supp. 1991).

85. MODEL NONPROFIT CORP. ACT § 8.31(b)(2) (1988).

86. *Id.* § 8.13.

87. *See id.* § 8.13 official cmt. Professor Oleck was particularly distressed with this provision because it legalizes rather than prohibits conflicts of interest. Oleck, *Mixtures*, *supra* note 5, at 246.

88. MODEL NONPROFIT CORP. ACT §§ 1.70, 6.30, 8.10 (1988). *See HONE*, *supra* note 9, at xxvii.

89. *See MODEL NONPROFIT CORP. ACT* § 1.70 official cmt. (1988). *See also HONE*, *supra* note 9, at xxvii.

The INCA's drafters rejected the Model Act's oversight approach and provided only limited state oversight of nonprofit corporations by the attorney general and the secretary of state. This decision is questionable. It can be asserted that granting the Indiana attorney general oversight authority is an unwarranted expansion of prior Indiana law as reflected in the 1971 Act.<sup>90</sup> However, to do so ignores the observation that the absence of such authority from the previous generation of statutes in part prompted the revision of the 1964 Model Act.

For example, if a court concludes that removal of a director is in the best interest of the corporation, the Model Act gives the attorney general the authority to seek judicial removal of directors of public benefit corporations who have engaged in fraudulent or dishonest conduct or who have grossly abused their authority or discretion.<sup>91</sup> The INCA authorizes judicial removal of directors in an action brought by the corporation or by ten percent of the members,<sup>92</sup> but does not authorize the attorney general to bring such an action. Obviously, this is a major loophole for directors of nonprofit corporations *without* members.

The INCA, unlike the Model Act, does not authorize the attorney general of an adopting state to request court-ordered meetings of public benefit corporations.<sup>93</sup> The INCA also omits the Model Act's general requirement that the attorney general be given notice of the commencement of any proceeding by another person that the attorney general could have brought.<sup>94</sup> Even more significant is the omission of the attorney general's authority to bring an action against a director for breach of a duty of care or loyalty.<sup>95</sup>

The Model Act limits the right of public benefit corporations to merge unless the attorney general is notified.<sup>96</sup> Although the INCA confers no general oversight power, it does require notification of the attorney general when court approval of a merger is required.<sup>97</sup> Public benefit corporations and religious corporations must give written notice to the attorney general before they sell, lease, or otherwise dispose of all or

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90. The drafter's intended to exclude "major policy changes or controversial provisions" from the INCA. Constance J. Godvia, *Overview of Indiana Nonprofit Act of 1991*, NONPROFIT CORPORATIONS 1991, at 3 (1991) (ICLEF). This is an ironic statement from the chairperson of the Corporate Law Survey Commission considering how much the INCA changes prior law.

91. MODEL NONPROFIT CORP. ACT § 8.10(a) (1988).

92. IND. CODE § 23-17-12-13 (Supp. 1991).

93. MODEL NONPROFIT CORP. ACT § 7.03(a) (1988).

94. *Id.* § 1.70.

95. *Id.* §§ 1.70, 3.04(c), 6.30(c).

96. *Id.* § 11.02(a).

97. IND. CODE § 23-17-19-2(a) (Supp. 1991).

substantially all of their property.<sup>98</sup> They must also notify the attorney general if they intend to dissolve.<sup>99</sup>

In fact, the drafters of the INCA reduced the oversight of nonprofit corporations compared to the 1971 Act. The 1971 Act gave the secretary of state substantial oversight authority to at least ensure that the interests of those affected by nonprofit corporations were protected. For example, the 1989 changes to the director accountability provisions of the 1971 Act<sup>100</sup> were balanced by subjecting the nonprofit corporation itself to remedial sanctions for defective director performance.<sup>101</sup> Section 23-7-1.1-63 of the 1971 Act authorized the secretary of state to refuse to file papers submitted by not-for-profit corporations when the secretary of state decided that the corporation was: (1) not acting in good faith as a not-for-profit corporation; (2) was violating provisions of the statute or other laws; or (3) was engaging in conduct improperly beneficial to persons, firms, or corporations.<sup>102</sup> The 1971 Act also authorized the secretary of state to certify violations of the statute to the attorney general who was to bring an action to dissolve the corporation.<sup>103</sup> The INCA follows the Model Act<sup>104</sup> in that the attorney general can seek judicial dissolution of nonprofit corporations in certain circumstances.<sup>105</sup> However, it is unclear how the attorney general will learn of questionable conduct absent involvement by her office or by the secretary of state.

The INCA follows the Model Act and modern business corporation statutes such as the IBCL by casting the secretary of state in a "ministerial" role with respect to filing documents.<sup>106</sup> The 1971 Act required the secretary of state to determine if certain fundamental corporate documents of not-for-profit corporations, such as articles of incorporation, "conformed to law" before issuing a certificate of incorporation.<sup>107</sup> Under the INCA, the secretary of state only determines if a document submitted for filing complies with the statutory requirements for filing.<sup>108</sup> This change might not actually reduce effective state oversight authority over nonprofit corporations because it is unclear that examining

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98. MODEL NONPROFIT CORP. ACT § 12.02(g) (1988). The INCA omits this requirement.

99. *Id.* § 14.03.

100. IND. CODE § 23-7-1.1-10.5 (repealed 1991).

101. *Id.* § 23-7-1.1-66 (repealed 1991).

102. *Id.* § 23-7-1.1-63 (repealed 1991).

103. *Id.*

104. MODEL NONPROFIT CORP. ACT § 14.30 (1988).

105. IND. CODE § 23-17-24-1(a) (Supp. 1991).

106. *Id.* § 23-17-29-6. See MODEL NONPROFIT CORP. ACT § 1.25 official cmt. (1988).

107. IND. CODE § 23-7-1.1-19 (repealed 1991).

108. IND. CODE §§ 23-17-29-1, -6 (Supp. 1991).

the substance of documents before filing really protected the interests of those involved in not-for-profit corporations. The requirement might even have hindered the incorporation process. No objections can be raised to other steps that facilitate incorporation of nonprofit corporations by eliminating anachronistic requirements, such as having to specify the duration of a corporation in the articles when almost all corporations have perpetual duration.<sup>109</sup>

There are other situations in which the oversight authority of the attorney general or members of nonprofit corporations is more circumscribed under the INCA than under the Model Act. Under the Model Act, the attorney general must be notified when a derivative action concerning assets held in trust is filed against a mutual benefit corporation<sup>110</sup> and of all derivative actions against public benefit corporations.<sup>111</sup> The attorney general can intervene in such actions.<sup>112</sup> The INCA does not impose this notification requirement. This omission may not be too surprising because the INCA, unlike the Model Act,<sup>113</sup> does *not* expressly authorize derivative suits.

#### F. Derivative Suits

The court in *Kirtley v. McClelland*<sup>114</sup> recognized the right of a member of an Indiana not-for-profit corporation organized under the 1971 Act to bring a derivative action to remedy the defendant's breach of duty. However, it is possible that the INCA's drafters intended to eliminate this right.<sup>115</sup> The relevant provision of the Model Act<sup>116</sup> resolves most issues pertaining to derivative suits by directors and members of nonprofit corporations, and the IBCL also has express provisions relating to shareholder derivative suits.<sup>117</sup> In fact, the IBCL provision limits shareholder derivative suits more than the comparable RMBCA provision.<sup>118</sup> The INCA's conscious omission of a provision comparable to that in the

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109. Nonprofit corporations have perpetual duration unless otherwise limited in their articles. *Id.* § 23-17-4-2.

110. MODEL NONPROFIT CORP. ACT § 6.30(f) (1988).

111. *Id.*

112. *Id.* § 1.70(b)(2).

113. *Id.* § 6.30.

114. 562 N.E.2d 27 (Ind. Ct. App. 1990).

115. Certainly, the drafters rejected Professor Baker's suggestion that at "a bare minimum," the 1971 Act "should be amended to permit derivative actions my members of nonprofits." Baker, *supra* note 12, at 829.

116. MODEL NONPROFIT CORP. ACT § 6.30 (1988).

117. IND. CODE §§ 23-1-32-1 to -5 (1988). See generally 19 GALANTI, *supra* note 7, §§ 38.4, 38.6.

118. The IBCL litigation committee provision is more liberal than its RMBCA counterpart. See generally 19 GALANTI, *supra* note 7, § 38.19.

IBCL authorizing litigation committees to terminate groundless derivative actions and, therefore, protect corporate management, makes sense only if the drafters intended to overrule *Kirtley*.

The extensive director and officer indemnification provisions of the INCA<sup>119</sup> are based on the IBCL.<sup>120</sup> However, with respect to mandatory director indemnification, the INCA omits the reference to proceedings "by or in the right of the corporation" (meaning derivative suits). The IBCL also omits such language.<sup>121</sup> The drafters of the INCA omitted Model Act section 8.51(d) and (e),<sup>122</sup> which contains such language. The IBCL's drafters omitted comparable provisions contained in the RMBCA.<sup>123</sup> The Model Act and the RMBCA provisions therefore require directors to obtain court-approved indemnification in certain shareholder derivative suits.<sup>124</sup> The IBCL approach liberalizes the mandatory indemnification rights of directors of business corporations without casting doubt on the long recognized right of shareholders to bring derivative actions. One cannot be so sanguine with respect to the INCA. Perhaps the INCA's drafters felt that omitting the language requiring court approval of indemnification payments liberalizes the indemnification rights of directors of nonprofit corporations, as in the IBCL, and that a statutory provision on derivative actions was unnecessary in light of *Kirtley*. However, this is a problematic stance. Even the Model Act's drafters thought it wise to include statutory authority for such suits, and the right of members of nonprofit corporations to bring derivative actions is not as well established.

The evidence that the drafters intended to cast doubts on the viability of *Kirtley* is not conclusive. The INCA requires a nonprofit corporation to notify members if it indemnifies or advances expenses to a director in connection with "a proceeding by or in the right of the corporation,"<sup>125</sup> and this provision, at least by implication, supports derivative actions by members of nonprofit corporations. Of course, the INCA's drafters might have simply included the IBCL's indemnification language without considering its possible impact on the right of members and directors of nonprofit corporations to bring derivative actions. Hopefully, Indiana

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119. IND. CODE §§ 23-17-16-1 to -15 (Supp. 1991). See *supra* notes 75-87 and accompanying text.

120. IND. CODE §§ 23-1-37-1 to -15 (1988). See generally 19 GALANTI, *supra* note 7, § 26.1.

121. See IND. CODE § 23-1-37-8 official cmt. (1988).

122. MODEL NONPROFIT CORP. ACT § 8.51(d), (e) (1988).

123. MODEL BUSINESS CORP. ACT ANN. § 8.51(d), (e) (1985).

124. See IND. CODE § 23-1-37-8 official cmt. (1988).

125. IND. CODE § 23-17-27-7 (Supp. 1991). It is possible that this Model Act provision was inadvertently left in the INCA.



courts will continue to recognize derivative actions by members of nonprofit corporations. Otherwise, the INCA's drafters did not just reject Professor Baker's suggestion concerning derivative actions,<sup>126</sup> but in fact took away a valuable right given to members of nonprofit corporations by case law. This right is extremely important in holding the managers of nonprofit corporations accountable for their conduct.

### G. *Rights of Nonprofit Corporation Members*

The INCA defines a member to mean a person who, on more than one occasion, has the right to vote for the election of a director under the articles of incorporation or bylaws.<sup>127</sup> A person is not a member merely because of any rights she may have as a delegate, director, or designator of director.<sup>128</sup> The INCA differs from the 1971 Act in this respect. Under the 1971 Act, trustees or directors were members, along with those persons who signified their intent to be members, met the requirements of membership, and were accepted as members of the corporation.<sup>129</sup> A nonprofit corporation may operate through a self-perpetuating board of directors<sup>130</sup> or through delegates.<sup>131</sup>

Unlike prior law, the INCA and the Model Act recognize that not all nonprofit corporations will, or necessarily should, have "members" as that word is commonly used.<sup>132</sup> The Model Act's drafters noted that public benefit corporations may or may not have members depending on the nature of their activities and costs.<sup>133</sup> Whether religious corporations have members generally depends on the nature of the religion: congregational religions are likely to have members, whereas hierarchical religions are not.<sup>134</sup> Because most people benefited by mutual benefit corporations are entitled to vote for directors, they are "members" as defined in the statute.<sup>135</sup>

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126. See *supra* note 115.

127. IND. CODE § 23-17-2-17(a) (Supp. 1991).

128. *Id.* § 23-17-2-17(b).

129. IND. CODE § 23-7-1.1-2(g) (repealed 1991).

130. IND. CODE §§ 23-17-7-3, 23-17-12-4 (Supp. 1991).

131. *Id.* §§ 23-17-9-1, -2. Some nonprofit corporations, such as professional associations, hold representative assemblies or conventions at which delegates decide organizational and policy matters. Delegates may be, or have the authority of, members, but they are not members simply because they are delegates. *Id.* §§ 23-17-2-8, -17(b)(1). Delegates also may have the powers of directors. See MODEL NONPROFIT CORP. ACT § 6.40 official cmt. (1988).

132. HONE, *supra* note 9, at xxxii-xxxiii.

133. *Id.* at xxxiii.

134. *Id.*

135. *Id.*

For all three forms of nonprofit corporation, the articles of incorporation must specify whether the corporation will have members.<sup>136</sup> If it does, the statutes specify the rights enjoyed by the statutory members. The INCA contains extensive provisions regulating the rights, duties, and responsibilities of the members of nonprofit corporations.<sup>137</sup> The INCA provisions basically track the comparable provisions of the Model Act.<sup>138</sup> There are, however, several significant changes from the 1971 Act. The 1971 Act required that nonprofit corporations issue membership certificates to every member.<sup>139</sup> The INCA eliminates this requirement; however, it does not prohibit membership certificates, and nonprofit corporations with members customarily issue certificates even though not mandated by statute.<sup>140</sup> The Model Act is also silent on membership certificates. The 1964 version of the Model Act authorized, but did not require, that nonprofit corporations issue certificates evidencing membership.<sup>141</sup>

Nonprofit corporations with members sometimes have problems with meetings and voting by members. Both the Model Act and INCA address these problems, although the two statutes differ in some respects. For example, the INCA authorizes members to participate in annual or special meetings by means of telecommunication devices such as conference telephone calls, whereas the Model Act is silent.<sup>142</sup> Both statutes allow proxy voting by members,<sup>143</sup> but the Model Act limits the validity of a proxy to three years.<sup>144</sup> Both statutes provide that proxies are revocable, but the INCA omits Model Act provisions specifying conduct that automatically revokes a proxy appointment by a member.<sup>145</sup>

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136. IND. CODE § 23-17-3-2(5) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.02(a)(5) (1988).

137. IND. CODE §§ 23-17-7-1 to -11-9 (Supp. 1991). Both statutes make it clear that as such, a member of a nonprofit corporation is not personally liable for the acts, debts, liabilities, or obligations of the corporation other than dues, assessments, or fees. The statutes also require a creditor to have obtained a final judgment against the corporation before proceeding against a member. IND. CODE §§ 23-17-7-6 to -8 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 6.12 to -.14 (1988).

138. MODEL NONPROFIT CORP. ACT §§ 6.01 - 6.22 (1988).

139. IND. CODE § 23-7-1.1-7 (repealed 1991). The certificate was signed by the president or a vice president of the corporation and the secretary or an assistant secretary. The certificate designated the class of the member if the corporation had more than one class of members.

140. See 20 GALANTI, *supra* note 7, § 53.28.

141. MODEL NONPROFIT CORP. ACT § 11 (1964).

142. IND. CODE § 23-17-10-1(g) (Supp. 1991). The articles or bylaws must authorize this method.

143. *Id.* § 23-17-11-6; MODEL NONPROFIT CORP. ACT § 7.24 (1988).

144. MODEL NONPROFIT CORP. ACT § 7.24(b) (1988).

145. *Id.* § 7.24(e).

Many nonprofit corporations have low quorum requirements because of anticipated low membership turnout at meetings. The INCA provides that a quorum of members is ten percent of the members unless the statute, articles, or bylaws provides otherwise.<sup>146</sup> Thus, one person may be sufficient for a quorum. To prevent a few members from taking over an annual or regular meeting, the statute provides that only those matters described in the meeting notice may be voted on at an annual or regular meeting of members, unless one-third or more of the voting power is present in person or by proxy.<sup>147</sup>

The INCA and the Model Act significantly change prior law by authorizing a court to set temporary rules allowing a nonprofit corporation to hold meetings of members, directors, or delegates when it otherwise would be impossible or impractical to do so. For example, in the event of an unrealistically high quorum requirement or the absence of office holders, the provisions would enable the nonprofit corporation to conduct necessary functions.<sup>148</sup>

Both statutes provide for cumulative voting for electing directors,<sup>149</sup> and authorize the articles of incorporation or bylaws to provide for election on the basis of organizational unit, by region or geographic unit, preferential voting, or any other reasonable method.<sup>150</sup> As the drafters of the Model Act note, the method must be authorized in the articles or bylaws, and directors cannot be elected on an ad hoc basis.<sup>151</sup>

The INCA specifically provides that members may advance or loan money to the corporation, but places limits on what can be received by the member in return.<sup>152</sup> The INCA allows the repayment of loans or advances as an exception to the prohibited distributions.<sup>153</sup> There are no comparable provisions in the Model Act. The INCA also allows nonprofit corporation distributions to members or affiliates that are governmental entities or to another domestic or foreign nonprofit entity provided certain financial conditions are satisfied.<sup>154</sup> These distributions can apparently be made to members of public benefit corporations and religious

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146. IND. CODE § 23-17-11-4(a) (Supp. 1991).

147. *Id.* § 23-17-11-4(d).

148. *Id.* § 23-17-30-4; MODEL NONPROFIT CORP. ACT § 1.60 (1988).

149. IND. CODE § 23-17-11-7 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.25 (1988).

150. IND. CODE § 23-17-11-7 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.26 (1988).

151. MODEL NONPROFIT CORP. ACT § 7.26 official cmt. (1988).

152. IND. CODE § 23-17-7-9 (Supp. 1991).

153. *Id.* § 23-17-21-2(d).

154. *Id.* § 23-17-21-2(c). After the distribution, the corporation must be able to pay its debts as they become due in the usual course of the corporation's activities, and its total assets must at least equal its total liabilities.

corporations as well as to members of mutual benefit corporations. There are no comparable provisions in the Model Act.

Both the Model Act and the INCA contain extensive provisions relating to record keeping by nonprofit corporations and the right of members to inspect membership lists.<sup>155</sup> Again, the two statutes differ in significant respects. The Model Act permits members of nonprofit corporations to inspect and copy membership lists.<sup>156</sup> To prevent abuse, the Model Act places limits on the use of membership lists, but protects members by giving them access to membership lists in struggles for corporate control or internal policy disputes.<sup>157</sup> The INCA's member inspection rights<sup>158</sup> are based on the Model Act, but the inspection rights enjoyed by members of Indiana nonprofit corporations are less than those enjoyed by members of nonprofit corporations in states that follow the Model Act more closely. Again, the difference can be attributed to the IBCL because the member inspection rights under the INCA parallel the shareholder inspection rights provisions of the IBCL.<sup>159</sup>

For example, the Model Act provides that a membership list prepared for a meeting must be made available beginning two business days after notice of the meeting is given,<sup>160</sup> whereas it does not have to be made available until five business days before the meeting under the INCA.<sup>161</sup> Both statutes require a written demand before a member, a member's agent, or a member's attorney is entitled to inspect and copy a membership list, but *only* the Indiana statute requires that the attorney's authority be in writing.<sup>162</sup> A claim by an "attorney at law" that he or she is a member's "agent" and that oral authorization is sufficient will not succeed because it would negate what appears to be a conscious decision of the drafters of the INCA to raise a hurdle to inspection and copying of membership lists by members of the bar. However, it

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155. IND. CODE §§ 23-17-27-1 to -8 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 16.01-16.22 (1988).

156. IND. CODE §§ 23-17-11-1(b), -27-2(b) (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 7.20, 16.02(b) (1988).

157. See HONE, *supra* note 9, at xxxvii.

158. IND. CODE §§ 23-17-11-1(b), -27-2 (Supp. 1991).

159. See generally 19 GALANTI, *supra* note 7, § 33.10.

160. MODEL NONPROFIT CORP. ACT § 7.20(b) (1988).

161. IND. CODE § 23-17-11-1(b) (Supp. 1991).

162. *Id.* § 23-17-11-1(b)(3); MODEL NONPROFIT CORP. ACT §§ 7.20 (b) (1988). The IBCL also requires that an agent seeking to examine a shareholder list be authorized in writing. IND. CODE § 23-1-30-1(b) (1988). The drafters of the INCA probably intended the same for the INCA, and the wording of the general inspection provision of the INCA seems to indicate that an agent has to be authorized in writing. IND. CODE § 23-17-27-3(a) (Supp. 1991). However, Indiana Code § 23-17-11-1(b) does not expressly require this. Of course, a cautious member of a nonprofit corporation will give written authority to an agent, as well as to an attorney, to be on the safe side.

will only be an obstacle to those lawyers who have not read the INCA. Hopefully, most Indiana practitioners will ensure that their authority is in writing. Of course, the hurdle might be more of an obstacle to attorneys from other states who might be representing nonresident members of Indiana nonprofit corporations.

Both the INCA and the Model Act provide for court-ordered inspection and copying of membership lists prepared for membership meetings.<sup>163</sup> However, unlike the Model Act,<sup>164</sup> the INCA does not authorize a court to "summarily" order the inspection of a list. The drafters of the IBCL also deleted summary authority from the comparable shareholder list provision of that statute.<sup>165</sup>

A major difference between the two statutes is the impact of a refusal or failure to make available the list of members. The INCA provides that the unavailability of the list does not affect the validity of an action taken at a meeting.<sup>166</sup> The Model Act permits a court to invalidate a meeting after considering the equities if the corporation wrongfully refuses a member's request to inspect a membership list when the member has made a written demand to inspect and copy the list before the meeting.<sup>167</sup>

In effect, the INCA's approach means that a member, challenging the stewardship of those in control of a nonprofit corporation, will have no practical remedy if he is refused access to a membership list. It is unlikely that an action could be filed, and a court could order inspection and copying, other than summarily, in the five days between the date the list was supposed to be available and the meeting date. The drafters of the INCA also deleted the provision of the Model Act authorizing a court to order a corporation that has wrongfully denied access to a membership list to pay the member's costs, including reasonable counsel fees, incurred in obtaining the order.<sup>168</sup>

The articles of incorporation or bylaws of a religious corporation may limit or abolish a member's right to inspect and copy records under the INCA.<sup>169</sup> It also permits the articles of incorporation of a public benefit corporation to limit or abolish the inspection rights of members if the corporation provides a reasonable means of mailing the com-

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163. IND. CODE § 23-17-11-1(d) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.20(d) (1988).

164. MODEL NONPROFIT CORP. ACT § 7.20(d) (1988).

165. See IND. CODE § 23-1-30-1 official cmt. (1988).

166. IND. CODE § 23-17-11-1(e) (Supp. 1991).

167. MODEL NONPROFIT CORP. ACT § 7.20(e) (1988).

168. *Id.* § 7.20(d).

169. IND. CODE §§ 23-17-11-1(g), -27-2(e) (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 7.20(f), 16.02(e) (1988).

munications of a member concerning the corporation, at that member's expense, to other members.<sup>170</sup> There is no comparable provision in the Model Act. The alternative authorized by the INCA not only denies a member effective access to other members in a battle for control, but also gives those in control of the nonprofit corporation information concerning issues being raised by a disgruntled member. One can only wonder if the drafters of the INCA feared a massive onslaught of hostile takeover attempts of Indiana nonprofit corporations.

The INCA also expressly subjects a member's right to inspect and copy a membership list prepared for a meeting to the requirements of the general inspection right provisions of the statute.<sup>171</sup> The statute grants general inspection rights to members of nonprofit corporations.<sup>172</sup> A member exercising those rights must describe with reasonable particularity the purpose for the inspection and which records are sought.<sup>173</sup> The Model Act provides that the demand requirements of the general inspection rights provision does not apply to inspection of membership lists prepared in connection with a meeting.<sup>174</sup>

Both statutes limit the use of a membership list obtained under the general inspection rights provisions of the statutes. Although the INCA makes the limitation express with respect to lists obtained in connection with a meeting, the limitation is only implicit in the Model Act.<sup>175</sup>

#### *H. Corporate Purposes*

The INCA differs from the 1971 Act with respect to the purposes of nonprofit corporations. The 1971 Act specified that a not-for-profit corporation could be organized for any lawful purposes consistent with the statute.<sup>176</sup> The 1964 version of the Model Act included a nonexclusive list of examples of corporate purposes.<sup>177</sup> The current Model Act resolves the "corporate purposes" debate by providing that every corporation has the purpose of engaging in any lawful activity unless a more limited

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170. IND. CODE §§ 23-17-11-1(h), -27-2(f)(2) (Supp. 1991).

171. *Id.* § 23-17-11-1(b).

172. *Id.* § 23-17-27-2.

173. *Id.* § 23-17-27-2(c)(2).

174. MODEL NONPROFIT CORP. ACT § 16.02(d)(1) (1988). The INCA seems to suffer from a slight circularity problem in this respect. Indiana Code § 23-17-11-1(b) subjects the right to inspect and copy a membership list prepared for a meeting to § 23-17-27-2(c), but § 23-17-27-2(d)(1) provides that § 23-17-27-2 does not affect the rights of a member to inspect records under § 23-17-11-1.

175. IND. CODE § 23-17-11-1(b) (Supp. 1991). *See* MODEL NONPROFIT CORP. ACT § 7.20 official comment (1988).

176. IND. CODE § 23-7-1.1-3 (repealed 1991).

177. *See* HONE, *supra* note 9, at xx-xxi.

purpose is set forth in the articles of incorporation.<sup>178</sup> The INCA follows this approach.<sup>179</sup> Unlike the Model Act, but like the IBCL, the INCA provides that a corporation engaging in an activity subject to regulation under another Indiana statute may incorporate under the statute unless provisions for incorporation exist under the other statute.<sup>180</sup>

The INCA authorizes challenges to a corporation's power to act in certain circumstances, but this authority differs from the Model Act in two major respects. Both statutes authorize the attorney general to bring an action to enjoin an act when no third party brings suit.<sup>181</sup> The INCA, on its face, goes further by authorizing a declaratory judgment action challenging a nonprofit corporation's power to act.<sup>182</sup> However, the Model Act authorizes a challenge to a corporation's power to act in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. It is possible for a nonprofit corporation to be liable to a third party on an ultra vires contract, and the Model Act allows an action for damages against the person or persons responsible for the ultra vires activity.<sup>183</sup> The INCA does not authorize such an action. The decision to omit this action against corporate personnel generally will not be significant because of the infrequency of ultra vires conduct, although ultra vires actions might be more common with nonprofit corporations than business corporations. The omission is significant as evidence of the drafters' intent to eliminate, or at least seriously curtail, the right of members of nonprofit corporations to bring derivative actions.

### *I. Effect on Existing Corporations*

The 1971 Act did not automatically apply to existing corporations. Rather, the statute permitted not-for-profit corporations, which could be formed under the 1971 Act, but were organized under other Indiana laws, to elect to become subject to the statute by filing articles of acceptance or by amending the articles of incorporation or similar gov-

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178. MODEL NONPROFIT CORP. ACT § 3.01(a) (1988).

179. IND. CODE § 23-17-4-1(a) (Supp. 1991).

180. *Id.* § 23-17-4-1(b). The Model Act provides for incorporation under its provisions only if incorporation is not prohibited under other statute. MODEL NONPROFIT CORP. ACT § 3.01(b) (1988).

181. IND. CODE § 23-17-4-4(b) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 3.04(b) (1988). The INCA's drafters consciously omitted the Model Act's provision allowing members to challenge ultra vires acts in a derivative proceeding.

182. IND. CODE § 23-17-4-4(b) (Supp. 1991). It is not clear if the requirement that a third person not have acquired rights before injunctive relief is available also applies to declaratory judgment actions. Allowing declaratory judgment actions even when a third person has acquired rights is justifiable in order to resolve any issues of a nonprofit corporation's power to act.

183. MODEL NONPROFIT CORP. ACT § 3.04(c) (1988).

erning instrument to declare that the corporation was to be governed by the statute.<sup>184</sup> The Model Act contemplates that the statute will apply to existing nonprofit corporations if the statute under which the corporation was incorporated includes a clause reserving the power to amend or repeal the statute. The Model Act also contains an optional provision that allows nonprofit corporations to decide whether to be governed by the provisions of the Model Act or the statute under which they were organized.<sup>185</sup> The drafters of the Model Act observed that most not-for-profit acts adopted in this century have a reserved powers clause, but that some nonprofit corporations could have been formed under statutes without such clauses or could be religious corporations formed under special statutes.<sup>186</sup>

The application of the INCA to new and existing nonprofit corporations differs. The INCA applies to all nonprofit corporations organized after its effective date of August 1, 1991.<sup>187</sup> It also permits nonprofit corporations existing on July 31, 1991, to "opt in" to the new statute by corporate action.<sup>188</sup> However, unlike the Model Act, the INCA does not give nonprofit corporations the choice of being governed by the laws under which they were organized. Rather, the new statute will apply to all corporations in existence on July 31, 1993, organized under *or subject to* the 1971 Act or its predecessor, the General Not-for-Profit Act of 1935.<sup>189</sup> This approach is similar to the ICBL's approach to existing business corporations.<sup>190</sup> There is a potential problem here in that the 1971 Act did not contain a reserved powers clause.<sup>191</sup> Thus, it is conceivable that a court would refuse to apply the INCA to existing nonprofit corporations if, for example, the new statute is less favorable to the interests of members than was the 1971 Act. The INCA applies to foreign nonprofit corporations desiring to transact business in Indiana after July 31, 1993.<sup>192</sup> A foreign nonprofit corporation authorized to transact business in Indiana on that date is not required to obtain a new certificate.<sup>193</sup>

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184. IND. CODE § 23-7-1.1-37 (repealed 1991).

185. MODEL NONPROFIT CORP. ACT § 17.01(b) (1988).

186. *Id.* § 17.01 official cmt.

187. IND. CODE §§ 23-17-1-1, -2 (Supp. 1991).

188. *Id.* § 23-17-1-1(b).

189. *Id.* § 23-17-1-1(b).

190. *Id.* § 23-1-17-3.

191. Unlike the Model Act, the INCA does not contain a reserved powers clause. However, a "universal" reserved powers clause was added to the Indiana Code in 1986. See IND. CODE § 1-1-5-2 (1988). See generally 17 GALANTI, *supra* note 7, § 8.3.

192. IND. CODE § 23-17-1-4 (Supp. 1991).

193. *Id.*



*J. Amendment of Articles and Bylaws*

The provisions of the Model Act and the INCA relating to amending articles of incorporation are similar.<sup>194</sup> These provisions are more detailed than the comparable provisions in the 1971 Act<sup>195</sup> in that the current statute distinguishes among the three types of nonprofit corporations. Both the Model Act and the INCA allow provisions giving third persons the right to approve articles of incorporation and bylaw amendments.<sup>196</sup> The INCA adopts the optional Model Act provision authorizing public benefit corporations and mutual benefit corporations to terminate all members or any class of members by amending the articles of incorporation.<sup>197</sup> In effect the INCA allows "going-private" transactions.

The INCA and Model Act provisions regulating bylaw amendments of nonprofit corporations are also more detailed than those of the prior generation of statutes for the same reason.<sup>198</sup> However, the members of Indiana nonprofit corporations have fewer rights with respect to bylaw amendments than those provided by the Model Act. The INCA provides that the board of directors may amend or repeal the bylaws of a nonprofit corporation unless the articles of incorporation, the bylaws, or the statute provide otherwise.<sup>199</sup> The articles of incorporation may require that a specified person other than the board of directors approve in writing a bylaw amendment.<sup>200</sup> The incorporators have the power to amend or repeal the bylaws until the directors have been chosen.<sup>201</sup> This power to amend or repeal bylaws is subject to the class voting rules in certain

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194. *Id.* §§ 23-17-17-1 to -11; MODEL NONPROFIT CORP. ACT §§ 10.01-10.08 (1988).

195. IND. CODE §§ 23-7-1.1-23 to -28 (repealed 1991).

196. IND. CODE § 23-17-17-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.30 (1988).

197. IND. CODE § 23-17-17-2 (Supp. 1991). Directors must meet their fiduciary obligations if they decide that the corporation should have a self-perpetuating board of directors by eliminating members. MODEL NONPROFIT CORP. ACT § 10.31 official cmt. (1988)

198. IND. CODE §§ 23-17-18-1, -2 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 10.20-10.22 (1988).

199. IND. CODE § 23-17-18-1(a) (Supp. 1991). Indiana Code § 23-17-18-1(b)(1) requires notice of a directors meeting at which bylaw amendments are to be approved. This probably means notice to the directors and not to the members. The provision requires that notice be in accordance with § 23-17-15-2(c). The reference probably should be to § 23-17-15-3(c), which relates to calling and giving notice of director meetings. Indiana Code § 23-17-15-2(c) relates to the effect of a consent of directors to action taken without a meeting. The comparable cross-reference in the Model Act is to the call and notice provision. MODEL NONPROFIT CORP. ACT §§ 8.22(c), 10.20 (1988).

200. IND. CODE § 23-17-17-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.30 (1988).

201. IND. CODE § 23-17-18-1(a) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.20 (1988).

circumstances, in which members are entitled to vote on bylaw amendments.<sup>202</sup>

The drafters of the Model Act note that bylaws of a nonprofit corporation setting forth the rights and duties of members are analogous to the provisions in the articles of incorporation of business corporations relating to preference shares.<sup>203</sup> Consequently, for nonprofit corporations with members, the Model Act not only permits members to initiate bylaw amendments, but also requires member approval of all bylaw changes.<sup>204</sup>

The drafters of INCA departed significantly from this structure by vesting the authority to amend bylaws in the directors and by permitting member-initiated bylaw amendments only if the articles of incorporation or bylaws give members this right.<sup>205</sup> Members are only required to approve bylaw amendments adopted by the directors when the amendment will change the members' rights.<sup>206</sup> This approach is similar to the bylaw provisions of the IBCL. The IBCL eliminated the inherent power of shareholders to amend or repeal bylaws of business corporations that the RMBCA recognizes.<sup>207</sup> Bylaw flexibility resulting from the directors' right to amend bylaws may be desirable in the for-profit sector, but the wisdom of circumscribing the rights of members of nonprofit corporations with respect to bylaws is far from clear.

The INCA does not totally deprive members of the right to vote on bylaw amendments, and members of nonprofit corporations can vote on bylaw amendments in certain cases.<sup>208</sup> These voting rights exist even when the articles of incorporation and bylaws provide otherwise.<sup>209</sup> The right depends on the type or nature of the nonprofit corporation. The members of a class of a religious corporation may vote as a separate

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202. IND. CODE § 23-17-18-2 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.22 (1988).

203. MODEL NONPROFIT CORP. ACT § 10.21 official cmt. (1988).

204. *Id.* § 10.21(a).

205. IND. CODE § 23-17-18-1 (Supp. 1991).

206. *Id.* § 23-17-18-2.

207. See IND. CODE § 23-1-39-1 official cmt. (1988). See generally 19 GALANTI, *supra* note 7, § 39.15 (1991).

208. The members of a class in a public benefit corporation may vote as a separate voting group on a proposed amendment to the bylaws if the amendment would affect the class's voting rights differently from those of another class. The members of a class in a mutual benefit corporation may vote as a separate voting group on a proposed amendment to the bylaws that substantially affects the rights, privileges, preferences, restrictions, or conditions of the class. Members of a class of a religious corporation may vote as a separate voting group on a proposed amendment to the bylaws only if a class vote is provided for in the articles of incorporation or the bylaws. IND. CODE § 23-17-18-2 (Supp. 1991).

209. *Id.* § 23-17-18-2(e).

voting group on a proposed amendment to the bylaws only if a class vote is provided for in the articles of incorporation or bylaws.<sup>210</sup>

The Model Act provides that if a class of members is to be divided into two or more classes as a result of a bylaw amendment, the amendment must be approved by the members of each class that would be created by the amendment.<sup>211</sup> The Model Act also specifies that an amendment be approved by the members of the class by the lesser of two thirds of the vote cast or a majority of the votes castable by the class.<sup>212</sup>

The INCA provides that if a class of members is to be divided into at least two classes by an amendment *and* a class vote is required to approve an amendment to the bylaws, an amendment must be approved only by a *majority of the votes cast* by the members of each class that would be created by the amendment.<sup>213</sup> The provision gives less protection to the members of a class in this situation than does the Model Act because a majority of the votes cast can be substantially less than a majority of the class. A small group of members may be able to cause a major change to the structure of a nonprofit corporation. This also is possible under the Model Act, but the risks are reduced by the requirement that at least two-thirds of the votes cast approve the amendment.

### K. Emergency Powers

The Model Act and the INCA both grant emergency powers to the board of directors of nonprofit corporations.<sup>214</sup> This authority was not common under the previous generation of nonprofit corporations. However, the definition of emergency is broader under the INCA than under the Model Act. The INCA uses the IBCL definition of emergency, that is, an extraordinary event that prevents a quorum from assembling.<sup>215</sup> The Model Act defines an emergency in terms of a "catastrophic" event.<sup>216</sup> The purpose of the IBCL language was to allow the board of

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210. *Id.* § 23-17-18-2(c).

211. MODEL NONPROFIT CORP. ACT § 10.22(d) (1988).

212. *Id.* § 10.22(e).

213. IND. CODE § 23-17-18-2(d) (Supp. 1991). Presumably, a simple majority of the votes cast will also suffice to approve any other bylaw amendment that requires member approval, although the statute is silent on this point.

214. *Id.* § 23-17-4-3; MODEL NONPROFIT CORP. ACT § 3.03 (1988). For example, in an emergency, lines of succession can be modified to accommodate the incapacity of any director, officer, employee, or agent, and the corporation can relocate its principal office, designate alternative principal offices or regional offices, or authorize an officer to do so.

215. IND. CODE § 23-17-4-3(d) (Supp. 1991).

216. MODEL NONPROFIT CORP. ACT § 3.03(d) (1988).

directors to react to any untoward event such as a hostile takeover attempt.<sup>217</sup> The approach of the Model Act, and the comparable RMBCA provision,<sup>218</sup> is to permit a corporation to act in the event directors are killed in an event such as a plane crash or a war.<sup>219</sup> Both statutes also authorize a nonprofit corporation to adopt "emergency bylaws" unless the articles of incorporation provide otherwise.<sup>220</sup> Again, the INCA definition of emergency for triggering emergency bylaws is couched in terms of an extraordinary event.<sup>221</sup> Corporate action taken in good faith during an emergency to further the ordinary affairs of a corporation binds the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.<sup>222</sup>

### *L. Dissolution*

The INCA contains detailed provisions relating to general dissolution,<sup>223</sup> judicial or involuntary dissolution,<sup>224</sup> and administrative dissolution<sup>225</sup> of nonprofit corporations. Again, these provisions are similar to the comparable provisions of the IBCL.<sup>226</sup> The INCA gives less protection to the interests of claimants against a dissolved nonprofit corporation than does the Model Act.<sup>227</sup>

Distribution of assets when business corporations dissolve rarely presents problems even in the absence of provisions in the articles or bylaws relating to such matters. However, the nature and goals of nonprofit corporations require special handling of corporate assets upon dissolution.<sup>228</sup> It was uncertain under statutes such as the 1971 Act who would receive assets of a dissolved nonprofit corporation if the articles

217. IND. CODE § 23-1-22-3(d) (1988). See generally 17 GALANTI, *supra* note 7, § 10.22.

218. MODEL BUSINESS CORP. ACT ANN. § 3.03(d) (1985).

219. See *id.* § 3.03 official cmt.

220. IND. CODE § 23-17-3-9 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.07 (1988).

221. IND. CODE § 23-17-3-9(d) (Supp. 1991).

222. *Id.* § 23-17-4-3(c)(2); MODEL NONPROFIT CORP. ACT § 3.03(c)(2) (1988).

223. IND. CODE §§ 23-17-22-1 to -7 (Supp. 1991).

224. *Id.* §§ 23-17-24-1 to -4.

225. *Id.*

226. See generally 20 GALANTI, *supra* note 7, §§ 44.1-44.30.

227. For example, a claimant has five years under the Model Act to bring an action if a nonprofit corporation has published notice of dissolution, while only two years is allowed by the INCA. IND. CODE § 23-17-22-7(c) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 14.08 (c) (1988).

228. See HONE, *supra* note 9, at xxxiv. An existing nonprofit corporation might have to amend its articles of incorporation to remain a public benefit corporation. MODEL NONPROFIT CORP. ACT § 17.07 official cmt. (1988).

or bylaws did not specify a distribution plan. The INCA eliminates this problem by requiring the articles to include provisions for the distribution of corporate assets.<sup>229</sup> The articles of incorporation do not have to state to whom assets will be distributed on dissolution as long as they provide how to resolve the issue.<sup>230</sup>

### M. Foreign Corporations

Like the 1971 Act, the INCA contains provisions on how foreign not-for-profit corporations are to procure certificates of admission from the secretary of state before transacting business in Indiana.<sup>231</sup> The INCA generally tracks the provisions of the IBCL regulating the admission of foreign business corporations wishing to transact business in Indiana.<sup>232</sup> The INCA follows the contemporary approach of not attempting an affirmative definition of what constitutes transacting business. Rather, it defines the concept in negative terms, by specifying what activities do *not* constitute transacting business.<sup>233</sup>

The prime sanction against a foreign nonprofit corporation that transacts business without a certificate of authority is to deny the corporation access to Indiana courts until it is qualified.<sup>234</sup> The INCA also continues the sanction of the 1971 Act and subjects a foreign corporation to a penalty not exceeding ten thousand dollars.<sup>235</sup> The INCA eliminated the minor criminal penalty against agents of unqualified foreign nonprofit corporations.<sup>236</sup>

A foreign nonprofit corporation with a valid certificate of authority has the same rights and enjoys the same privileges as domestic nonprofit corporations, and except as otherwise provided by the INCA, is subject to the same duties, restrictions, penalties, and liabilities as domestic nonprofit corporations.<sup>237</sup> The INCA expressly provides that the statute does not authorize Indiana to regulate the organization or internal affairs of qualified foreign corporations.<sup>238</sup> The Model Act is similar.<sup>239</sup>

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229. IND. CODE § 23-17-3-2(6) (Supp. 1991). The Model Act is similar. MODEL NONPROFIT CORP. ACT § 2.02(a)(6) (1988).

230. HONE, *supra* note 9, at xxxiv. For example, the articles can specify the name of the organization or organizations to receive the assets or state that a particular individual, organization, or the board of directors will determine who will receive the assets.

231. IND. CODE §§ 23-7-1.1-48 to -60 (repealed 1991).

232. IND. CODE §§ 23-1-49-1 to -51-3 (1988).

233. IND. CODE § 23-17-26-1(b) (Supp. 1991).

234. *Id.* § 23-17-26-2.

235. *Id.* § 23-17-26-2(d). See IND. CODE § 23-7-1.1-60(a) (repealed 1991).

236. IND. CODE § 23-7-1.1-60(c) (repealed 1991). There are no reported decisions imposing sanctions on a foreign not-for-profit corporation or its agents.

237. IND. CODE § 23-17-26-5 (Supp. 1991).

238. *Id.* § 23-7-26-5(c).

239. MODEL NONPROFIT CORP. ACT § 15.05(c) (1988).

### III. CONCLUSION

By this time, the reader will have realized that the author views the INCA with mixed emotions. I am on record as having qualms with the tilt of the IBCL in favor of the interests of corporate management and against the interests of shareholders of Indiana business corporations, although I recognize that corporate managers do have rights and interests that should be protected.<sup>240</sup> To whatever extent favoring management of business corporations is justified in our global economy, it is not clear that the same tilt is justified with nonprofit corporations. Obviously, my concern is with the wholesale incorporation of IBCL substantive provisions into the INCA. This Article points out some of the features of the INCA that might be questionable or problematic. Whether or not readers agree with this position, all can agree that the INCA is a significant development and that Indiana nonprofit corporations are now regulated by one of the most modern, flexible, state of the art nonprofit corporation statutes found in any jurisdiction.

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240. See 18 GALANTI, *supra* note 7, § 25.2.