

Governance Documents: Articles of Incorporation

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This is a first of a series of articles addressing governance documents for organizations. The first governance document is the articles of incorporation. This document is important not only for purposes of creating the nonprofit (through filing with the Secretary of State's office) but also for its continued existence. As a result, it is advisable for an organization to periodically review its articles of incorporation to ensure the document contains accurate information as well as any provisions the organization may desire to include in order to take advantage of some protections available under the Revised Iowa Nonprofit Corporation Act ("Revised Act") in terms of liability protection for the directors and indemnification protection for the directors.

Under the Revised Act, there are certain mandatory provisions that need to be included in the articles of incorporation. These include the name of the entity, the name and address of the registered agent, and the name and address of the incorporator. For nonprofits incorporated after January 1, 2005, the articles need to state whether the corporation will have members and provide a description regarding the distribution of assets on dissolution. Depending on the tax-exempt status of the organization, there are certain provisions relating to the purpose of the organization and the distribution of assets upon dissolution that need to be included in the articles of incorporation.

The Revised Act provides that it is permissible (but not a requirement) to include the purpose for which the nonprofit is organized, the names and addresses of the individuals who are to serve as the initial directors, and provisions not inconsistent with law regarding (1) managing and regulating the affairs of the nonprofit, (2) defining, limiting and regulating the powers of the corporation, its board of directors and members, or any class of members, and (3) characteristics, qualifications, rights, limitations and obligations attaching to each or any class of members.

As discussed in a previous article, the liability shield under the Revised Act provides significant protection to a director as well as an officer, member or other volunteer. Specifically, it states that such individuals are not to be personally liable in that capacity for any action taken or failure to take any action except liability for any of the following: (1) the amount of any financial benefit to which the person is not entitled; (2) an intentional infliction of harm on the corporation or member; (3) a violation of the unlawful distribution provision; and (4) an intentional violation of criminal law. Iowa Code section 504.901. To the extent a director is compensated by the organization, a provision may be included in the organization's articles of incorporation to ensure similar protection from liability to the organization and its members. Iowa Code section 504.202.

In addition, the Revised Act provides that an organization may indemnify its directors for any of their actions or inactions to the same extent as the liability shield protection if there is a provision included in the articles of incorporation that eliminates or limits the liability of a director

to the corporation or its members for money damages. In addition, it is possible to provide for indemnification of directors for all of their actions or inactions only if a provision is included in the articles of incorporation (as opposed to some other document such as the bylaws).

From a drafting standpoint, it often makes sense to include only those provisions that are mandatory and those permissive provisions that may provide additional protection to the nonprofit or its directors. This is because the subject matter of permissive provisions often is addressed in the bylaws. In order to avoid unnecessary conflict, it is best to cover the subject matter in the bylaws, which is the document more frequently referred to by board members and officers in the governance of the organization.