

D R A F T

FOR DISCUSSION ONLY

AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

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AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

PREFATORY NOTE

(1) Introduction and Process

The Committee is charged with drafting an Agriculture and Agriculture Related Cooperative Act. The Act is to be a free-standing act separate and apart from current cooperative acts and, therefore, is not a statutory replacement of other law but; rather, another statutory option for organizing cooperatives as a way to encourage economic development.

The Committee's scope is limited to "Agriculture and Agriculture Related" purposes. The scope is not, however, limited to agricultural marketing cooperatives (and, thus, contemplates supply and service activities). As a later Reporter's Note observes, the demarcation of activities which are "agriculture and agriculture related" is a central issue. Another overarching question raised by this draft, and discussed at the Committee meetings, is what it means to be a cooperative. Older traditional statutes have found meaning and form by finding the definition of a cooperative in other law. A brief illustrative discussion of some of those definitions is contained in the next part of this preliminary note ("Coops: Background Information"). The last part (3) of these "Reporter's Preliminary Notes" identify narrower issues ("Overview of Draft") that need to be discussed.

The genesis of the project was the enactment of the "Wyoming Processing Cooperative Law" in 2001 and the "Minnesota Cooperative Associations Act" in 2003. The Province Saskatchewan enacted an Act for similar purposes that predated the Wyoming law. There has been study or legislative activity in Tennessee, Missouri, Iowa, Wisconsin and Vermont, but the status of that activity is unknown to the Reporter at the time of drafting of this note.

(2) Coops: General Background Information

The new cooperative acts on which this project is based are sometimes known as "New Generation Cooperative" ("NGC" acts) though that name has not gained a precise technical meaning. The features that generally distinguish these cooperatives from traditional cooperatives include: (1) a focus on value-added processing; (2) expanded use of equity as a funding source; and (3) restricted membership with equity contributions limited by equity requirements to build plants for purposes of value-added processing. The latter feature allows cooperatives organized under NGC statutes to be "closed-end" with a limited number of members.

The new cooperative acts are more flexible than traditional cooperative acts and such flexibility moves away from fail-safe statutory drafting for purposes of qualifying as a "cooperative" under other federal and state law and regulation. The primary "other laws" are anti-trust law, taxation, securities law, and access to the Farm Credit System.

An example of how other laws relate to the law of cooperatives is the Capper-Volstead Act of 1922. Without the Capper-Volstead Act, the Sherman Act of 1890 would apply to make most farmer marketing contracts with cooperatives *per se* illegal restraints of trade because the contracts fix prices. That is, when farmers market products through cooperatives they agree on prices they will charge and may agree to sell *exclusively* to the cooperative. The Capper-Volstead Act provides limited, but important protection from the Sherman Act. In order for a cooperative to qualify for the protection: (1) only agricultural producers may be voting members; (2) the cooperative must be operated for the mutual benefit of members as producers; (3) no member may have more than one vote or dividends on stock may not exceed 8% per year; and (4) the value of products marketed for members must be greater than the value of products marketed for nonmembers. Many traditional state agricultural (and general purpose) cooperative statutes “hard-wire” compliance with Capper-Volstead by, for example, mandating the 8% dividend limit on equity. The NGC statutes, on the other hand, follow the general trend in unincorporated statutes allowing a cooperative to *decide* whether to qualify for the anti-trust protection provided by the Capper-Volstead Act. Thus, the 8% dividend limitation is not mandated by the NGC statutes.

Similarly, federal income tax law delineates requirements that associations must meet to qualify for taxation under Subchapter T of the Internal Revenue Code (patronage refunds not taxable at the cooperative level). The Code further delineates more requirements to qualify for tax treatment under Section 521 (for *farmer* cooperatives with additional tax benefits). Qualification for cooperative taxation, however, is inconsistent with tax treatment as a partnership. Thus, the NGC model allows flexibility for the organization to be taxed as a partnership or as a cooperative as the organization itself chooses. To some extent NGCs *may* reflect a trend in the larger cooperative world consolidating multiple single purpose cooperative acts into fewer more general purpose acts (*e.g.* Minnesota, Oregon, Colorado).

The Drafting Committee was established by the Conference at the 2003 Annual Meeting and met December 12-14, 2003, and February 20-22, 2004. The first meeting of the drafting committee discussed substantive and general drafting and formatting issues, including the level of detail appropriate for the act, and used the provisions “Wyoming Processing Cooperative Law” as a model. The Committee determined that a higher level of detail than that found in the Wyoming law, following the general “look and feel” of general and traditional cooperative acts, was appropriate.

Discussion at the second drafting committee meeting focused on substantive issues within the context of a draft very closely following the Minnesota Cooperative Associations Act which integrated some of the substantive discussion from the first meeting. The current draft is a result of those discussions and, for the first time, can be fairly said to be a committee draft. Nonetheless, the Committee has not had the opportunity to discuss the specific language of this draft or new issues raised by its language. Moreover, the style committee has had the opportunity to review only select articles and while its suggestions have been largely incorporated in those articles, some of the “styled” provisions have been redrafted.

(3) Overview of Draft

This draft draws heavily from the Uniform Limited Partnership Act (2001), the Minnesota Cooperative Associations Act, the Oregon Cooperative Corporations Act and the Model Business Corporation Act. It also incorporates ideas from the Uniform Limited Liability Company Act and the Colorado Cooperative Act, among others.

Even though the draft relies, in part, on general organizational law outside cooperatives, it makes every reasonable attempt to recognize that cooperatives are a different kind of organization legally, historically, functionally, and in purpose. Thus, this draft has a strong member focus. For example, the bylaws must be amended by members and not the board of directors which is somewhat unusual even in cooperative law. The specific size and purpose of the cooperatives contemplated by this act, however, support the member focus. Moreover, unlike the trend in corporate law, this draft generally requires supermajority voting of members on fundamental matters.

On the other hand, this draft provides more flexibility for attracting capital from outside the community of agricultural producers and gives cooperatives the authority to erode producer capital lock-in in its organic rules. Thus, it allows wide latitude for both patron members (*e.g.* producers/users of the cooperative) and nonpatron members and provides, within limitations, for the sharing of net proceeds, surplus, or profit and governance participation between patron and nonpatron members. The constraints on nonmember patron participation in this draft are tighter than those found in most, if not all, the “new generation” cooperative statutes clearly distinguishing this cooperative draft from limited liability company statutes in an attempt to maintain the “coop brand.”

The centers of gravity of this draft are:

- (i) Section 102's definition of “agricultural and agricultural related” in conjunction with the “any lawful” purpose portion of Section 105;
- (ii) Article 13, “Amendment of Articles and Bylaws”;
- (iii) Article 3, “Members”;
- (iv) Article 4, “Membership Interests”;
- (v) Article 8, “Contributions, Fees and Distributions”;
- (vi) Article 9, “Dissociation”;
- (vii) Article 6, “Directors and Officers”.

It would be most helpful to receive guidance on those topics. The final center of gravity is Article 5 which governs contracts made between cooperatives and their users. The reason Article 5 is not listed with the others is because that Article may not yet be completely ripe. Article 5, nonetheless, merits attention. The Reporter’s Notes raise a few of the issues in these and other articles and sections.

This is a work still very much in process. For example, existing cooperative acts contain provisions addressing state anti-trust and securities regulation of cooperatives but the drafting committee has tentatively deleted them from this draft. Further, there remain many technical drafting issues. For example, this draft repeats the mantra “unless otherwise provided in the organic rules” almost endlessly instead of centralizing “nonwaivable” provisions by reference in a single section as *do* RUPA, ULPA, and ULLCA. That is, for now, the repetition may be helpful to identify nonwaivable provisions for later centralization. There, too, are probably errors in cross-referencing. Finally, a few Articles are reserved pending further discussion of related topics. For example, the “sale of substantially all the assets” article is reserved pending discussion and further refinement of the “merger” article.

1 **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

2 **ARTICLE 1**

3 **GENERAL PROVISIONS**

4
5 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Agricultural and
6 Agricultural Related Cooperatives Act.

7 **Preliminary Comments**

8 The date of promulgation and the determination of whether this is a uniform act will be
9 reflected in later drafts.

10
11 Is it clear the act is not a “corporate” statute that does not foreclose cooperatives
12 organized pursuant to it to be treated as unincorporated entities for purposes of other law?
13

14 **SECTION 102. DEFINITIONS.** In this [act]:

15 (1) “Agricultural” and “Agricultural Related” means farming or related to
16 farming including, but not limited to, the cultivation and tillage of soil; dairying; ranching; the
17 production, planting, cultivation, growing, and the capture, harnessing or harvesting of
18 agricultural, horticultural, or aquacultural commodities, including crops produced on trees, vines,
19 bushes, the production and raising of timber, and raising, propagating, fattening or grazing
20 livestock, born or unborn, including aquaculture; the storage, provision, marketing or processing
21 of the resultant products of farming; and the provision services and goods used in or helpful to
22 agricultural production of any type. These terms also include the forbearance of conducting any
23 such activities or production and the capture, harnessing or conversion of wind, sunlight, or
24 water.

1 (2) “Articles of organization” means initial, amended, and restated articles of
2 organization and articles of merger. In the case of a foreign cooperative, the term includes all
3 records serving a similar function required to be filed in the office of the [Secretary of State] or
4 other official having custody of similar records in the State or country under whose law it is
5 organized.

6 (3) “Association” means an organization conducting business on a cooperative
7 plan under the laws of this state or another state that is authorized to conduct business under
8 other laws of this state or another state.

9 (4) “Contribution” means any benefit provided by a person to a cooperative in
10 order to become a partner or in the person’s capacity as a partner.

11 (5) “Cooperative” means an association organized under this chapter conducting
12 activity pursuant to a cooperative plan.

13 (6) “Debtor in bankruptcy” means a person that is the subject of:

14 (A) an order for relief under Title 11 of the United States Code or a
15 comparable order under a successor statute of general application; or

16 (B) a comparable order under federal, state, or foreign law governing
17 insolvency.

18 (7) “Distribution” means a transfer of money or other property from a cooperative
19 to a member in the member’s capacity as a member or to a transferee on account of an interest
20 owned by the transferee.

21 (8) “Entity” means a company, limited liability company, limited liability
22 partnership, limited partnership, cooperative or other legal entity, whether domestic or foreign,

1 association, or body vested with the power or function of a legal entity whether or not for profit.

2 (9) “Domestic entity” means an entity organized under the laws of this state.

3 (10) “Domestic cooperative” means a cooperative organized under this [act] or
4 [chapters].

5 (11) “Foreign entity” means an entity that is not a domestic entity.

6 (12) “Foreign cooperative” means a foreign business entity organized to conduct
7 business on a cooperative plan consistent with this [act] or authorized to transact business under
8 [Article] 12.

9 (13) “Member” means a person that is a member of a cooperative and includes
10 patron and nonpatron members. The term does not include a person that has dissociated.

11 (14) “Membership interest” means patron membership interests and nonpatron
12 membership interests.

13 (15) “Members’ meeting” means a regular or special members’ meeting.

14 (16) “Nonpatron membership interest” means a membership interest that does not
15 require the holder to conduct patronage business for or with the cooperative to receive financial
16 rights or distributions.

17 (17) “Organic law” means the statute providing for the creation of an entity or
18 principally governing its internal affairs.

19 (18) “Organic rules” means the public organic document and private organic rules
20 of an entity.

21 (19) “Patron” means a person or entity who conducts patronage activity with the
22 cooperative.

1 (20) “Patronage” means the quantity or value of business, transactions, services,
2 or other activity done for or with the cooperative.

3 (21) “Patron member” means a member holding a patron membership interest.

4 (22) “Patron membership interest” means the membership interest requiring the
5 holder to conduct patronage activity for or with the cooperative, as specified by the cooperative
6 to receive financial rights or distributions.

7 (23) “Person” means an individual, corporation, business trust, estate, trust,
8 partnership, limited partnership, limited liability company, association, joint venture,
9 government; governmental subdivision, agency or instrumentality; public corporation, or any
10 other legal or commercial entity.

11 (24) “Principal Office” means the office, whether or not in this State, where the
12 principal executive office of a domestic or foreign cooperative is located.

13 (25) “Record” means information that is inscribed on a tangible medium or that
14 is stored in an electronic or other medium and is retrievable in perceivable form.

15 (26) “Required information” means the information that a cooperative is required
16 to maintain.

17 (27) “Sign” means:

18 (A) to execute or adopt a tangible symbol with the present intent to
19 authenticate a record; or

20 (B) to attach or logically associate an electronic symbol, sound, or
21 process to or with a record with the present intent to authenticate the record.

22 (28) “State” means a State of the United States, the District of Columbia, Puerto

Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(29) “Transfer” includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

Preliminary Comments

- “Agricultural and Agricultural Related” is informed by several sources including federal law. It is intended to be as broad as reasonably practicable and still retain some definitional meaning. It is intended to include functions served by several industry categories of cooperatives including service, supply purchasing, marketing, and processing cooperatives. Tough definitional issues include whether this language includes such activities as farmers organizing to pool farmland for carbon sequestration programs and “wind” harvesting on the marketing side or health insurance purchasing groups on the supply side. Possible uses of cooperatives also include private “ditch” companies in some states. This definition needs to be read in the context of the definition of “entity.” Another fundamental but not substantive question raised by style is whether this defined term, and the name of the Act, should be modified to “Agricultural and Agriculturally Related.”
- The definition of “Cooperative” requires activity “pursuant to a cooperative plan.” “Cooperative plan” has intentionally been left undefined based on committee discussion. The term “cooperative plan” appears in other cooperative acts without definition but acting in conformity with a cooperative plan is required for definitional purposes in other law. Thus, a plan is a basic cooperative notion that is not defined or described in this draft.

SECTION 103. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received notification of it; or

(3) has reason to know it exists from all of the facts known to the person at

1 the time in question; or

2 (c) A person notifies or gives a notification to another person by taking steps
3 reasonably required to inform the other person in ordinary course, whether or not the other
4 person learns of it.

5 (d) A person receives a notification when the notification:

6 (1) comes to the person's attention; or

7 (2) is delivered at the person's place of business or at any other place held
8 out by the person as a place for receiving communications.

9 (e) A person other than an individual knows, has notice, or receives a notification
10 of a fact for purposes of a particular transaction when the individual conducting the transaction
11 for the person knows, has notice, or receives a notification of the fact, or in any event when the
12 fact would have been brought to the individual's attention if the person had exercised reasonable
13 diligence. A person other than an individual exercised reasonable diligence if it maintains
14 reasonable routines for communicating significant information to the individual conducting the
15 transaction for the person and there is reasonable compliance with the routines. Reasonable
16 diligence does not require an individual acting for the person to communicate information unless
17 the communication is part of the individual's regular duties or the individual has reason to know
18 of the transaction and that the transaction would be materially affected by the information.

19 Preliminary Comments

20 **Source:** Derived from ULPA (2001).

21
22 **SECTION 104. RESERVATION OF POWER TO AMEND OR REPEAL.** The

[name of state legislature] has the power to amend or repeal all or part of [this act] at any time and all domestic and foreign cooperatives subject to [this act] are governed by the amendment or repeal. A cooperative organized or governed by this [act] is subject to this reserved right.

Preliminary Comments

This is a common corporate law provision that is not included in many unincorporated entity statutes because of the greater reliance on contract in those organizations. It is commonly included in cooperative statutes.

SECTION 105. NATURE, PURPOSE, AND DURATION OF ENTITY.

(a) A cooperative is an entity distinct from its members.

(b) A cooperative may be organized under this [act] for any lawful agricultural or agriculturally related purpose.

(c) A cooperative has a perpetual duration.

Preliminary Comments

Subsection (b) states “any lawful purpose” which is consistent with the unincorporated acts promulgated by the Conference. It is also consistent with the general laws of cooperatives which in some states reference or are included in not-for-profit acts. Finally, it is consistent with the historical roots of cooperatives as mutual aid societies. Evidence of the ambivalence of the for-profit, not-for-profit distinction can be seen in the federal tax treatment of cooperatives.

SECTION 106. POWERS. A cooperative has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a member for harm caused to the cooperative by a violation of the organic laws or rules of the cooperative or violation of a duty to the cooperative.

Preliminary Comments

The formulation of powers in this draft is based upon unincorporated law models as

1 opposed to a more detailed listing of powers contained in corporate law. The Committee has
2 discussed this approach for powers only briefly and it is consistent with a general direction to
3 draft as efficiently as possible even though most cooperative acts tend to follow the more detailed
4 (and older) corporate model. The question of the level of detail in this section is probably one
5 that should be informed by givers of legal opinion letters.
6

7 **SECTION 107. GOVERNING LAW.** The law of this State governs relations among
8 the members of a cooperative and between the members and the cooperative.

9 **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF**
10 **INTEREST.**

11 (a) Unless displaced by particular provisions of this [act], the principles of law
12 and equity supplement this [act].

13 (b) If an obligation to pay interest arises under this [act] and the rate is not
14 specified, the rate is that specified in [applicable statute].

15 **SECTION 109. NAME.**

16 (a) The name of a cooperative may contain “cooperative” or “association”.
17 “Cooperative” may be abbreviated as “Co-op” or “Coop”.

18 (b) Except as authorized by subsections (c) and (d), the name of a cooperative
19 must be distinguishable upon the records of the [Secretary of State] from:

20 (1) the name of any corporation, limited partnership, limited liability
21 company, cooperative, or company incorporated, organized or authorized to transact business, in
22 this State;

23 (2) a name reserved or registered under Section 110 or 111;

24 (3) a fictitious name approved under Section 1205 for a foreign

1 cooperative authorized to transact business in this State because its real name is unavailable.

2 (c) A cooperative may apply to the [Secretary of State] for authorization to use a
3 name that is not distinguishable upon the records of the [Secretary of State] from one or more of
4 the names described in subsection (b). The [Secretary of State] shall authorize use of the name
5 applied for it:

6 (1) the present user, registrant, or owner of a reserved name consents to the
7 use in a record and submits an undertaking in form satisfactory to the [Secretary of State] to
8 change the name to a name that is distinguishable upon the records of the [Secretary of State]
9 from the name applied for; or

10 (2) the applicant delivers to the [Secretary of State] a certified copy of the
11 final judgment of a court of competent jurisdiction establishing the applicant's right to use the
12 name applied for in this State.

13 (d) A cooperative may use the name, including a fictitious name, of another
14 domestic or foreign cooperative which is used in this State if the other cooperative is organized
15 or authorized to transact business in this State and the cooperative proposing to use the name has:

16 (1) merged with the other cooperative;
17 (2) been formed by reorganization with the other cooperative; or
18 (3) acquired substantially all of the assets, including the name, of the other
19 cooperative.

20 Preliminary Comments

21 The use of the word "cooperative" under this draft is voluntary but may not be used by
22 organizations that are not cooperatives under Section 112. An issue raised by this section and its
23 analogues under existing law is that there is *no* required designation or abbreviation to indicate

1 the entity is a limited liability entity.
2

3 **SECTION 110. RESERVED NAME.**

4 (a) A person may reserve the exclusive use of the name of a cooperative,
5 including a fictitious name for a foreign cooperative whose name is not available, by delivering
6 an application to the [Secretary of State] for filing. The application must set forth the name and
7 address of the applicant and the name proposed to be reserved. If the [Secretary of State] finds
8 that the name applied for is available, it must be reserved for the applicant's exclusive use for a
9 nonrenewable 60 day period.

10 (b) The owner of a name reserved for a cooperative may transfer the reservation to
11 another person by delivering to the [Secretary of State] a signed notice of the transfer which
12 states the name and address of the transferee.

13 **SECTION 111. REGISTERED NAME.**

14 (a) A foreign cooperative may register its name subject to the requirements of
15 Section 109; if the name is distinguishable upon the records of the [Secretary of State] from
16 names that are not available under Section 109.

17 (b) A foreign cooperative registers its name, or its name with any addition
18 required by Section 1205; by delivering to the [Secretary of State] for filing an application:

19 (1) setting forth its name, or its name with any addition required by
20 Section 1205; the State or country and date of its organization, and a brief description of the
21 nature of the affairs in which it is engaged; and

22 (2) accompanied by a certificate of existence, or a record of similar import,

1 from the State or country of organization.

2 (c) A foreign cooperative whose registration is effective may qualify as a foreign
3 cooperative under its name or consent in a record to the use of its name by a cooperative later
4 organized under this [act] or by another foreign cooperative later authorized to transact business
5 in this State. The registered name terminates when the cooperative is organized or the foreign
6 cooperative qualifies or consents to the qualification of another foreign cooperative under the
7 registered name.

8 **SECTION 112. USE OF THE TERM “COOPERATIVE”.**

9 (a) No person other than a cooperative organized pursuant to [this act] or [other
10 laws governing cooperatives in this State], or a similar law of another state, shall use the word
11 “cooperative” as a part of its name or as a trademark, brand, or designation.

12 (b) A cooperative organized pursuant to this article, or one or more members of
13 the cooperative may bring an action for an injunction to enforce the provisions of this Section.
14 Upon proof that the word “cooperative” is used in violation of this Section, the [court] shall enter
15 an order permanently enjoining such use of the word.

16 **Preliminary Comments**

17 Cooperative statutes include name protection provisions unique among organizational
18 law. The draft of this Section is typical of those provisions. Many such provisions also contain
19 bond and attorney’s fees provisions.
20

21 **SECTION 113. REQUIRED RECORDS.** A cooperative shall maintain at its
22 designated office the following information:

23 (1) a current list showing the full name and last known street and mailing address

1 of each member, separately identifying the patronage, members, in alphabetical order, and the
2 nonpatronage, in alphabetical order;

3 (2) a current list showing the full name and last known street address, mailing
4 address, and term of office of each director and officer;

5 (3) a copy of the initial articles of organization and all amendments to and
6 restatements of the articles, together with signed copies of any powers of attorney under which
7 any articles, amendments, or restatement has been signed;

8 (4) a copy of the initial bylaws and all amendments to and restatements of the
9 bylaws;

10 (5) a copy of any filed articles of consolidation or merger;

11 (6) a copy of the cooperatives federal, state, and local income tax returns and
12 reports, if any, for the three most recent years;

13 (7) a copy of any financial statement of the cooperative for the three most recent
14 years and all other appropriate accounting records;

15 (8) a copy of the three most recent annual reports delivered by the cooperative to
16 the [Secretary of State];

17 (9) a copy of the minutes of members' meetings, and records of all actions taken
18 by members without a meeting for the three most recent years;

19 (10) a copy of the minutes of director's meetings and records of all actions taken
20 by directors without a meeting;

21 (11) a copy of all communications in a record to members as a group or to any
22 class of members as a group for the three most recent years;

1 (12) a record stating:

2 (A) the amount of cash, and a description and statement of the agreed
3 value of the other benefits, contributed and agreed to be contributed by each member;

4 (B) the times at which, or events on the happening of which, any
5 additional contributions agreed to be made by each member are to be made; and

6 (C) for any person that is both a patronage and nonpatronage member, a
7 specification of the interest the person owns in each capacity.

8 **SECTION 114. BUSINESS TRANSACTIONS OF MEMBER WITH**
9 **COOPERATIVE.** A member may lend money to and transact other business with the
10 cooperative and has the same rights and obligations with respect to the loan or other transaction
11 as a person that is not a member.

12 **SECTION 115. DUAL CAPACITY.** A person may be both a patron member and a
13 nonpatron member. A person that is both a patron and a nonpatron member has the rights,
14 powers, duties, and obligations provided by this [act] and the organic laws and rules in each of
15 those capacities. When the person acts as a patron member, the person is subject to the
16 obligations, duties and restrictions under this [act] and the organic laws and rules for patron
17 members. When the person acts as a nonpatron member, the person is subject to the obligations,
18 duties and restrictions under this [act] and the organic laws and rules for nonpatron members.

19 **SECTION 116. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

20 (a) A cooperative shall designate and continuously maintain in this State:

21 (1) an office, which need not be a place of its activity in this State; and;

22 and

1 (2) an agent for service of process

2 (b) A foreign cooperative shall designate and continuously maintain in this State
3 an agent for service of process

4 (c) An agent for service of process of a cooperative or foreign cooperative must be
5 an individual who is a resident of this State or other person authorized to do business in this
6 State.

7 **SECTION 117. CHANGE OF REGISTERED OFFICE OR REGISTERED**
8 **AGENT FOR SERVICE OF PROCESS.**

9 (a) In order to change its designated office, agent for service of process, or the
10 address of its agent for service of process, a cooperative or a foreign cooperative shall deliver to
11 the [Secretary of State] for filing a statement of change containing:

12 (1) the name of the cooperative or foreign cooperative;

13 (2) the street and mailing address of its current designated office;

14 (3) if the current designated office is to be changed, the street and mailing
15 address of the new designated office;

16 (4) the name and street and mailing address of its current agent for service
17 of process; and

18 (5) if the current agent for service of process or an address of the agent is
19 to be changed, the new information.

20 (b) Subject to Section 210, a statement of change is effective when filed by the
21 [Secretary of State].

22 **SECTION 118. RESIGNATION OF REGISTERED AGENT FOR SERVICE OF**

1 **PROCESS.**

2 (a) In order to resign as an agent for service of process of a cooperative or foreign
3 cooperative, the agent must deliver to the [Secretary of State] for filing a statement of resignation
4 containing the name of the cooperative or foreign cooperative.

5 (b) After receiving a statement of resignation, the [Secretary of State] shall file it
6 and mail a copy to the designated office of the cooperative or foreign cooperatives and another
7 copy to the principal office if the address of the office appears in the records of the [Secretary of
8 State] and is different from the address of the designated office.

9 (c) An agency for service of process is terminated on the 31st day after the
10 [Secretary of State] files the statement of resignation.

11 **SECTION 119. SERVICE OF PROCESS.**

12 (a) An agent for service of process appointed by a cooperative or foreign
13 cooperative is an agent of the cooperative or foreign cooperative for service of any process,
14 notice, or demand required or permitted by law to be served upon the cooperative or foreign
15 cooperative.

16 (b) If a cooperative or foreign cooperative does not appoint or maintain an agent
17 for service of process in this State or the agent for service of process cannot with reasonable
18 diligence be found at the agent's address, the [Secretary of State] is an agent of the cooperative or
19 foreign cooperative upon whom process, notice, or demand may be served.

20 (c) Service of any process, notice, or demand on the [Secretary of State] may be
21 made by delivering to and leaving with the [Secretary of State] duplicate copies of the process,
22 notice, or demand. If a process, notice, or demand is served on the [Secretary of State], the

1 [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt
2 requested, to the cooperative or foreign cooperative at its designated office.

3 (d) Service is effected under subsection (c) at the earliest of:

4 (1) the date the cooperative or foreign cooperative receives the process,
5 notice, or demand;

6 (2) the date shown on the return receipt, if signed on behalf of the
7 cooperative or foreign cooperative; or

8 (3) five days after the process, notice, or demand is deposited in the mail,
9 if mailed postpaid and correctly addressed.

10 (e) The [Secretary of State] shall keep a record of each process, notice, and
11 demand served pursuant to this section and record the time of, and the action taken regarding, the
12 service.

13 (f) This section does not affect the right to serve process, notice, or demand in
14 any other manner provided by law.

1 **ARTICLE 2**

2 **FORMATION; ARTICLES OF ORGANIZATION AND OTHER FILINGS**

3
4 **SECTION 201. ORGANIZATION.**

5 (a) A cooperative may be organized by three or more organizers who are
6 individuals.

7 (b) Each organizer under subsection (a) must in good faith:
8 (1) intend to become a member of the cooperative; or
9 (2) who represent entities which intend to become members of the
10 cooperative.

11 **Preliminary Comments**

12 The issues raised in Section 201 have been discussed at length by the Committee but
13 consensus has not been reached on resolution of all the issues.
14

15 The *first* issue raised in conjunction with this Section is whether the formation of “shelf”
16 cooperatives *should* be allowed. “Shelf” entities are those entities formed by promoters, or
17 others for possible future use without a specific current need for the entity. The tentative
18 conclusion of the Committee was not to allow for shelf cooperatives because they are
19 inconsistent with the member focus of cooperatives. For the same reason, multiple organizers
20 are required under this draft.
21

22 The Committee recognizes that the execution of that tentative conclusion is difficult and
23 raises other issues including the number of members necessary to avoid dissolution. This draft
24 requires only a single member for the latter purposes, in part, because of the current use of
25 wholly owned subsidiaries of cooperatives which are themselves cooperatives and because
26 requiring more than a single member increases the risk of inadvertent dissolution. On the other
27 hand, like under partnership law, it is difficult to conceive of a “cooperative” without more than
28 one member.
29

30 The use of “good faith” as a standard raises practical concerns for opinions concerning
31 “valid organization.” Some standard, however, is necessary to avoid using straw persons as
32 organizers as became the practice under corporate law when more than one incorporator was

1 required.

2
3 This draft raises those, and no doubt other, fundamental issues. The Minnesota
4 Cooperative Associations Act allows for “one or more organizers... [who] need not be members.”
5 The Colorado Cooperative Act too, allows for one or more “incorporators.”
6

7 **SECTION 202. FORMATION OF COOPERATIVE; ARTICLES OF**
8 **ORGANIZATION.**

9 (a) In order for a cooperative to be formed, articles of organization must be
10 delivered to the [Secretary of State] for filing. The articles must state:

- 11 (1) the name of the cooperative;
12 (2) the purposes for which the cooperative was formed;
13 (3) the street and mailing address of the initial designated office and the
14 name, street and mailing address of the agent for service of process;
15 (4) the name and the street and mailing address of each organizer;
16 (5) the term for which the cooperative is to exist if other than perpetual;
17 (6) the number and terms of directors; and
18 (7) any additional information required by [Article] 14 [Merger and
19 Consolidation].

20 (b) Articles of organization may also contain any other matters.

21 (c) If there has been substantial compliance with subsection (a) and a cooperative
22 is formed when the [Secretary of State] files the articles of organization, unless the articles state a
23 delayed effective date. If the articles state a delayed effective date, a cooperative will not be
24 formed if, before the articles take effect, one or more organizers sign and deliver to the [Secretary

of State] for filing a statement of cancellation.

SECTION 203. AMENDMENT OR RESTATEMENT OF ARTICLES OF ORGANIZATION.

(a) In order to amend its articles of organization, a cooperative must deliver to the [Secretary of State] for filing an amendment or, pursuant to [Article] 14, articles of merger stating:

(1) the name of the cooperative;

(2) the date of filing of its initial articles; and

(3) the changes the amendment makes to the articles as most recently amended or restated.

(b) A cooperative shall promptly deliver to the [Secretary of State] for filing an amendment to the articles of organization to reflect the appointment of a person to wind up the cooperative's activities under Section 1006.

(c) An organizer that knows that any information in a filed articles of organization was false when the articles were filed or has become false due to changed circumstances shall promptly:

(1) cause the articles to be amended; or

(2) if appropriate, deliver to the [Secretary of State] for filing an amendment pursuant to Section 203 or a statement of correction pursuant to Section 211.

(d) Articles of organization may be amended at any time for any other proper purpose as determined by the cooperative.

(e) Restated articles of organization may be delivered to the [Secretary of State]

1 for filing in the same manner as an amendment.

2 (f) Subject to Section 210, an amendment or restated article is effective when
3 filed by the [Secretary of State].

4 **SECTION 204. ORGANIZATION OF CORPORATION.** After the effective date of
5 the filing of the articles of organization:

6 (1) if initial directors are named in the articles of organization, the initial directors
7 shall hold an organizational meeting to appoint officers, adopt initial bylaws, and carry on any
8 other business brought before the meeting;

9 (2) if initial directors are not named in the articles, the organizers shall call a
10 meeting of initial members to adopt initial bylaws and elect directors.

11 **Preliminary Comments**

12 The locus of authority of this draft are the members of the cooperative. Thus, it varies
13 from corporate theory reflected in most existing cooperative laws which give directors and
14 incorporators broad discretion. This locus of authority is also reflected in this draft by requiring
15 members to amend bylaws. This requirement causes dissonance in the formation stage of the
16 cooperative but is consistent with industry practice under which the bylaws are the primary
17 governance document.

18
19 Formation under this draft presents a classic circularity problem concerning which comes
20 first: members or the cooperative. This same issue has been discussed in the context of limited
21 liability companies. There (probably) is no nice theoretical solution to this very practical
22 problem.
23

24 **SECTION 205. BYLAWS.**

25 (a) If not stated in the articles of organization, the bylaws shall be in a record and
26 include:

27 (1) a statement of the capital structure of the cooperative, including a

1 statement of the classes and relative rights, preferences, and restrictions granted to or imposed
2 upon each group, class or other type of member interests, the rights to share in profits or
3 distributions of the cooperative, and the authority to admit members, which may be designated to
4 be determined by the board of directors;

5 (2) a statement designating the voting and governance rights, including
6 which members have voting power and any limitations or restrictions on the voting power
7 pursuant to Section 312;

8 (3) a statement that membership interests held by a member are
9 transferable only with the approval of the board of directors or as otherwise provided in the
10 organic rules; and

11 (4) if nonpatron members are authorized a statement as to how profits and
12 losses will be apportioned and how distributions will be made as between patron members and
13 nonpatron members; and

14 (b) The bylaws of the cooperative may contain any provision for managing and
15 regulating the affairs of the cooperative that is not inconsistent with organic law or the articles of
16 organization.

17 **SECTION 206. EMERGENCY BYLAWS.**

18 (a) Unless the articles of organization provide otherwise, the board of directors
19 may adopt bylaws to be effective only in an emergency defined in subsection (d). The emergency
20 bylaws, which are subject to amendment or repeal by the members, may make all provisions
21 necessary for managing the corporation during the emergency, including:

22 (1) procedures for calling a meeting of the board of directors;

1 (2) quorum requirements for the meeting; and

2 (3) designation of additional or substitute directors.

3 (b) All provisions of the regular bylaws consistent with the emergency bylaws
4 remain effective during the emergency. The emergency bylaws are not effective after the
5 emergency ends.

6 (c) Action taken by the cooperative in good faith in accordance with the
7 emergency bylaws:

8 (1) binds the cooperative; and

9 (2) may not be used to impose liability on a director, officer, employee, or
10 agent of the cooperative.

11 (d) An emergency exists for purposes of this section if a quorum of the
12 cooperative's board of directors cannot readily be assembled because of some catastrophic event.

13 **Preliminary Comments**

14 Emergency bylaw provisions are common in both cooperative and corporate law.
15 Similar provisions are not typically found in unincorporated entity law.
16

17 **SECTION 207. STATEMENT OF TERMINATION.** A dissolved cooperative that
18 has completed winding up may deliver to the [Secretary of State] for filing a statement of
19 termination that states:

20 (1) the name of the cooperative;

21 (2) the date of filing of its initial articles of organization; and

22 (3) any other information as determined by the officer filing the statement or by a
23 person appointed pursuant to Section 1006.

1 **SECTION 208. SIGNING OF RECORDS.**

2 (a) Each record delivered to the [Secretary of State] for filing pursuant to this [act]
3 must be signed in the following manner:

4 (1) The initial articles of organization or statement of cancellation must be
5 signed by the organizers listed in the articles.

6 (2) An amendment required by Section 1006 following the appointment of
7 a person to wind up the dissolved cooperative's activities must be signed by that person.

8 (3) Any other amendment must be signed by the person or officer
9 designated for that purpose by the cooperative.

10 (b) Any person except an organizer may sign by an attorney in fact any record to
11 be filed pursuant to this [act].

12 **SECTION 209. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

13 (a) If a person required by this [act] to sign or deliver a record to the [Secretary of
14 State] for filing does not do so, any other person that is aggrieved may petition the [appropriate
15 court] to order:

16 (1) the person to sign the record;

17 (2) deliver the record to the [Secretary of State] for filing; or

18 (3) the [Secretary of State] to file the record unsigned.

19 (b) If the person aggrieved under subsection (a) is not the cooperative or foreign
20 cooperative to which the record pertains, the aggrieved person shall make the cooperative or
21 foreign cooperative a party to the action. A person aggrieved under subsection (a) may seek the
22 remedies provided in subsection (a) in the same action in combination or in the alternative.

1 (c) A record filed unsigned pursuant to this section is effective without being
2 signed.

3 **SECTION 210. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
4 **OF STATE]; EFFECTIVE TIME AND DATE.**

5 (a) A record authorized to be delivered to the [Secretary of State] for filing under
6 this [act] must be captioned to describe the record's purpose, be in a medium permitted by the
7 [Secretary of State] and be delivered to the [Secretary of State]. Unless the [Secretary of State]
8 determines that a record does not comply with the filing requirements of this [act], and if all
9 filing fees have been paid, the [Secretary of State] shall file the record and send a copy of the
10 filed record and a receipt for the fees to the person on whose behalf the record was filed.

11 (b) Upon request and payment of a fee, the [Secretary of State] shall send to the
12 requester a certified copy of the requested record.

13 (c) Except as otherwise provided in Sections 118 and 211, a record delivered to
14 the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
15 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
16 State] is effective:

17 (1) if the record does not specify an effective time and does not specify a
18 delayed effective date, on the date and at the time the record is filed as evidenced by the
19 [Secretary of State's] endorsement of the date and time on the record;

20 (2) if the record specifies an effective time but not a delayed effective date,
21 on the date the record is filed at the time specified in the record;

22 (3) if the record specifies an effective time but not a delayed effective date,

1 on the date the record is filed at the time specified in the record;

2 (A) the specified date; or

3 (B) the 90th day after the record is filed; or

4 (4) if the record specifies an effective time and a delayed effective date, at
5 the specified time on the earlier of:

6 (A) the specified date; or

7 (B) the 90th day after the record is filed.

8 **SECTION 211. CORRECTING FILED RECORD.**

9 (a) A cooperative or foreign cooperative may deliver to the [Secretary of State]
10 for filing a statement of correction to correct a record previously delivered by the cooperative or
11 foreign cooperative to the [Secretary of State] and filed by the [Secretary of State], if at the time
12 of filing the record contained false or erroneous information or was defectively signed.

13 (b) A statement of correction may not state a delayed effective date and must:

14 (1) describe the record to be corrected, including its filing date, or attach a
15 copy of the record as filed;

16 (2) specify the incorrect information and the reason it is incorrect or the
17 manner in which the signing was defective; and

18 (3) correct the incorrect information or defective signature.

19 (c) When filed by the [Secretary of State], a statement of correction is effective
20 retroactively as of the effective date of the record the statement corrects, but the statement is
21 effective when filed as to persons relying on the uncorrected record and adversely affected by the
22 correction.

1 **SECTION 212. LIABILITY FOR FALSE INFORMATION IN FILED RECORD.**

2 (a) If a record delivered to the [Secretary of State] for filing under this [act] and
3 filed by the [Secretary of State] contains false information, a person that suffers loss by reliance
4 on the information may recover damages for the loss from:

5 (1) a person that signed the record, or caused another to sign it on the
6 person's behalf, and knew the information to be false at the time the record was signed; and

7 (2) an organizer or director that has notice that the information was false
8 when the record was filed or has become false because of changed circumstances, if the organizer
9 or director has notice for a reasonably sufficient time before the information is relied upon to
10 enable the organizer or director to effect an amendment under Section 203, file a petition
11 pursuant to Section 209, or deliver to the [Secretary of State] for filing a statement of change
12 pursuant to Section 117 or a statement of correction pursuant to Section 211.

13 (b) Signing a record authorized or required to be filed under this [act] constitutes
14 an affirmation under the penalties of perjury that the facts stated in the record are true.

15 **Preliminary Comments**

16 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee
17 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it
18 is appropriate to add director. An addition or an alternative to director might be officer though it
19 may be difficult at times to demarcate between officers and mere agents.
20

21 **SECTION 213. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

22 (a) The [Secretary of State], upon request and payment of the requisite fee, shall
23 furnish a certificate of existence for a cooperative if the records filed in the [office of the
24 Secretary of State] show that the [Secretary of State] has filed articles of organization and has

1 not filed a statement of termination. A certificate of existence must state:

2 (1) the cooperative's name;

3 (2) that it was duly formed under the laws of this State and the date of
4 formation;

5 (3) whether all fees, taxes, and penalties due to the [Secretary of State]
6 under this [act] or other law have been paid;

7 (4) whether the cooperative's most recent annual report required by
8 Section 214 has been filed by the [Secretary of State];

9 (5) whether the [Secretary of State] has administratively dissolved the
10 cooperative;

11 (6) whether the cooperative's articles of organization have been amended
12 to state that the cooperative is dissolved;

13 (7) that a statement of termination has not been filed by the [Secretary of
14 State]; and

15 (8) other facts of record in the [office of the Secretary of State] which may
16 be requested by the applicant.

17 (b) The [Secretary of State], upon request and payment of the requisite fee, shall
18 furnish a certificate of authorization for a foreign cooperative if the records filed in the [office of
19 the Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has
20 not revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of
21 authorization must state:

22 (1) the foreign cooperative's name and any alternate name adopted under

1 Section 1205 for use in this State;

2 (2) that it is authorized to transact business in this State;

3 (3) whether all fees, taxes, and penalties due to the [Secretary of State]
4 under this [act] or other law have been paid;

5 (4) whether the foreign cooperative's most recent annual report required
6 by Section 214 has been filed by the [Secretary of State];

7 (5) that the [Secretary of State] has not revoked its certificate of authority
8 and has not filed a notice of cancellation; and

9 (6) other facts of record in the [Office of the Secretary of State] which may
10 be requested by the applicant.

11 (c) Subject to any qualification stated in the certificate, a certificate of existence
12 or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence that
13 the cooperative or foreign cooperative is in existence or is authorized to transact business in this
14 State.

15 **SECTION 214. ANNUAL REPORT FOR [SECRETARY OF STATE].**

16 (a) A domestic cooperative or a foreign cooperative authorized to transact
17 business in this State shall deliver to the [Secretary of State] for filing an annual report that
18 states:

19 (1) the name of the domestic cooperative or foreign cooperative;

20 (2) the street and mailing address of its designated office and the name and
21 street and mailing address of its agent for service of process in this State;

22 (3) in the case of a domestic cooperative, the street and mailing address of

1 its principal office if different than its designated office; and

2 (4) in the case of a foreign cooperative the State or other jurisdiction under
3 whose law the foreign cooperative is formed and any alternative name adopted under Section
4 [1205].

5 (b) Information in an annual report must be current as of the date the annual report
6 is delivered to the [Secretary of State].

7 (c) The first annual report must be delivered to the [Secretary of State] between
8 [January 1 and April 1] of the year following the calendar year in which a domestic cooperative
9 was formed or a foreign cooperative was authorized to transact business. An annual report must
10 be delivered to the [Secretary of State] between [January 1 and April 1] of each subsequent
11 calendar year.

12 (d) If an annual report does not contain the information required in subsection (a),
13 the [Secretary of State] shall promptly notify the reporting domestic cooperative or foreign
14 cooperative and return the report to it for correction. If the report is corrected to contain the
15 information required in subsection (a) and delivered to the [Secretary of State] within 30 days
16 after the effective date of the notice, it is timely delivered.

17 (e) If a filed annual report contains an address of a designated office or the name
18 or address of an agent for service of process which differs from the information shown in the
19 records of [Secretary of State] immediately before the filing, the differing information in the
20 annual report is considered a statement of change under Section 117.

21 (f) A cooperative that has failed to file a registration under the requirements of
22 this section must be dissolved by the secretary of state under Section 1009.

SECTION 215. FILING FEES; RULES AND REGULATIONS; ANNUAL

REPORTS AND LICENSE TAXES. Unless otherwise provided, the filing fee for documents filed under this article with the [Secretary of State] shall be subject to the provisions of [the general business corporation law of this state]. The [Secretary of State] shall promulgate rules and regulations necessary to implement the provisions of this article.

Preliminary Comments

Consideration might be given to bracketing this Section. The obvious idea is to use the same fee schedule as used for similar filings.

The base source for much of this Article is ULPA (2001) which is the latest pronouncement of the Conference on these matters.

1 **ARTICLE 3**

2 **MEMBERS**

3
4 **SECTION 301. MEMBERS.** A cooperative shall have [one] or more members.

5 **Preliminary Comments**

6 Section 301 is inconsistent with the Section 201 which requires three organizers. *See*
7 Reporter's Note Section 201. This is an important theoretical as well as practical issue.
8

9 **SECTION 302. BECOMING MEMBER.** A person becomes a member:

10 (1) as provided in the organic rules;

11 (2) under Section 1002 following the dissociation of the cooperative's last
12 member;

13 (3) as the result of merger or consolidation under [Article] 14; or

14 (4) with the consent of all the members.

15 **SECTION 303. NO RIGHT OR POWER AS MEMBER TO BIND**

16 **COOPERATIVE.** A member does not have the right or power as a member to act for or bind
17 the cooperative.

18 **Preliminary Comments**

19 **Source:** ULPB (2001).
20

21 **SECTION 304. NO LIABILITY AS MEMBER FOR COOPERATIVE**

22 **OBLIGATIONS.** Unless otherwise provided by the articles of organization, an obligation of a
23 cooperative whether arising in contract, tort, or otherwise, is not the obligation of a member. A

1 member is not personally liable, directly or indirectly, by way of contribution or otherwise, for an
2 obligation of the cooperative solely by reason of being a member.

3 **Preliminary Comments**

4 **Source:** ULPA (2001).
5

6 **SECTION 305. RIGHT OF MEMBER AND FORMER MEMBER TO** 7 **INFORMATION.**

8 (a) On 10 days' demand, made in a record received by the cooperative, a member
9 may inspect and copy required information during regular business hours in the cooperative's
10 designated office. The member need not have any particular purpose for seeking the information.

11 (b) During regular business hours and at a reasonable location specified by the
12 cooperative, a member may obtain from the cooperative and inspect and copy true and full
13 information regarding the state of the activities and financial condition of the cooperative and
14 other information regarding the activities of the cooperative as is just and reasonable if:

15 (1) the member seeks the information for a purpose reasonably related to
16 the member's interest as a member;

17 (2) the member makes a demand in a record received by the cooperative,
18 describing with reasonable particularity the information sought and the purpose for seeking the
19 information; and

20 (3) the information sought is directly connected to the member's purpose.

21 (c) Within 10 days after receiving a demand pursuant to subsection (b), the
22 cooperative shall inform the member in a record that made the demand:

1 (1) what information the cooperative will provide in response to the
2 demand;

3 (2) when and where the cooperative will provide the information; and

4 (3) if the cooperative declines to provide any demanded information, the
5 cooperative's reasons for declining.

6 (d) Subject to subsection (f), a person dissociated as a member may inspect and
7 copy required information during regular business hours in the cooperative's designated office if:

8 (1) the information pertains to the period during which the person was a
9 member;

10 (2) the person seeks the information in good faith; and

11 (3) the person meets the requirements of subsection (b).

12 (e) The cooperative shall respond to a demand made pursuant to subsection (d) in
13 the same manner as provided in subsection (c).

14 (f) If a member dies, Section 903 applies.

15 (g) The cooperative may impose reasonable restrictions on the use of information
16 obtained under this Section. In a dispute concerning the reasonableness of a restriction under this
17 subsection, the cooperative has the burden of proving reasonableness.

18 (h) A cooperative may charge a person that makes a demand under this Section
19 reasonable costs of copying, limited to the costs of labor and material.

20 (i) Whenever this [act] or the organic rules provide for a member to give or
21 withhold consent to a matter, before the consent is given or withheld, the cooperative shall,
22 without demand, provide the member with all information material to the member's decision that

1 the cooperative knows.

2 (j) A member or person dissociated as a member may exercise the rights under
3 this section through an attorney or other agent. Any restriction imposed under subsection (g) or
4 by the organic rules member or person dissociated as a member applies both to the attorney or
5 other agent and to the member or person dissociated as a member.

6 (k) The rights stated in this section do not extend to a person as transferee, but
7 may be exercised by the legal representative of an individual under legal disability who is a
8 member or person dissociated as a member.

9 Preliminary Comments

10 This Section generally tracks the rights given limited partners under ULPa (2001) and is
11 similar to the formulation under modern cooperative and corporate acts. In addition to the
12 information in the “required records” under this draft, the Minnesota Cooperative Associations
13 Act mandates each member is entitled a “Statement of Membership Interest.” For purposes of
14 this draft it is intended that the information contained in the Minnesota “Statement” is available
15 through the required records. Nonetheless the relevant portion of the Minnesota Act is set forth
16 below for discussion purposes:

17 18 **308B.611. Nature of a membership interest and statement of** 19 **interest owned**

20 ***

21 **Subd. 2. Statement of membership interest.** At the request of
22 any member, the cooperative shall state in writing the particular
23 membership interest owned by that member as of the date the
24 cooperative makes the statement. The statement must describe the
25 member’s rights to vote, if any, to share in profits and losses, and
26 to share in distributions, restrictions on assignments of financial
27 rights under section 308B.605, subdivision 3, or voting rights
28 under section 308B.555 then in effect, as well as any assignment of
29 member’s rights then in effect other than a security interest.

30
31 The interrelationship between this Section of the draft and the rights of dissociated
32 members and transferees has not yet been fully discussed.
33

1 **SECTION 306. ANNUAL MEMBERS' MEETINGS.**

2 (a) The members of the cooperative shall meet annually as provided in the organic
3 rules or at the direction of the board of directors not inconsistent with the organic rules.

4 (b) Annual members meetings may be held in or out of this state at the place
5 stated in the organic rules or by the board of directors in accordance with the organic rules.

6 (c) Unless otherwise provided by the organic rules, the presiding officer of the
7 annual members' meeting shall be designated by the board of directors.

8 (d) The board of directors shall report, or cause to be reported, the business and
9 financial condition as of the close of the fiscal year at the annual members' meeting first
10 preceding the date of the meeting.

11 **Preliminary Comments**

12 This section expands the MBCA provision to address issues, *e.g.* meeting chair and
13 financial reports, typically addressed in general cooperative law. Note that there is no time
14 period following the close of the fiscal year in which the meeting must necessarily be held.
15 Annual meetings are not generally required under general partnership law (*e.g.* UPA (1997)),
16 limited partnership law (*e.g.* ULPA (2001)) or limited liability company law (*e.g.* ULLCA). Best
17 practice would be to coordinate the dates of the meetings in the organic rules.
18

19 **SECTION 307. SPECIAL MEMBER'S MEETINGS.**

20 (a) Special members' meetings shall be called

21 (1) as provided in the organic rules;

22 (2) by a majority vote of the board of directors;

23 (3) by demand in a record signed by members holding at least 10 percent
24 of the votes of any class or group entitled to cast on the matter that is the purpose of the meeting;
25 or

1 (4) by demand in a record signed by the members holding at least 10
2 percent of all votes entitled to be cast on the matter that is the purpose of the meeting.

3 (b) Any voting member may withdraw its demand under subsection (a)(3) and
4 (a)(4) prior to the receipt by the cooperative of demands sufficient to require a special members
5 meeting.

6 (c) Special members' meetings may be held in or out of this state at the place
7 stated in the organic rules or by the board of directors in accordance with the organic rules.

8 (d) Only affairs within the purpose or purposes stated pursuant to Section 309(c)
9 may be conducted at a special members meeting.

10 (e) Unless otherwise provided by the organic rules, the presiding officer of the
11 meeting shall be designated by the board of directors.

12 **Preliminary Comments**

13 Subsection (a)(3) and (a)(4) generally follows the Minnesota Cooperative Associations
14 Act. Those subsections do not seem to be mutually exclusive and query whether there are any
15 circumstances where subsection (a)(4) would apply without subsection (a)(3) also applying.

16
17 The MBCA allows the 10 percent minimum for demand to be varied upward to 25
18 percent if provided in the articles of incorporation.
19

20 **SECTION 308. EXPRESS AUTHORITY FOR DISTRICT MEETINGS.**

21 The articles of organization of a cooperative may provide that district members may elect
22 delegates at district member meetings who shall represent the district in annual and special
23 members meetings.

24 **Preliminary Comments**

25 Query whether this section is (1) necessary or (2) should be limited to patronage

1 members.

2
3 Neither this draft nor the general cooperative statutes consulted provide for any type of
4 “fiduciary duties” for representatives of districts even though agency principles could apply. The
5 Committee has not yet discussed this issue though it has discussed whether members, generally,
6 have fiduciary duties. There exists strong sentiment on the Committee that members, solely by
7 reason of being members, should not have fiduciary duties. A finer issue is whether members
8 owe (or should owe) the cooperative or other members a duty of good faith or fair dealing.
9

10 For the notice required of district meetings *see* Section 309(d).
11

12 **SECTION 309. NOTICE OF MEMBERS MEETINGS.**

13 (a) The cooperative shall notify each member of the time, date and place of any
14 annual or special member meeting not less than [fifteen] days before the meeting.

15 (b) Unless [this act] or the articles of organization otherwise provide, notice of an
16 annual members meeting need not include [a description of] the purpose or purposes of the
17 meeting.

18 (c) Notice of a special members meeting must include [a description of] the
19 purpose or purposes of the meeting as contained in the demand under Sections 307 (a)(3) and
20 (a)(4) or as voted upon by the board of directors under Section 307 (a)(2).

21 (d) Notice of district meetings under Section 308 shall be given to members of the
22 district in the same manner as provided in subsections (a) through (c).

23 **Preliminary Comments**

24 Query whether the members of a district, having elected a delegate, need to be given
25 notice of the meeting of delegates or whether those members may take part in the meeting. *See*
26 Reporter’s Note, Section 308.
27

28 **SECTION 310. WAIVER OF MEETING NOTICE.**

1 (a) A member may waive notice of any meeting of the members either before,
2 during, or after the meeting.

3 (b) A member's participation in a meeting is waiver of notice of that meeting
4 unless the member objects to the meeting at the beginning of the meeting or promptly upon its
5 arrival at the meeting and does not thereafter vote for or assent to action taken at the meeting.

6 **SECTION 311. QUORUM OF MEMBERS.** Unless the articles of organization
7 provide otherwise, the voting power of those members present at an annual or special members
8 meeting shall constitute a quorum.

9 **Preliminary Comments**

10 The interaction of Sections 310 and 311 means that a member objecting to a meeting
11 under Section 310 is present for purposes of the quorum under 311. The quorum is low. The
12 quorum requirement could, of course, be bifurcated by the number of the cooperative's members.
13

14 **SECTION 312. VOTING BY PATRONAGE MEMBERS.**

15 (a) Each patron member has one vote except the organic rules may provide
16 additional voting power to members on the basis of patronage under Section 313 (a) and may
17 provide for voting by district, group, or class under subsection (b) of this section.

18 (b) The organic rules may provide for voting by geographical district or other
19 group or class and the voting district, group or class may elect delegates to vote on its behalf at
20 any annual or special members meeting. Delegates shall have one vote subject to Section 313

21 (b).

22 (c) If a cooperative has both patron and nonpatron members:

23 (1) the aggregate voting power of all patron members shall be not less than

1 [two-thirds] [three quarters] of the entire voting power entitled to vote [but the organic rules may
2 reduce the collective voting power of patronage members to not less than a majority of the entire
3 voting power entitled to vote]; and

4 (2) the entire aggregate voting power of patron members shall be voted as
5 determined by the majority vote of patronage members voting at the members meeting.

6 **Preliminary Comments**

7 The quantum of voting reserved to patron members under Section 312(c) is controversial
8 because it is a departure from the general law of cooperatives. It has been controversial in
9 Committee discussion. It is also one of the primary changes that allows for greater flexibility for
10 capital formation. Other “new generation” cooperative laws are far less restrictive than this draft.
11 For example, Minnesota substitutes fifteen (15) percent for the two bracketed alternatives and the
12 “majority” floor.
13

14 **SECTION 313. ACTION WITHOUT A MEETING.**

15 (a) Unless otherwise provided by the organic rules, any action that may be taken
16 by the members may be taken without a meeting if each member entitled to vote on such action
17 consents to the action in a record.

18 (b) Consent under subsection (a) may be withdrawn by the member in a record at
19 any time before the cooperative receives a consent from each member entitled to vote.

20 (c) The consent record of any action may specify the effective date or time of the
21 action.

22 **Preliminary Comments**

23 This Section does not expressly require notification or consent by nonvoting members (if
24 any).
25

26 **SECTION 314. DETERMINATION OF VOTING POWER OF PATRONAGE**

1 **MEMBER OR DELEGATE.**

2 (a) The organic rules may provide additional voting power be allocated for each
3 patron member for:

4 (1) actual, estimated, or potential patronage or any combination thereof;

5 (2) equity allocated or held by a patron member in the cooperative;

6 [(3) if the patronage member is a cooperative, the number of patron
7 members of the member cooperative]; or

8 (4) any combination of clauses (a)(1), (a)(2) and (a)(3) of this subsection.

9 (b) The organic rules may provide additional voting power be allocated to each
10 district group or class or delegate for the aggregate of the number of patron members in each
11 such district, group or class or as provided under subsection (a).

12 **SECTION 315. VOTING BY NONPATRONAGE MEMBERS.**

13 (a) If the organic rules provide for nonpatron members, each nonpatron member
14 has one vote except as otherwise provided by the organic rules.

15 (b) The collective voting power of nonpatron members is subject to Section
16 312(c).

17 **SECTION 316. MANNER OF VOTING.**

18 (a) Proxy voting by members is prohibited except the organic rules may provide
19 for member voting by secret mail ballot.

20 (b) Delegate voting based on geographical district, group, or class is not voting by
21 proxy under this [Section].

22 **Preliminary Comments**

1 Proxy voting is not available under traditional cooperative law but mail ballots are
2 allowed, under the law of several states. For example, the Oregon general cooperative statute, in
3 part, states:
4

5 (2) Members as such shall not vote by proxy; but a member that is
6 a corporation, association or partnership may designate a
7 representative to cast its vote. In the absence of written notice that
8 some person has been designated to represent a member which is
9 other than a natural person, such member may be represented by
10 any of its principal officers. If the bylaws of a cooperative provide
11 for the formation of districts and the election of delegates at district
12 meetings to represent their districts in member meetings, such
13 representation is not considered voting by proxy, and the delegates
14 so elected shall cast the votes to which members represented by
15 them are entitled on such matters as are not covered by mail ballots
16 submitted to all members.
17

18 (3) If the bylaws so provide, the board may cause to be submitted
19 by mail ballot any question to be voted on at any member meeting,
20 including the election of directors. In such event the secretary shall
21 mail to each member along with the notice of the meeting, the
22 ballot on each such question and a voting envelope. The ballot
23 may be cast only in a sealed envelope which is authenticated by the
24 member's signature. A vote so cast shall be counted as if the
25 member were present and voting in person.
26

27 Query whether member proxy voting should be allowed if the organic rules so state? As
28 a matter of analysis, member proxies are distinguishable from any sort of board member proxy.
29 Corporate law generally provides for the former but not the latter. The Uniform Limited
30 Partnership Act (2001) provides for proxy voting (section 118).

1 **ARTICLE 4**

2 **MEMBERSHIP INTERESTS**

3
4 **SECTION 401. MEMBERS INTEREST.** A members' interest in the cooperative is its
5 membership interest. A membership interest:

6 (1) consists of participation in governance under [Article] 3 and financial
7 participation under this [Article]; and

8 (2) is personal property.

9 **SECTION 402. TERMS OF MEMBERSHIP INTERESTS.**

10 (a) Membership interests shall be patron membership interests with equal rights
11 unless the organic rules establish patron membership groups, districts, or classes with differing
12 rights or authorize the board of directors to establish such patron membership groups, districts, or
13 classes.

14 (b) Nonpatron membership interests:

15 (1) shall be established by organic rule and the organic rules may not
16 authorize the board of directors to establish nonpatron membership interests;

17 (2) shall have the equal rights as to all other nonpatron membership
18 interests unless the organic rules:

19 (A) establish nonpatron membership groups, districts, or classes
20 with differing rights; or

21 (B) establish nonpatron membership groups, districts, or classes
22 and authorize the board of directors to establish the rights of such nonpatron membership groups,

1 districts, or classes.

2 **Preliminary Comments**

3 The draft of this section is conceptually consistent with the Minnesota Cooperative
4 Associations Act. It differs, however, in that the Minnesota Act contains subsections governing
5 the form of the board of resolution and a subsection detailing, without limitation, the kinds of
6 rights and preferences difference classes might possess (*e.g.* cumulative distributions,
7 distribution preferences, and voting rights.)
8

9 If an agricultural cooperative governed by this draft had not provided for nonpatron
10 interests, it would be required to amend either its articles or bylaws to so provide. This draft
11 requires a two-thirds member vote for bylaw amendments dealing with members' relative rights
12 and preferences and all article amendments require two-thirds vote (of those votes present at the
13 members meeting).
14

15 **SECTION 403. TRANSFERABILITY OF MEMBERSHIP INTERESTS.** Unless
16 otherwise provided in the organic rules and subject to Section 404 [Transfer of Financial
17 Interests] membership interests shall be nontransferable. The terms of the restriction on
18 transferability shall be set forth in the cooperative's organic rules, the interest transfer records of
19 the cooperative, and shall be conspicuously noted on any certificates evidencing a member's
20 interest if certificates are provided by the organic rules.

21 **SECTION 404. TRANSFER OF FINANCIAL INTEREST.**

22 (a) A member may transfer its financial interests in the cooperative unless the
23 transfer is restricted by the organic rules. Any restriction on the members' right to transfer its
24 financial interest shall not be manifestly unreasonable.

25 (b) The transferee of a member's financial interest has, to the extent transferred,
26 the right to share in the allocation of surplus, profits or losses and to receive the distributions to
27 the member transferring the interest.

1 (c) The transferee shall not become a member upon transfer of a member's
2 financial rights unless it is admitted as a member by the cooperative.

3 (d) Subject to Section 901, the member transferring the interest shall continue to
4 have the power to exercise its governance rights in the cooperative unless otherwise provided in
5 the organic rules.

6 (e) A cooperative need not give effect to a transfer under this Section until the
7 cooperative has notice of the transfer.

8 (f) A transfer of a members financial interest in violation of a restriction on
9 transfer contained in the organic rules is ineffective as to a person having notice of the restriction
10 at the time of transfer.

11 (g) Unless otherwise provided by the organic rules, the granting of a security
12 interest in the financial interest by a member shall not be considered a transfer for purposes of
13 this Section.

14 **SECTION 405. RIGHTS OF CREDITOR OF MEMBER OR TRANSFEE.**

15 (a) On application to a court of competent jurisdiction by any judgment creditor of
16 a member or transferee, the court may charge the transferable interest of the judgment debtor
17 with payment of the unsatisfied amount of the judgment with interest. To the extent so charged,
18 the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the
19 share of the distributions due or to become due to the judgment debtor in respect of the
20 cooperative and make all other orders, directors, accounts, and inquiries the judgment debtor
21 might have made or which the circumstances of the case may require to give effect to the charged
22 order.

1 (b) A charging order constitutes a lien on the judgment debtor's financial interest.
2 The court may order a foreclosure upon the interest subject to the charging order at any time.
3 The purchaser at the foreclosure sale becomes a transferee.

4 (c) At any time before foreclosure, an interest charged may be redeemed:
5 (1) by the judgment debtor;
6 (2) with property other than cooperative property, or by one or more of the
7 other members; or
8 (3) with members property, by the cooperative with the consent of all
9 partners whose interests are not so charged.

10 (d) This [act] does not deprive any member or transferee of the benefit of any
11 exemption laws applicable to the member's or transferee's financial interest.

12 (e) This section provides the exclusive remedy by which a judgment creditor of a
13 member or transferee may satisfy a judgment out of the judgment debtor's financial interest.

14 **Preliminary Comments**

15 This Section is derived with minor modification from ULPB (2001). The charging order
16 provision has been the subject of much discussion in conjunction with the Conference's current
17 LLC drafting project. Because of the significant work being done on this issue in the LLC
18 Committee, this Section is not yet ripe for discussion beyond inclusion of the charging order
19 concept in the context of the agriculture or agricultural cooperative. Minnesota does have an
20 analogue to the charging order provision. Many cooperative acts address set-off by the
21 cooperative of obligations owed it by the members and establish priority in the cooperative for
22 such set-off. This draft leaves set-offs to other law.

1 **ARTICLE 5**

2 **MARKETING CONTRACTS**

3
4 **SECTION 501. AUTHORITY.** Unless otherwise provided by organic rules, a
5 cooperative may contract with another party, who need not be a patron member, requiring the
6 other party to:

7 (1) sell, or deliver for sale or marketing on the person's behalf, a specified portion
8 of the other party's agricultural product or specified commodity exclusively to, or through, the
9 cooperative or any facilities furnished by the cooperative or authorize the cooperative to act for
10 the party in any manner with respect to the product;

11 (2) buy or procure from or through the cooperative or any facilities furnished by it,
12 all or a specified part of the goods or services to be bought or procured by the party or authorize
13 the cooperative to act for the party in any manner in the procurement of goods or the performance
14 of services.

15 **Preliminary Comments**

16 This language is adapted from *Or. Rev. Stat.* § 62.355. *See, West's Ann. Cal. Food &*
17 *Agric. Code* §§ 54261-266.
18

19 **SECTION 502. MARKETING CONTRACTS.**

20 (a) The contract may provide for sale of the product or commodity to the
21 cooperative, and, if so, the sale shall transfer title absolutely to the cooperative except for security
22 interests properly perfected under other law, upon delivery or at any other specific time expressly
23 provided by the contract.

(b) The contract may authorize the cooperative to grant a security interest in the product or commodity delivered, and may provide that the cooperative may sell the product or commodity delivered, and pay or distribute the sales price on a pooled or other basis to the other party after deducting the following:

(1) selling, processing, overhead, and other costs and expenses; and

(2) reserves for the purposes set forth under Section 805.

Preliminary Comments

The topics covered in this Section is common to all statutes but the language is novel based upon discussion at the last Committee meeting. It is important because cooperatives need to clearly ascertain whether the contract is a “buy-sell” or “agency” contract not only as a matter of state law but because of issues raised by pending federal income taxation litigation under the taxation of cooperatives. The tax issues become more complex if a cooperative under this draft is taxed as a partnership. Moreover, there is at least one financial accounting issue which turns on the type of contract.

Many of the current statutes stress “title” which in other contexts has been ceded to UCC law so, at least arguably, language in the older statutes may be anachronistic though Committee discussion observed the importance of “insurable title” to the cooperative. The Committee has not vetted this particular language and the reporter has little confidence that this language is yet “dialed-in” appropriately.

SECTION 503. TERM OF CONTRACT. A single term of a contract shall not exceed ten years but may be renewable for additional periods not exceeding five years each subject to the right of either party not to renew by giving record notice during a period of the current term as specified in the contract.

Preliminary Comments

The substance of this section is common to many cooperative statutes.

SECTION 504. REMEDIES FOR BREACH OF CONTRACT.

1 (a) The contract or organic rules may establish a specific sum of money as
2 liquidated damages to be paid by a patron member to the cooperative. The damages may be a
3 percentage of the value of a specific amount per unit of the product, goods or services involved
4 by the breach or a fixed sum of money.

5 (b) If there is a breach or threatened breach of a contract the cooperative is entitled
6 to an injunction to prevent the breach and to a judgment of specific performance. Pending the
7 adjudication of the action, and upon filing sufficient bond, the cooperative is entitled to a
8 temporary restraining order and a preliminary injunction.

9 **Preliminary Comments**

10 **Source:** *See generally* Minnesota Cooperatives Associations Act, Oregon Cooperative
11 Corporations Act.
12

13 **SECTION 505. CONTRACT INTERFERENCE AND FALSE REPORTS.**

14 (a) Any person who, with knowledge that a contract exists, induces or attempts to
15 induce any breach of the contract with the cooperative, or who in any manner aids a breach of the
16 contract, is liable to the cooperative for damages caused by such interference. The cooperative is
17 also entitled to an injunction to prevent any interference with the contract.

18 (b) In addition to the remedies provided in subsection (a), a civil action with a
19 penal sum of \$500 for each offense shall be available for the benefit of a cooperative against any
20 person who knowingly and maliciously:

21 (1) induces or attempts to induce a breach of contract with the cooperative
22 under Section 501; or

23 (2) publishes any false report about the finances or management of a

1 cooperative.

1 **ARTICLE 6**

2 **DIRECTORS AND OFFICERS**

3
4 **SECTION 601. EXISTENCE AND POWERS OF BOARD OF DIRECTORS.**

5 (a) Each cooperative shall have a board of directors consisting of not less than
6 three directors as provided in the articles of organization.

7 (b) The affairs of the cooperative shall be managed by, or under the direction of,
8 the board of directors.

9 (c) A director does not have agency authority on behalf of the cooperative solely
10 by being a director.

11 **SECTION 602. NO LIABILITY AS DIRECTOR FOR COOPERATIVE**
12 **OBLIGATIONS.** An obligation of a cooperative, whether arising in contract, tort, or otherwise,
13 is not the obligation of a director. A director is not personally liable, directly or indirectly, by
14 way of contribution or otherwise, for an obligation of the cooperative solely by reason of being a
15 director or officer.

16 **Preliminary Comments**

17 **Source:** Derived from ULPA (2001). “New” to the law of cooperatives.
18

19 **SECTION 603. QUALIFICATIONS OF DIRECTORS AND COMPOSITION OF**
20 **BOARD.**

21 (a) The organic rules may provide for qualification of directors subject to this
22 Section.

1 (b) A director must be an individual.

2 (c) A director need not be a resident of this state unless otherwise provided in the
3 articles of bylaws.

4 (d) If provided by the articles of organization or organic rules, one-fifth or less of
5 the board of directors may be directors who are neither members of the cooperative nor
6 designated representatives of members who are not individuals.

7 (e) No less than two-thirds of the board of directors shall be elected exclusively by
8 patron members.

9 **Preliminary Comments**

10 The allowance of nonmember directors *and*, conversely, the limitation in subsection (d)
11 need to be discussed.
12

13 **SECTION 604. ELECTION OF DIRECTORS.**

14 (a) The articles of organization may provide the election of all or a specified
15 number of directors by the holders of one or more groups or classes of membership interest.

16 (b) The articles of organization or bylaws may provide for the nomination or
17 election of directors by geographic district either directly or by district delegates and if provided
18 shall state:

19 (1) the number of directors to be elected or nominated by each district;

20 (2) the manner and method of reapportioning the directors; and

21 (3) the manner and method of redistricting the geographic territory covered
22 by the cooperative.

23 (c) Except as provided in subsection (b) directors shall be elected at an annual

1 members meeting.

2 **SECTION 605. TERMS OF DIRECTORS.**

3 (a) Unless otherwise provided in the articles of organization directors terms shall
4 expire at the annual members' meeting following their election but in no event shall the stated
5 term of any director exceed three years.

6 (b) Directors may be reelected for subsequent terms.

7 (c) Each director shall continuously serve as director until a successor director is
8 elected and qualified.

9 **Preliminary Comments**

10 This raises "staggered terms."
11

12 **SECTION 606. RESIGNATION OF DIRECTORS.**

13 (a) A director has the power to resign at any time by giving notice in a record to
14 the board of directors or to the cooperative.

15 (b) A resignation is effective when notice is received by the cooperative unless the
16 notice states a later effective date.

17 **SECTION 607. REMOVAL OF DIRECTORS BY MEMBERS.**

18 (a) The members may remove one or more directors without cause unless the
19 organic rules provide that directors may be removed for cause only.

20 (b) A director shall be removed by the same affirmative vote and in the same
21 manner as required for the director's election.

22 (c) A director shall be removed by the members at a special or regular members

meeting called for the purpose, or for one of the purposes, of removing the director.

SECTION 608. REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING.

(a) On application by the cooperative the [appropriate court] may remove a director if considering the director's course of conduct and the inadequacy of other available remedies removal is in the best interest of the cooperative and the director engaged in:

(1) fraudulent conduct with respect to the cooperative or its members;

(2) grossly abused the position of director; or

(3) intentionally inflicted harm on the cooperative.

(b) This section does not limit the equitable powers of the court to order other relief.

SECTION 609. BOARD VACANCY.

(a) Unless the organic rules otherwise provide, a vacancy on the board of directors shall be filled:

(1) by majority vote of the remaining directors until the next annual members' meeting; and

(2) for the unexpired term by members at the next annual members' meeting or special members meeting called for that purpose.

(b) If the vacating director was elected by a group of class of membership interest or by district:

(1) the appointed director shall be of that group, class or district; and

(2) the election of the director for the unexpired term shall be conducted in the same manner as would the election of that position without a vacancy.

1 **SECTION 610. COMPENSATION OF DIRECTORS.** Unless the organic rules
2 otherwise provide the board of directors may fix the remuneration of directors.

3 **SECTION 611. MEETINGS.**

4 (a) The board of directors shall meet at least annually and may hold meetings in or
5 out of [this state].

6 (b) Unless otherwise provided in the organic rules, the board may permit directors
7 to attend board of directors meetings or conduct board meetings through the use of any means of
8 communication if all directors attending the meeting can simultaneously hear each other during
9 the meeting.

10 **SECTION 612. ACTION WITHOUT A MEETING.**

11 (a) Unless otherwise provided by the organic rules, any action that may be taken
12 by the board of directors may be taken without a meeting if each director consents to action in a
13 record.

14 (b) Consent under subsection (a) may be withdrawn by the director in a record at
15 any time before the cooperative receives a consent record from each director.

16 (c) The consent record of any action may specify the effective date or time of the
17 action.

18 **SECTION 613. MEETINGS AND NOTICE.**

19 (a) The board of directors unless the organic rules otherwise provide, may
20 establish a time and place for regular board meetings and notice of the time, place or purpose of
21 those meetings is not required.

22 (b) Unless the organic rules provide otherwise, special meetings of the board of

1 directors must be preceded by at least three days notice of the time, date and place of the
2 meeting.

3 **SECTION 614. WAIVER OF MEETING NOTICE.**

4 (a) A director may waive any required notice of a meeting of the board of
5 directors either before, during, or after the meeting.

6 (b) A director's participation in a meeting is waiver of notice of that meeting
7 unless the director objects to the meeting at the beginning of the meeting or promptly upon the
8 directors arrival at the meeting and does not thereafter vote for or assent to action taken at the
9 meeting.

10 **SECTION 615. QUORUM.**

11 (a) Unless otherwise provided in the articles of organization, a majority of the
12 fixed number of directors on the board of directors constitutes a quorum for the management of
13 the affairs of the cooperative.

14 (b) If a quorum is in attendance at the beginning of the meeting any action taken
15 by the board of directors present is valid even though the withdrawal of directors originally
16 present results in the number of directors being less than the number required for a quorum.

17 **SECTION 616. VOTING.**

18 (a) Unless otherwise provided in the articles of organization each director shall be
19 entitled to one vote on matters before the board of directors.

20 (b) The articles of organization may allocate director voting power in any manner
21 provided two-thirds or more of the votes required for action on general matters of the cooperative
22 shall be allocated to directors elected by patron members.

1 (c) Unless otherwise provided in the articles of organization the board may take
2 action by affirmative majority vote or assent of the director voting power present at the meeting.

3 **Preliminary Comments**

4 Reporter was directed to move the following subsection to a Reporter's Note as a matter
5 of economy and for further discussion of its necessity.

6
7 (d) A director who is present at a meeting of the board of directors when action is taken
8 shall be deemed to have assented to the action taken unless:

9
10 (1) the director objects at the beginning of the meeting or promptly upon the
11 directors arrival at the meeting and does not thereafter vote for or assent to action taken at the
12 meeting;

13
14 (2) the directors assent or abstention from the action is made in a record

15
16 (A) in the minutes of the meeting; or

17
18 (B) the director

19
20 (i) does not vote for or assent to the action taken at the meeting;
21 and

22
23 (ii) delivers notice in a record to the presiding officer of the
24 meeting before adjournment or to the cooperative immediately after adjournment of the meeting.
25

26 **SECTION 617. COMMITTEES.**

27 (a) Unless otherwise provided by the organic rules a board of directors may create
28 one or more committees and appoint one or more directors to serve on the committee.

29 (b) Unless otherwise provided by the organic rules, the creation of a committee
30 and appointment of directors to a committee shall be in accordance with Section 511 or Section
31 515.

32 (c) Unless otherwise provided by the organic rules, each committee may exercise

1 the powers of the board of directors except no committee shall have the power

2 (1) to approve distributions unless according to a formula or method
3 prescribed by the board of directors;

4 (2) approve or propose to members action requiring approval of members;
5 or

6 (3) fill vacancies on the board of directors or any of its committees.

7 **Preliminary Comments**

8 Special litigation committee, audit committee; Minnesota allows non-directors to be
9 members of a committee. This draft does not expressly allow executive committees but many
10 cooperative statutes do so.
11

12 **SECTION 618. STANDARD OF CONDUCT.**

13 (a) A director shall discharge the duties of a director and as a member of a
14 committee of the board of directors:

15 (1) in good faith;
16 (2) with the care of an ordinarily prudent person in a like position would
17 reasonably believe appropriate under similar circumstances; and

18 (3) in a manner the director reasonably believes to be in the best interests
19 of the cooperative.

20 (b) In discharging the duties of a director and as a member of a committee of the
21 board of directors a director, who does not have knowledge that makes reliance unwarranted, is
22 entitled to rely on information, opinions, reports, or statements including financial statements and
23 other financial data, if prepared or presented by:

1 (1) officers or employees of the cooperative whom the director reasonably
2 believes to be reliable and competent in the matters presented;

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

5 (3) a committee of the board of directors of which the director is not a
6 member if the director reasonably believes the committee merits confidence.

7 (c) A director is not liable to the cooperative [or its members] for any action taken
8 as a director, or any failure to take such action, if the director performed the duties of the director
9 in compliance with this section.

10 **Preliminary Comments**

11 The current formulation of the standard of conduct for directors varies significantly from
12 the formulation used in unincorporated entity acts promulgated by the conference.

13
14 Subsection (a): The MBCA contains the language in (a)(1) and (a)(3). Its formulation of
15 (a)(2), however, is limited to its oversight function and to becoming informed with respect to the
16 decision-making function. The MBCA formulation also deletes all reference to "ordinarily
17 prudent person" because of the ambiguity of that phrase in the law of negligence. The MBCA
18 states a standard for liability in a subsequent section separately from the standard of conduct.
19 Generally it is the latter section (MBCA § 8.31) which contemplates, but does not expressly
20 state, the business judgment rule.

21
22 Neither the Minnesota Cooperative Associations Act, or this draft, contain the separate
23 liability section. The Minnesota Act's "conduct" section uses the phrase, "ordinarily prudent
24 person in a like position would exercise under similar circumstances" without including the
25 MBCA's modification "would reasonably believe appropriate." Oregon's Cooperative
26 Corporation Act (general application) contains the same language as (a)(2).

27
28 For purposes of this draft the Committee directed the Reporter to add language to raise
29 the issue of a director whom possesses specialized skill for purposes of *increasing* the duty of the
30 director. The language used in (a)(2) is intended to do so.

32 **SECTION 619. CONFLICT OF INTEREST.**

1 (a) A conflict of interest transaction is a director transaction with the cooperative,
2 other than in the course of activity for which the cooperative is organized, whether or not on a
3 patronage basis, in which the director of the cooperative

4 (1) has a direct, indirect, or familial interest; or

5 (2) is dominated or controlled by another person to the extent that the
6 director would reasonably be expected to affect the director's judgment.

7 (b) A director's conflict of interest transaction may not be enjoined, set aside, or
8 give rise to an award of damages or other sanctions, in a proceeding by a member or in the right
9 of the cooperative, if:

10 (1) the conflict of interest was:

11 (A) subject to subsection (c) disclosed or known to the board of
12 directors, the committee of the board of directors, or the members of the cooperative; and

13 (B) a majority of the voting power not interested in the transaction
14 assented authorized or ratifiable transaction; or

15 (2) the transaction was fair to the cooperative.

16 (c) If a director has a conflict of interest in a transaction but is neither a party to
17 the transaction nor has a familial interest to a party to the transaction and has a duty under law or
18 professional canon, or a duty of confidentiality to another person that prohibits disclosure under
19 subsection (b)(1)(A), then disclosure is sufficient if the director discloses to persons voting on
20 the transaction the existence and nature of his conflicting interest and the character and
21 limitations imposed by that duty before their vote on the transaction; and takes no part in the
22 deliberation or vote.

Preliminary Comments

This Section is taken almost directly from the MBCA. It's organization and style are, rather obviously, a problem. Attempts by the Reporter to reformulate it have been unsuccessful so far. Thus, for purposes of discussion, emphasis should be placed on the substance and necessity of the Section and not its specific language.

SECTION 620. LIMITATION OF DIRECTORS DUTIES. The articles of organization may vary the standards under Sections 618 and 619 except it may not:

(1) eliminate the conflict of interest provisions under Section 619, but may:

(A) identify specific types of categories of activities that shall not be conflicts of interest transactions, if not manifestly unreasonable; and

(B) specify the number or percentage of voting power which may authorize or ratify, after disclosure, a specific act or transaction that would otherwise be a conflict of interest.

(2) unreasonably reduce the standard of conduct under Section 618 (a)(2); or

(3) eliminate the obligation of good faith under Section 618 (a)(1) but it may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

Preliminary Comments

The committee has not discussed this controversial section as drafted. It mirrors the provisions found in the other uniform unincorporated acts and is somewhat similar to Minnesota's provision on limitation of director liability.

SECTION 621. RIGHT OF DIRECTOR TO INFORMATION. A director may obtain, inspect and copy true and full information regarding the state of activities and financial

1 condition of the cooperative and other information regarding the activities of the cooperative
2 reasonably related to the performance of the director’s duties as director but not for any other
3 purpose or in any manner that would violate any duty to the cooperative would violate any duty
4 to the cooperative.

5 **SECTION 622. OTHER CONSIDERATIONS OF DIRECTORS.** For purposes of
6 Article 14 of [this act] a director may, in determining the best interests of the cooperative,
7 consider the interests of employees, customers, and suppliers of the cooperative and on the
8 communities in which the cooperative operates, and the long term and short term interests of the
9 cooperative and its members.

10 **Preliminary Comments**

11 The Minnesota Cooperative Associations Act does not limit this provision to mergers; but
12 Oregon’s Cooperative Corporation Act does. The language suggests that the original source of
13 this provision is “anti-takeover acts” for general business corporations in various states (*e.g.*
14 Pennsylvania). The committee has discussed this provision only briefly in its broader form and
15 there was strong support for deleting the section in its broader form completely. The Reporter
16 limited its scope to mergers for this draft for purposes of discussion.
17

18 **SECTION 623. APPOINTMENT AND AUTHORITY OF OFFICERS.**

19 (a) A cooperative shall have the offices provided in its organic rules or established
20 by the board of directors consistent with the organic rules.

21 (b) The organic rules or the board of directors shall designate one of the officers
22 for preparing all records required by Section 113 and by the rules and for the authentication of
23 records.

24 (c) Officers shall have such authority and perform such duties as the organic rules
25 prescribe or as the board of directors may determine is consistent with the organic rules.

1 (d) Election or appointment of an officer shall not of itself create a contract with
2 the officer.

3 (e) Unless otherwise provided in the organic rules an individual may
4 simultaneously hold more than one office in the cooperative.

5 **Preliminary Comments**

6 Almost all current cooperative acts follow pre-1984 business corporation law either
7 requiring or expressly permitting named offices. This draft does not do so. Rather, it provides
8 the flexibility present in many cooperative statutes in a more (word) efficient way which is closer
9 to post-1984 business corporation law and with the law of unincorporated organizations.
10

11 **SECTION 624. RESIGNATION AND REMOVAL OF OFFICERS.**

12 (a) Unless otherwise provided by the organic rules the board has the power to
13 remove an officer at any time with or without cause.

14 (b) An officer has the power to resign at any time by giving notice to the
15 cooperative. The resignation is effective when the notice is given unless the notice specifies a
16 later time.

17 **Preliminary Comments**

18 Note that this draft contains no provision directly addressing the standard of conduct of
19 officers. This is, at the least, not unusual in the world of general cooperative statutes. At bottom,
20 this draft leaves much of the law governing officers to contract and agency principles.

1 **ARTICLE 7**

2 **INDEMNIFICATION**

3
4 **SECTION 701. PERMISSIBLE INDEMNIFICATION OF INDIVIDUAL.**

5 (a) Subject to Section 702, a cooperative may indemnify against liability incurred
6 by an individual who is a party, or is threatened to be made a party, to any proceeding because of
7 the performance of duties to, or the activity on behalf of, the cooperative if:

8 (1) the conduct of the individual was in good faith;

9 (2) the individual reasonably believed that the individual's conduct was in
10 the best interests of the cooperative; and

11 (3) in any criminal proceeding, the individual had no reasonable cause to
12 believe the conduct was unlawful.

13 (b) The termination of a proceeding by judgment order, settlement or conviction
14 or its equivalent is not, of itself, determinative that the individual did not meet the standard of
15 conduct described in this section.

16 **Preliminary Comments**

17 Corporate law (MBCA) includes the concept "at least not opposed to the best interests" in
18 subsection (a)(2).
19

20 **SECTION 702. PROHIBITED INDEMNIFICATION OF INDIVIDUAL. A**

21 cooperative may not indemnify an individual under [this Article] in connection with:

22 (a) a proceeding by or in the right of the cooperative in which the individual was
23 adjudged liable to the cooperative; or

(b) any other proceeding charging improper personal benefit to the individual in which the individual was adjudged liable on the basis that personal benefit was improperly received.

SECTION 703. MANDATORY INDEMNIFICATION OF DIRECTOR OR OFFICER. Unless limited by its organic rules, a cooperative shall indemnify a director or officer who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director or officer was a party because of being a director of the cooperative against reasonable expenses incurred by the director or officer in connection with the proceeding.

SECTION 704. ADVANCE FOR EXPENSES OF DIRECTOR OR OFFICER.

(a) A cooperative may pay or reimburse the reasonable expenses incurred by a director or officer who is a party or is threatened to be made a party to a proceeding in advance of final disposition of the proceeding if:

(1) the director or officer furnishes the cooperative an affirmation in a record of the director's or officer's good faith belief that the director or officer has met the standard of conduct in Section 701; and

(2) the director or officer furnishes the cooperative an undertaking in a record to repay the advance if it is determined that the director or officer did not meet the standard of conduct.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director or officer but need not be secured and need not reference financial ability to make repayment.

SECTION 705. DISCLOSURE TO MEMBERS. If a cooperative indemnifies or

1 advances expenses to a director or officer under [this Article] it shall disclose the indemnification
2 or advance to the members at or before the next members meeting.

3 **Preliminary Comments**

4 The draft of this article is tentative because it varies the language used in general
5 cooperative acts, the Minnesota Cooperative Associations Act and the MBCA. It does so, in
6 part, in an attempt to shorten the provision. Another approach is used in the Colorado
7 Cooperative Act which statutorily adopts, with modification, the general business corporation
8 law of indemnification.
9

10 By way of illustration, this Article does not currently contain the free standing
11 definitional section of comparative acts, deletes the section on judicial indemnification, broadens
12 its coverage to any individual in Sections 601 and 602 and combines provisions on officers and
13 directors throughout the Article. It also deletes any mention on indemnification for liability on
14 account of benefit plans. The comparative acts also include the procedure for determining
15 whether to indemnify or advance.
16

17 Beyond the issue of the appropriate drafting detail, two substantive questions remain
18 unanswered by this draft: (1) Is this exclusive or preemptive of other law? (2) May it be varied
19 in the organic rules or by agreement?

ARTICLE 8

CONTRIBUTIONS, FEES AND DISTRIBUTIONS

SECTION 801. MEMBERSHIP CONTRIBUTIONS AND FEES.

(a) The organic rules shall establish:

(1) the amount, manner, or method of determining any membership contribution requirements for members or may authorize the board of directors to establish the manner and terms of any contributions for new members; and

(2) the accounting procedures and methods for receiving and allocating those fees.

(b) The organic rules shall establish:

(1) the amount, manner, or method of determining membership fees or

may authorize the board of directors to establish the manner and terms of any fees; and

(2) the accounting procedures and methods for receiving and allocating those fees.

Preliminary Comments

Source: Derived from the Oregon Cooperative Corporation Act and ULPA (2001). This draft does not expressly provide for stock or use the corporate capital accounting model which allows the board of directors, for example, to establish par value. Rather this draft follows unincorporated law which is far more general, and less detailed. The draft does contemplate that the organic rules may establish a more corporate-like capital structure and a different article contemplates “certificated” membership interests. Thus, this draft more closely follows the unincorporated organizational model and is, therefore, arguably more contractually or agreement based. Paradoxically, the entity contemplated by this draft is more flexible upon formation but gives the board of directors less power to establish new classes or voting interests than in a business corporation. This mix is consistent with stronger member control.

1 **SECTION 802. FORMS OF CONTRIBUTION, FEES AND VALUATION.**

2 (a) Unless otherwise provided in the organic rules, the contributions and fees of a
3 member may consist of tangible or intangible property or other benefit to the cooperative,
4 including money, services performed, promissory notes, other agreements to contribute cash or
5 property, and contracts to be performed.

6 (b) The receipt and acceptance of contributions or fees and the valuation of
7 contributions or fees shall be reflected in the cooperatives required records pursuant to Section
8 113.

9 (c) Unless otherwise provided in the organic rules, the board of directors shall
10 value the contributions or fees received or to be received. The determination by the board of
11 directors is conclusive for purposes of whether the member is validly admitted and fully paid.

12 **Preliminary Comments**

13 The Minnesota Cooperative Associations Act contains detailed provisions requiring the
14 restatement of the value of contributions under certain circumstances. Those provisions effect
15 both liquidating distributions and federal partnership income tax consequences (“stepped up
16 basis”). This draft follows the Conference’s general treatment of such matters in its other
17 unincorporated entity acts by leaving them to agreement among the members in an organic rule.
18

19 **SECTION 803. CONTRIBUTION AND FEE AGREEMENTS.**

20 (a) A contribution or fee agreement entered into before formation of the
21 cooperative is irrevocable for six months unless:

22 (1) otherwise provided by the agreement; or

23 (2) all parties to the agreement consent to the revocation.

24 (b) Upon default by a party to a contribution or fee agreement entered into before

1 formation, the cooperative once formed may:

2 (1) collect the amount owed as any other debt; or

3 (2) unless otherwise provided in the agreement, rescind the agreement if
4 the debt remains unpaid more than 20 days after the cooperative demands payment from the party
5 in a record.

6 **Preliminary Comments**

7 **Source:** Oregon Cooperative Corporation Act; conceptually similar to the Minnesota
8 Cooperative Associations Act, the MBCA and ULPA (2001).
9

10 **SECTION 804. APPORTIONMENT OF NET PROCEEDS, SAVINGS OR** 11 **PROFITS.**

12 (a) Subject to subsection (b), the organic rules shall provide the apportionment or
13 allocation of net proceeds, savings, profits or losses between classes, groups or districts of
14 members.

15 (b) Patron members shall be apportioned not less than 50 percent of the net
16 proceeds, savings, or profits in any fiscal year but the articles of organization may reduce the
17 percentage apportioned to patron members to not less than 30 percent.

18 **SECTION 805. DISTRIBUTIONS AND RESERVES.**

19 (a) Unless otherwise provided in the organic rules, the board of directors may
20 retain or set aside a portion of net proceeds, savings or profits apportioned to patron members for
21 purposes of the following:

22 (1) to create or accumulate a capital reserve;

23 (2) to create or accumulate reserves for specific purposes including but not

1 limited to expansion and replacement of capital assets; and

2 (3) for promoting cooperative organization but the amount set aside for
3 promoting cooperative organization shall not exceed five percent of the annual net proceeds,
4 savings or profits for the last fiscal year.

5 (b) Subject to subsection (c), distribution of the amount apportioned to patron
6 members in excess of the uses under subsection (a) shall be made at least annually in accordance
7 with the ratio of each member's patronage during the period to total patronage of all members
8 during that period.

9 (c) For purposes of apportionment of net proceeds, savings or profits to patron
10 members the organic rules may establish allocation units based on function, division, district,
11 department, or other methods, and may account for and distribute to patrons based on allocation
12 units or pooling arrangements.

13 (d) Unless otherwise provided by the organic rules, distributions to members may
14 be made in the form of cash, capital credits, allocated patronage equities, revolving fund
15 certificates, or its own or other securities.

16 Preliminary Comments

17 Two shadow issues raised by the draft language are: (1) whether the cooperative may
18 allocate or distribute "dividends" based on the amount of apportioned but retained member
19 capital; and (2) Whether the provisions in this Section should expressly apply to nonpatron
20 distributions (is there an "untoward" negative implication in the language used?).
21

22 **SECTION 806. REDEMPTION OF EQUITY.** Subject to Section 807 and unless the
23 articles of organization otherwise provide, a cooperative may redeem member's equity upon
24 dissociation of the member. Consideration for such equity shall be the amount of the member's

1 contributions or fees as previously allocated or apportioned under Section 805 plus any accrued
2 allocations to the member's equity.

3 **Preliminary Comments**

4 This Section may be needless repetition of other authority for distributions under this
5 draft but, on the other hand, it may make the draft more user-friendly for those cooperatives
6 which contemplate "stock" or certificated interests. It is important to note that this Section is
7 permissive at the discretion of the cooperative and does not give any member a put right.
8

9 **SECTION 807. APPORTIONMENT OF LOSSES.** Unless otherwise provided in the
10 organic rules, losses shall be apportioned and charged in the same manner as net proceeds,
11 savings or profits.

12 **SECTION 808. LIMITATIONS ON DISTRIBUTIONS.**

13 (a) A cooperative may not make a distribution if after the distribution:

14 (1) the cooperative would not be able to pay its debts as they become due
15 in the ordinary due course of the cooperative's activities; or

16 (2) the cooperative's assets would be less than the sum of its total
17 liabilities.

18 (b) A cooperative may base a determination that a distribution is not prohibited
19 under subsection (b) on financial statements prepared on the basis of accounting practices and
20 principles that are reasonable in the circumstances or on a fair valuation or other method that is
21 reasonable in the circumstances.

22 (c) Except as otherwise provided in subsection (g), the effect of a distribution
23 under subsection (b) is measured:

24 (1) in the case of distribution by purchase, redemption, or other

1 acquisitions of a transferable interest in the cooperative, as of the date money or other property is
2 transferred or debt incurred by the cooperative; and

3 (2) in all other cases, as of the date:

4 (A) the distribution is authorized, if the payment occurs within 120
5 days after that date; or

6 (B) the payment is made, if payment occurs more than 120 days
7 after the distribution is authorized.

8 (d) A cooperative's indebtedness to a member incurred by reason of a distribution
9 made in accordance with this section is at parity with the cooperative's indebtedness to its
10 general, unsecured creditors.

11 (e) A cooperative's indebtedness, including indebtedness issued in connection
12 with or as part of a distribution, is not considered a liability for purposes of subsection (a) if the
13 terms of the indebtedness provide that payment of principal and interest are made only to the
14 extent that a distribution could then be made to partners under this Section.

15 (f) If indebtedness is issued as a distribution, each payment of principal or interest
16 on the indebtedness is treated as a distribution, the effect of which is measured on the date the
17 payment is made.

18 Preliminary Comments

19 This limiting language is from ULPA (2001) and, generally, cooperative acts do not deal
20 with this issue with this level of detail. Nonetheless, it seems the same policy and governance
21 issues are raised in cooperatives, limited partnerships, and corporations.

22
23 This Section also raises another issue specific to this draft: Who is liable? Under typical
24 unincorporated law it is possible to require members to return a proportionate amount of an
25 unlawful distribution. It is one of the few bright-line areas for director liability under corporate

1 law.
2

3 **[SECTION 809. DISTRIBUTIONS OF UNCLAIMED PROPERTY.]**

4 **Preliminary Comments**

5 Several state cooperative laws provide an exception for the application of other law on
6 unclaimed property. For example, the Oregon Cooperative Corporation Act sets forth a
7 procedure for unclaimed property to revert to the cooperative and the Minnesota Cooperative
8 Associations Act allows the cooperative to designate another entity (“business” or “tax exempt”)
9 to receive the property. Committee has discussed these provisions but no decision has been
10 reached. By way of illustration relevant portion of the Oregon Act states:
11

12 **62.425. Unclaimed distribution, redemptions or payments. (1)**
13 Any distribution of net margins by a cooperative or any redemption
14 of or payment based upon any indebtedness, capital stock of a
15 cooperative or other equity interest which remains unclaimed four
16 years after the date authorized for payment, redemption or
17 retirement may be forfeited by the board. Any amount forfeited
18 may revert to the cooperative, if, at least six months prior to the
19 declared date of forfeiture, notice that the payment is available has
20 been mailed to the last known address of the person shown by the
21 cooperative’s records to be entitled thereto or, if the address is
22 unknown, is published as provided by ORS 62.245....

1 **ARTICLE 9**

2 **DISSOCIATION**

3
4 **SECTION 901. MEMBER DISSOCIATION.**

5 (a) Unless otherwise provided by the organic rules, a member does not have a
6 right to dissociate as a member of a cooperative but does have the power to dissociate.

7 (b) A member is dissociated from a cooperative upon the occurrence of any of the
8 following events:

9 (1) the cooperative's having notice of the person's express will to
10 withdraw as a member or to withdraw on a later date specified by the person;

11 (2) an event provided in the organic rules as causing the person's
12 dissociation as a member;

13 (3) the person's expulsion as a member pursuant to the organic rules;

14 (4) the person's expulsion as a member by the board of directors if:

15 (A) it is unlawful to carry on the cooperative's activities with the
16 person as a member;

17 (B) subject to Section 405 there has been a transfer of all of the
18 person's financial interest in the cooperative;

19 (C) the person is a corporation or a cooperative and, within 90 days
20 after the cooperative notifies the person that it will be expelled as a member because it has filed a
21 certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct
22 business has been suspended by the jurisdiction of its incorporation, there is no revocation of the

1 certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

2 (D) the person is a limited liability company, cooperative or
3 partnership that has been dissolved and whose business is being wound up;

4 (5) on application by the cooperative, the person's expulsion as a member
5 by judicial order because:

6 (A) the person engaged in wrongful conduct that adversely and
7 materially affected the cooperative's activities;

8 (B) the person willfully or persistently committed a material breach
9 of the organic rules or [this act]; or

10 (C) the person engaged in conduct relating to the cooperative's
11 activities which makes it not reasonably practicable to carry on the activities with the person as
12 member;

13 (6) in the case of a person who is an individual, the person's death;

14 (7) in the case of a person that is a trust or is acting as a member by virtue
15 of being a trustee of a trust, distribution of the trust's entire financial interest in the cooperative,
16 but not merely by reason of the substitution of a successor trustee;

17 (8) in the case of a person that is an estate or is acting as a member by
18 virtue of being a personal representative of an estate, distribution of the estate's entire financial
19 interest in the cooperative, but not merely by reason of the substitution of a successor personal
20 representative;

21 (9) termination of a member that is not an individual, partnership, limited
22 liability company, cooperative, corporation, trust, or estate;

(10) the cooperative's participation in a consolidation or merger under [Article] 14, if the cooperative:

(A) is not the surviving entity; or

(B) is the surviving entity but, as a result of the consolidation or merger, the person ceases to be a member.

Preliminary Comments

Source: ULPA (2001) § 601. Subsection (b)(6) follows ULPA in that it does not state incompetency as an event of dissociation. The issue raised by incompetency needs yet to be vetted.

SECTION 902. EFFECT OF DISSOCIATION AS MEMBER.

(a) Upon a person's dissociation as a member:

(1) subject to Section 903, the person does not have further rights as a member;

(2) the person's obligations under [this act] or the organic rules as a member continues only as to matters arising and events occurring before the dissociation; and

(3) subject to Section 903 and [Article] 14, any financial interest owned by the person in the person's capacity as a member immediately before dissociation is owned by the person as a mere transferee.

(b) A person's dissociation as a member does not of itself discharge the person from any obligation to the cooperative or the other members which the person incurred while a member.

Preliminary Comments

1 **Source:** ULPA (2001) § 602.
2

3 **SECTION 903. POWER OF ESTATE OF MEMBER.** If a member dies or is
4 adjudged incompetent, the member's personal representative or other legal representative may
5 exercise the rights of a transferee and the member's financial interest as provided in Section 405
6 and, for the purposes of settling the estate of a deceased member, may exercise the informational
7 rights of a current member under Section 305.

8 **Preliminary Comments**

9 **Source:** ULPA (2001) § 704. *See* Reporter's Note concerning the absence of
10 incompetency as a cause of dissociation by a member.

1 **ARTICLE 10**

2 **DISSOLUTION**

3
4 **SECTION 1001. DISSOLUTION.** A cooperative may be dissolved:

- 5 (1) nonjudicially under Section 1002;
6 (2) judicially under Section 1003; or
7 (3) administratively under Section 1009.

8 **SECTION 1002. NONJUDICIAL DISSOLUTION.** Except as otherwise provided in
9 Section 1003, a cooperative is dissolved and its activities must be wound up, only upon the
10 occurrence of any of the following:

- 11 (1) the happening of an event or a time specified in the articles of organization;
12 (2) the vote of the organizers, board of directors, or members under Section 1004
13 and 1005;
14 (3) the passage of 90 days after the dissociation of the last member, unless before
15 the end of the period the cooperative admits at least one member in accordance with its organic
16 rules; or
17 (4) the filing of a determination by the [Secretary of State] under Section 1009.

18 **Preliminary Comments**

19 Subsection (3) of this Section again begs the fundamental question of how many
20 members are required for the existence of a cooperative. This Section errs on the side of
21 continuity of life though it is inconsistent with matters of formation.
22

23 **SECTION 1003. JUDICIAL DISSOLUTION.** The [court of competent jurisdiction]

1 may dissolve a cooperative or order any action which under the circumstances is appropriate and
2 equitable:

3 (1) in a proceeding by the [attorney general] if it is established:

4 (A) the cooperative obtained its articles of organization through fraud; or

5 (B) the cooperative has continued to exceed or abuse the authority
6 conferred upon it by law;

7 (2) in a proceeding by a member or a transferee of a member's financial interest if
8 it established:

9 (A) the directors are deadlocked in the management of the cooperative
10 affairs, the members are unable to break the deadlock, and irreparable injury to the cooperative is
11 occurring or is threatened because of the deadlock;

12 (B) the directors or those in control of the cooperative have acted, are
13 acting, or will act in a manner that is illegal, oppressive, or fraudulent;

14 (C) the members are deadlocked in voting power and have failed, for a
15 period that includes at least two consecutive annual members meeting dates, to elect successors
16 to directors whose terms have expired;

17 (D) the assets of the cooperative are being misapplied or wasted;

18 (3) in a proceeding by the cooperative to have its voluntary dissolution continued
19 under court supervision.

20 Preliminary Comments

21 This section on judicial dissolution is derived from the MBCA but conceptually tracks the
22 current LLC draft being considered by the Conference. Substantively, note: (1) Subsection 2
23 authorizes transferees of financial interests to bring an action to dissolve (in addition to

1 members); (2) Subsection 2(A) does not include the MBCA phrase, “or the business and affairs
2 of the [cooperative] can no longer be conducted to the advantage of the ... [members] generally”;
3 and (3) the MBCA provides for an action for dissolution by a creditor of the corporation (here the
4 cooperative) if the claim has been reduced to judgment and the entity is insolvent.
5

6 This section also adds the phrase “or order any action which under the circumstances is
7 appropriate and equitable” thereby expressly authorizing the court to, illustratively, appoint
8 provisional directors or force a buy-out of interests. This follows what appears to be a trend in
9 both statutory and case law of corporations.
10

11 Finally, though it is included in the MBCA, the committee has not addressed subsection
12 (2)(C) which does not require any showing of damage to the cooperative.
13

14 **SECTION 1004. VOLUNTARY DISSOLUTION BEFORE COMMENCEMENT**
15 **OF ACTIVITY.** A majority of the organizers or initial directors of a cooperative that has not
16 yet began activity or the conduct of its affairs may dissolve the cooperative.

17 **SECTION 1005. VOLUNTARY DISSOLUTION BY THE BOARD AND**
18 **MEMBERS.**

19 **[Reserved]**

20 **Preliminary Comments**

21 This Article is reserved simply because it is anticipated it will mirror the language and
22 procedure utilized for both amendment of the articles or organization and, to a lesser extent, the
23 merger provisions. Thus, its drafting awaits further discussion on those items.
24

25 **SECTION 1006. WINDING UP.**

26 (a) A cooperative continues after dissolution only for purposes of winding up its
27 activities.

28 (b) In winding up its activities, the cooperative:

29 (1) shall amend its articles of organization indicating it is winding-up

pursuant to Section 203, preserve the cooperative or its property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal or administrative, transfer cooperative property, settle disputes by mediation or arbitration, and perform other necessary acts; and

(2) shall discharge the cooperatives liabilities, settle and close the cooperative's activities, and marshal and distribute the assets of the cooperative.

(c) On the application of the cooperative or any member, the [appropriate court] may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved cooperative's activities, if:

(1) after a reasonable time the cooperative has not executed winding up under subsection (b); or

(2) the applicant establishes other good cause.

SECTION 1007. KNOWN CLAIMS AGAINST DISSOLVED COOPERATIVE.

(a) A dissolved cooperative may dispose of the known claims against it by following the procedure described in subsection (b).

(b) A dissolved cooperative may notify its known claimants of the dissolution in a record. The notice must:

(1) specify the information required to be included in a claim;

(2) provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the notice is received by the claimant; and

(4) state that the claim will be barred if not received by the deadline.

(c) A claim against a dissolved cooperative is barred if the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) in the case of a claim that is timely received but rejected by the dissolved cooperative, the claimant does not commence an action to enforce the claim against the cooperative within 90 days after the receipt of the notice of the rejection.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that is contingent on that date.

SECTION 1008. OTHER CLAIMS AGAINST DISSOLVED COOPERATIVE.

(a) A dissolved cooperative may publish notice of its dissolution and request persons having claims against the cooperative to present them in accordance with the notice.

(b) The notice must:

(1) be published at least once in a newspaper of general circulation in the [county] in which the dissolved cooperative's principal office is located or, if it has none in this State, in the [county] in which the cooperative's designated office is or was last located;

(2) describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent; and

(3) state that a claim against the cooperative is barred unless an action to enforce the claim is commenced within five years after publication of the notice.

(c) If a dissolved cooperative publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the dissolved cooperative within five years after the publication date

1 of the notice:

2 (1) a claimant that did not receive notice in a record under Section 1007

3 (2) a claimant whose claim was timely sent to the dissolved cooperative

4 but not acted on; and

5 (3) a claimant whose claim is contingent or based on an event occurring

6 after the effective date of dissolution.

7 (d) A claim not barred under this section may be enforced:

8 (1) against the dissolved cooperative, to the extent of its undistributed

9 assets; or

10 (2) if the assets have been distributed in liquidation, against a member or

11 transferee to the extent of that person's proportionate share of the claim or the cooperative's

12 assets distributed to the member or transferee in liquidation, whichever is less, but a person's

13 total liability for all claims under this paragraph does not exceed the total amount of assets

14 distributed to the person as part of the winding up of the dissolved cooperative.

15 **SECTION 1009. ADMINISTRATIVE DISSOLUTION.**

16 (a) The [Secretary of State] may dissolve a cooperative administratively if the

17 cooperative does not, within 60 days after the due date:

18 (1) pay any fee, tax, or penalty due to the [Secretary of State] under this

19 [act] or other law; or

20 (2) deliver its annual report to the [Secretary of State].

21 (b) If the [Secretary of State] determines that a ground exists for administratively

22 dissolving a cooperative, the [Secretary of State] shall file a record of the determination and serve

1 the cooperative with a copy of the filed record.

2 (c) If within 60 days after service of the copy the cooperative does not correct
3 each ground for dissolution or demonstrate to the reasonable satisfaction of the [Secretary of
4 State] that each ground determined by the [Secretary of State] does not exist, the [Secretary of
5 State] shall administratively dissolve the limited partnership by preparing, signing and filing a
6 declaration of dissolution that states the grounds for dissolution. The [Secretary of State] shall
7 serve the cooperative with a copy of the filed declaration.

8 (d) A cooperative administratively dissolved continues its existence but may carry
9 on only activities necessary to wind up its activities and liquidate its assets under Section 1006
10 and to notify claimants under Sections 1007 and 1008.

11 (e) The administrative dissolution of a cooperative does not terminate the
12 authority of its agent for service of process.

13 **SECTION 1010. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
14 **DISSOLUTION.**

15 (a) A cooperative that has been administratively dissolved may apply to the
16 [Secretary of State] for reinstatement within two years after the effective date of dissolution. The
17 application must be delivered to the [Secretary of State] for filing and state:

18 (1) the name of the cooperative and the effective date of its administrative
19 dissolution;

20 (2) that the grounds for dissolution either did not exist or have been
21 eliminated; and

22 (3) that the cooperative's name satisfies the requirements of Section 109.

1 (b) If the [Secretary of State] determines that an application contains the
2 information required by subsection (a) and that the information is correct, the [Secretary of State]
3 shall prepare a declaration of reinstatement that states this determination, sign, and file the
4 original of the declaration of reinstatement, and serve the cooperative with a copy.

5 (c) When reinstatement becomes effective, it relates back to and takes effect as to
6 the effective date of the administrative dissolution and the cooperative may resume its activities
7 as if the administrative dissolution had never occurred.

8 **Preliminary Comments**

9 **Source:** ULPA, ULLCA, generally follows the MBCA.
10

11 **SECTION 1011. APPEAL FROM DENIAL OF REINSTATEMENT.**

12 (a) If the [Secretary of State] denies a cooperative's application for reinstatement
13 following administrative dissolution, the [Secretary of State] shall prepare, sign and file a notice
14 that explains the reason or reasons for denial and serve the cooperative with a copy of the notice.

15 (b) Within 30 days after service of the notice of denial, the cooperative may
16 appeal from the denial of restatement by petitioning the [appropriate court] to set aside the
17 dissolution. The petition must be served on the [Secretary of State] and contain a copy of the
18 [Secretary of State's] declaration of dissolution, the cooperative's application for reinstatement,
19 and the [Secretary of State's] notice of denial.

20 (c) The court may summarily order the [Secretary of State] to reinstate the
21 dissolved cooperative or may take other action the court considers appropriate.

22 **Preliminary Comments**

1 **ARTICLE 11**

2 **ACTIONS BY MEMBERS**

3
4 **SECTION 1101. DIRECT ACTION BY PARTNER.**

5 (a) Subject to subsection (b), a member may maintain a direct action against the
6 cooperative or another member for legal or equitable relief, to enforce the rights and otherwise
7 protect the interests of the member, including rights and interests under the organic rules or
8 organic law.

9 (b) A member commencing a direct action under this Section is required to plead
10 and prove an actual or threatened injury that is not solely the result of an injury suffered or
11 threatened to be suffered by the cooperative.

12 (c) The accrual of, and any time limitation on, a right of action for a remedy
13 under this section is governed by other law. Any right to an accounting upon a dissolution and
14 winding up does not revive a claim barred by law.

15 **Preliminary Comments**

16 **Source:** § 1001 ULPA (2001) (modified). The direct right to sue other members is based
17 on unincorporated entity law.
18

19 **SECTION 1102. DERIVATIVE ACTION.** A member may maintain a derivative
20 action to enforce a right of a cooperative if the member adequately represents the interests of the
21 cooperative and if:

22 (1) the member first makes a demand in writing on the cooperative, requesting
23 that it bring an action to enforce the right, and the cooperative does not bring the action within a

1 reasonable time; and

2 (2) 90 days have expired from the date the demand was made unless the member
3 has earlier been notified that the demand has been rejected by the cooperative or unless
4 irreparable injury to the cooperative would result by waiting for the expiration of the time period.

5 **Preliminary Comments**

6 **Source:** § 1002 ULPA (2001). This draft does not contain a futility exception.
7

8 **SECTION 1103. PROPER PLAINTIFF.** A derivative action may be maintained only
9 by a person that is a member at the time the action is commenced and:

10 (1) that was a member when the conduct giving rise to the action occurred; or
11 (2) whose status as a member devolved upon the person by operation of law from
12 a person that was a member at the time of the conduct.

13 **Preliminary Comments**

14 **Source:** § 1003 ULPA (2001). Query whether the requirement that the person bringing a
15 suit be a member at the time of commencement is advisable or necessary.
16

17 **SECTION 1104. PLEADING.** In a derivative action, the complaint must state with
18 particularity:

19 (1) the date and content of plaintiff's demand and the cooperative's response to
20 the demand; and

21 (2) if 90 days has not expired under Section 1102 (2), that irreparable injury to the
22 cooperative would result by waiting for the expiration of the time period.

23 **SECTION 1105. PROCEEDS AND EXPENSES.**

1 (a) Except as otherwise provided in subsection (b):

2 (1) any proceeds or other benefits of a derivative action, whether by
3 judgment, compromise, or settlement, belong to the cooperative and not to the derivative
4 plaintiff;

5 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff
6 shall
7 immediately remit them to the cooperative.

8 (b) If a derivative action is successful in whole or in part, the court may award the
9 plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the
10 cooperative.

11 Preliminary Comments

12 **Source:** § 1005 ULPA (2001).

13
14 Most cooperative statutes do not expressly provide for derivative actions. This draft
15 closely follows ULPA (2001) in providing for such actions.

16
17 Section 1102 modifies the ULPA (2001) formulation by adding the requirement that the
18 member adequately represents the interests of the cooperative; by adding a 90 day time period
19 after demand before suit may be commenced; and by deleting excused demand because of
20 futility. The 90 day period may be excused if the waiting period would result in irreparable harm
21 to the cooperative under subsection 1102(2). These modifications generally follow the law of the
22 Model Business Corporations Act. This draft does not include the MBCA provision concerning
23 litigation committees and the authority of the committee to have the suit dismissed if the
24 committee exercises good faith. One reason for not providing for such committees is because
25 directors under this draft must be members and, therefore, will rarely be "independent".
26 Nonetheless the addition of the requirement that the member bringing the derivative suit
27 "adequately represent" the cooperative should provide a framework for the evolution of such
28 concepts under the common law.

1 **ARTICLE 12**

2 **FOREIGN COOPERATIVES**

3
4 **SECTION 1201. GOVERNING LAW.**

5 (a) The laws of the State or other jurisdiction under which a foreign agricultural
6 or agricultural related cooperative is organized govern relations among the members of the
7 foreign cooperative and between the members and the foreign cooperative.

8 (b) A foreign agricultural or agricultural related cooperative may not be denied a
9 certificate of authority by reason of any difference between the laws of the jurisdiction under
10 which the foreign cooperative is organized and the laws of [this State].

11 (c) A certificate of authority does not authorize a foreign agricultural or
12 agricultural related cooperative to engage in any activity or exercise any power that an
13 agricultural or agricultural related cooperative may not engage in or exercise in this State.

14 **SECTION 1202. APPLICATION FOR CERTIFICATE OF AUTHORITY.**

15 (a) A foreign agricultural or agricultural related cooperative may apply for a
16 certificate of authority to transact business in this State by delivering an application to the
17 [Secretary of State] for filing. The application must state:

18 (1) the name of the foreign cooperative and, if the name does not comply
19 with Section 109, an alternate name adopted pursuant to Section 1205.

20 (2) the name of the State or other jurisdiction under whose law the foreign
21 cooperative is organized;

22 (3) the term of duration for the cooperative if the duration is not perpetual;

1 (4) the street and mailing address of the foreign cooperative's designated
2 office and, if the laws of the jurisdiction under which the foreign cooperative is organized require
3 the foreign cooperative to maintain an office in that jurisdiction, the street and mailing address of
4 the required office;

5 (5) the name and street and mailing address of the foreign cooperative's
6 agent for service of process in this State;

7 (6) the name and street and mailing address of each of the foreign
8 cooperative's current directors and officers.

9 (b) A foreign cooperative shall deliver with the completed application a
10 certificate of existence or a record of similar import signed by the [Secretary of State] or other
11 official having custody of the foreign cooperative's publicly filed records in the State or other
12 jurisdiction under whose law the foreign cooperative is organized.

13 **SECTION 1203. ACTIVITIES NOT CONSTITUTING TRANSACTING**
14 **BUSINESS.**

15 (a) Activities of a foreign cooperative which do not constitute transacting
16 business in this State within the meaning of this [article] include:

- 17 (1) maintaining, defending, and settling an action or proceeding;
18 (2) holding meetings of its members or carrying on any other activity
19 concerning its internal affairs;
20 (3) maintaining accounts in financial institutions;
21 (4) maintaining offices or agencies for the transfer, exchange, and
22 registration of the foreign cooperative's own securities or maintaining trustees or depositories

1 with respect to those securities;

2 (5) selling through independent contractors;

3 (6) soliciting or obtaining orders, whether by mail or electronic means or
4 through employees or agents or otherwise, if the orders require acceptance outside this State
5 before they become contracts;

6 (7) creating or acquiring indebtedness, mortgages, or security interests in
7 real or personal property;

8 (8) securing or collecting debts or enforcing mortgages or other security
9 interests in property securing the debts, and holding, protecting, and maintaining property so
10 acquired;

11 (9) conducting an isolated transaction that is completed within 30 days and
12 is not one in the course of similar transactions of a like manner; and

13 (10) transacting business in interstate commerce.

14 (b) For purposes of this [Article], the ownership in this State of income-
15 producing real property or tangible personal property, other than property excluded under
16 subsection (a), constitutes transacting business in this State.

17 (c) This section does not apply in determining the contacts or activities that may
18 subject a foreign cooperative to service of process, taxation, or regulation under any other law of
19 this State.

20 **SECTION 1204. FILING OF CERTIFICATE OF AUTHORITY.** Unless the
21 [Secretary of State] determines that an application for a certificate of authority does not comply
22 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,

1 shall file the application, prepare, sign and file a certificate of authority to transact business in
2 this State, and send a copy of the filed certificate, together with a receipt for the fees, to the
3 foreign cooperative or its representative.

4 **SECTION 1205. NONCOMPLYING NAME OF FOREIGN COOPERATIVE.**

5 (a) A foreign cooperative whose name does not comply with Section 109 may not
6 obtain a certificate of authority until it adopts, for the purpose of transacting business in this
7 State, an alternate name that complies with Section 111. A foreign cooperative that adopts an
8 alternate name under this subsection and then obtains a certificate of authority with the name
9 need not comply with [fictitious name statute]. After obtaining a certificate of authority with an
10 alternate name, a foreign cooperative shall transact business in this State under the name unless
11 the foreign cooperative is authorized under [fictitious name statute] to transact business in this
12 State under another name.

13 (b) If a foreign cooperative authorized to transact business in this State changes
14 its name to one that does not comply with Section 109, it may not thereafter transact business in
15 this State until it complies with subsection (a) and obtains an amended certificate of authority.

16 **SECTION 1206. REVOCATION OF CERTIFICATE OF AUTHORITY.**

17 (a) A certificate of authority of a foreign cooperative to transact business in this
18 State may be revoked by the [Secretary of State] in the manner provided in subsections (b) and

19 (c) if the foreign cooperative does not:

20 (1) pay, within 60 days after the due date, any fee, tax or penalty due to the
21 [Secretary of State] under this [act] or other law;

22 (2) deliver, within 60 days after the due date, its annual report required

1 under Section 214;

2 (3) appoint and maintain an agent for service of process as required by
3 Section 116; or

4 (4) deliver for filing a statement of a change under Section 117 within 30
5 days after a change has occurred in the name or address of the agent.

6 (b) In order to revoke a certificate of authority, the [Secretary of State] must
7 prepare, sign, and file a notice of revocation and send a copy to the foreign cooperative's
8 registered agent for service of process in this State, or if the foreign cooperative does not appoint
9 and maintain a proper agent in this State, to the foreign cooperative's designated office. The
10 notice must state:

11 (1) the revocation's effective date, which must be at least 60 days after the
12 date the [Secretary of State] sends the copy; and

13 (2) the foreign cooperative's failures to comply with subsection (a) which
14 are the reason for the revocation.

15 (c) The authority of the foreign cooperative to transact business in this State
16 ceases on the effective date of the notice of revocation unless before that date the foreign
17 cooperative cures each failure to comply with subsection (a) stated in the notice. If the foreign
18 cooperative cures the failures, the [Secretary of State] shall so indicate on the filed notice.

19 **SECTION 1207. CANCELLATION OF CERTIFICATE OF AUTHORITY;**
20 **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

21 (a) In order to cancel its certificate of authority to transact business in this State, a
22 foreign cooperative must deliver to the [Secretary of State] for filing a notice of cancellation.

1 The certificate is canceled when the notice becomes effective under Section 210.

2 (b) A foreign cooperative transacting business in this State may not maintain an
3 action or proceeding in this State unless it has a certificate of authority to transact business in this
4 State.

5 (c) The failure of a foreign cooperative to have a certificate of authority to
6 transact business in this State does not impair the validity of a contract or act of the foreign
7 cooperative or prevent the foreign cooperative from defending an action or proceeding in this
8 State.

9 (d) A member of a foreign cooperative is not liable for the obligations of the
10 foreign cooperative solely by reason of the foreign cooperative's having transacted business in
11 this State without a certificate of authority.

12 (e) If a foreign cooperative transacts business in this State without a certificate of
13 authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent for
14 service of process for rights of action arising out of the transaction of business in this State.

15 **SECTION 1208. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
16 may maintain an action to restrain a foreign cooperative from transacting business in this State in
17 violation of this [Article].

1 **ARTICLE 13**

2 **AMENDMENT OF ARTICLES AND BYLAWS**

3
4 **SECTION 1301. AUTHORITY TO AMEND ARTICLES OF ORGANIZATION**
5 **AND BYLAWS.**

6 (a) A cooperative may amend its articles of organization under Section 1302.

7 (b) A cooperative may amend its bylaws under Section 1302.

8 (c) A member of a cooperative does not have vested rights in any provision in the
9 articles of organization or bylaws.

10 **Preliminary Comments**

11 This article attempts to consolidate the amendment and restatement procedures for both
12 the articles of organization and bylaws. This section simply grants a general authority to amend.
13 Subsection (c) is in the MBCA and is the analogue of the effect of a change or amendment of
14 underlying law provided elsewhere in this draft.
15

16 **SECTION 1302. NOTICE AND ACTION ON AMENDMENT OF ARTICLES OF**
17 **ORGANIZATION OR BY-LAWS.** In order to amend the articles of organization or bylaws:

18 (a) the proposed amendment shall be approved by a majority vote of the board of
19 directors unless a greater vote is required by the organic rules;

20 (b) the board of directors shall mail or otherwise transmit or deliver in a record to
21 each member:

22 (1) the proposed amendment:

23 (2) a recommendation that the members approve the amendment unless the
24 board determines because of conflict of interest or other special circumstances it should not make

1 such a recommendation;

2 (3) if the board makes no recommendation, the basis of that decision;

3 (4) any condition of its submission of the amendment to the members; and

4 (5) give notice of the meeting in the same manner as an annual or special
5 members meeting.

6 **SECTION 1303. APPROVAL OF AMENDMENT.**

7 (a) Subject to Section 1304, an amendment to the articles of incorporation shall be
8 approved by at least two-thirds vote of members pursuant to Section 311.

9 (b) Subject to Section 1304, an amendment to the bylaws shall be approved by at
10 least majority vote of members present at the meeting except that a two-thirds vote of members
11 pursuant to Section 311 is required for any amendment modifying:

12 (1) the capital structure of the cooperative including the relative rights,
13 preferences and restrictions granted or imposed upon any group or class of members, and the
14 rights to share in profits, surplus or distributions of the cooperative members;

15 (2) the terms for admission of new members;

16 (3) meeting quorum, voting and governance rights;

17 (4) the transferability of membership interests; or

18 (5) the manner or method of apportionment or allocation of profits,
19 surpluses, or losses among members.

20 **Preliminary Comments**

21 Many cooperative acts allow the board of directors to amend the bylaws, some do not. It
22 is the initial general sense of the committee to be protective of members and this draft is
23 consistent with that sense.

1 The allocation of provisions between the articles of organization and bylaws, even given
2 the foregoing, in a unique feature of cooperatives. In many ways it seems that the bylaws of
3 some cooperative serve an analogous role of the operating agreement under LLC law, albeit far
4 easier to amend. In order to address the real function of the bylaws in a cooperative this Section
5 sets forth several actions that require a higher vote quantum no matter whether they are in the
6 bylaws or articles of organization. Whether the effect of changing of district boundaries is
7 included in subsection (b) as drafted needs to be considered.
8

9 **SECTION 1304. VOTING BY GROUP, CLASS, OR DISTRICT MEMBERSHIP.**

10 (a) If a proposed amendment affects a group, class, or district of members in one
11 or more of the ways under Section 1303(b) those members shall vote as a separate voting group
12 on the amendment.

13 (b) Unless otherwise provided in the organic rules, if a proposed amendment
14 affects more than one group, class, or district of members in the same or a substantially similar
15 way, the members of those groups, classes, or districts shall vote as a single group on the
16 proposed amendment.

17 (c) A group, class, or district of members shall have the rights provided in this
18 Section even though those members are not otherwise entitled to vote under the organic rules.

19 **Preliminary Comments**

20 Subsection (c) entitles “nonvoting” members the right to vote concerning fundamental
21 changes to the terms of their membership. The interrelationship between subsection (c) and the
22 rights of creditors and transferees of economic rights needs to be explored.

1 **ARTICLE 14**

2 **CONSOLIDATION AND MERGER**

3
4 **SECTION 1401. DEFINITIONS.** In this [article]:

5 (1) “Constituent cooperative” means a constituent organization that is a
6 cooperative.

7 (2) “Constituent organization” means an organization that is party to a merger.

8 (3) “Converting cooperative” means a converting organization that is a
9 cooperative.

10 (4) “Governing statute” of an organization means the statute that governs the
11 organization’s internal affairs.

12 (5) “Organization” means a general partnership, including a limited liability
13 partnership; limited partnership, including a limited liability limited partnership; limited liability
14 company; business trust; corporation; or any other person having a governing statute. The term
15 includes domestic and foreign organizations whether or not organized for profit.

16 (6) “Personal liability” means personal liability for a debt, liability, or other
17 obligation of an organization which is imposed on a person that co-owns, has an interest in, or is
18 a member of the organization:

19 (A) by the organization’s governing statute solely by reason of the person
20 co-owning, having an interest in, or being a member of the organization; or

21 (B) by the organization’s organizational documents under a provision of
22 the organization’s governing statute authorizing those documents to make one or more specified

1 persons liable for all or specified debts, liabilities, and other obligations of the organization
2 solely by reason of the person or persons co-owning, having an interest in, or being a member of
3 the organization.

4 (7) “Surviving organization” means an organization into which one or more other
5 organizations are merged. A surviving organization may preexist the merger or be created by the
6 merger.

7 **SECTION 1402. MERGER.**

8 (a) A cooperative may merge with one or more other constituent organizations
9 pursuant to this [Article] and a plan of merger, if:

10 (1) the governing statute of each the other organizations authorizes the
11 merger;

12 (2) the merger is not prohibited by the law of a jurisdiction that enacted
13 any of those governing statutes; and

14 (3) each of the other organizations complies with its governing statute in
15 effecting the merger.

16 (b) A plan of merger must be in a record and must include:

17 (1) the name and form of each constituent organization;

18 (2) the name and form of the surviving organization and, if the surviving
19 organization is to be created by the merger, a statement to that effect;

20 (3) the terms and conditions of the merger, including the manner and basis
21 for converting the interests in each constituent organization into any combination of money,
22 interests in the surviving organization, and other consideration;

1 (4) if the surviving organization is to be created by the merger, the
2 surviving organization's organizational documents; and

3 (5) if the surviving organization is not to be created by the merger, any
4 amendments to be made by the merger to the surviving organization's organizational documents.

5 **SECTION 1403. NOTICE AND ACTION ON PLAN OF MERGER BY**
6 **CONSTITUENT COOPERATIVE.**

7 (a) The plan of merger:

8 (1) shall be approved by the board of directors; and

9 (2) unless otherwise provided in the organic rules, approval of the plan
10 shall require a two-thirds vote of all members of the board of directors.

11 (b) The board of directors shall mail or otherwise transmit or deliver in a record to
12 each member:

13 (1) the plan;

14 (2) a recommendation that the members approve the plan unless the board
15 makes a determination because of conflicts of interest or other special circumstances it should
16 not make such a recommendation;

17 (3) if the board makes no recommendation, the basis for that decision;

18 (4) any condition of its submission of the plan to the members; and

19 (5) give notice of the meeting in the same manner as an annual or special
20 members meeting.

21 **SECTION 1404. APPROVAL AND ABANDONMENT OF MERGER BY**
22 **MEMBERS OF THE CONSTITUENT COOPERATIVE.**

1 (a) Unless the organic rules otherwise provide, a plan of merger shall be approved
2 by the patron members if:

3 (1) the quorum of the members eligible to vote under Section 311 is
4 registered as being present for the meeting; and

5 (2) two-thirds of the patron members present for the meeting consent to
6 the plan.

7 (b) Subject to any contractual rights, after a merger is approved, and at any time
8 before a filing is made under Section 1407, a constituent cooperative may amend the plan or
9 abandon the planned merger:

10 (1) as provided in the plan; and

11 (2) except as prohibited by the plan, with the same consent as was required
12 to approve the plan.

13 **SECTION 1405. MERGER OF SUBSIDIARY.**

14 (a) A cooperative that owns 90 percent of each class of the voting power of a
15 subsidiary entity may merge the subsidiary into itself or into another such subsidiary, unless the
16 organic rules of the cooperative or the organic law or organic rules of the other entity otherwise
17 provide, or

18 (b) The cooperative owning at least 90 percent of the subsidiary entity before the
19 merger shall notify each other owner of the subsidiary, if any, of the merger within ten days after
20 the effective date of the merger.

21 **SECTION 1406. RESTRICTIONS ON APPROVAL OF MERGERS.** If a member of
22 a constituent cooperative will have personal liability with respect to a converted or surviving

1 organization, approval and amendment of a plan of conversion or merger are ineffective without
2 the consent of the member to the specific plan in a record.

3 **SECTION 1407. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

4 (a) After each constituent organization has approved a merger, articles of merger
5 must be signed on behalf of each other preexisting constituent organization, by an authorized
6 representative.

7 (b) The articles of merger must include:

8 (1) the name and form of each constituent organization and the jurisdiction
9 of its governing statute;

10 (2) the name and form of the surviving organization, the jurisdiction of its
11 governing statute, and, if the surviving organization is created by the merger, a statement to that
12 effect;

13 (3) the date the merger is effective under the governing statute of the
14 surviving organization;

15 (4) if the surviving organization is to be created by the merger:

16 (A) if it will be a cooperative, the cooperative's articles of
17 organization; or

18 (B) if it will be an organization other than a cooperative, the
19 organizational document that creates the organization;

20 (5) if the surviving organization preexists the merger, any amendments
21 provided for in the plan of merger for the organizational document that created the organization;

22 (6) a statement as to each constituent organization that the merger was

1 approved as required by the organization's governing statute;

2 (7) if the surviving organization is a foreign organization not authorized to
3 transact business in this State, the street and mailing address of an office which the [Secretary of
4 State] may use for the purposes of Section 1207; and

5 (8) any additional information required by the governing statute of any
6 constituent organization.

7 (c) Each constituent cooperative shall deliver the articles of merger for filing in
8 the [Office of the Secretary of State].

9 (d) A merger becomes effective under this [Article]:

10 (1) if the surviving organization is a cooperative, upon the later of:

11 (A) compliance with subsection (c); or

12 (B) subject to Section [210], as specified in the articles of merger;

13 or

14 (2) if the surviving organization is not a cooperative, as provided by the
15 governing statute of the surviving organization.

16 **SECTION 1408. EFFECT OF MERGER.**

17 (a) When a merger becomes effective:

18 (1) the surviving organization continues or comes into existence;

19 (2) each constituent organization that merges into the surviving
20 organization ceases to exist as a separate entity;

21 (3) all property owned by each constituent organization that ceases to exist
22 vests in the surviving organization;

1 (4) all debts, liabilities, and other obligations of each constituent
2 organization that ceases to exist continue as obligations of the surviving organization;

3 (5) an action or proceeding pending by or against any constituent
4 organization that ceases to exist may be continued as if the merger had not occurred;

5 (6) except as prohibited by other law, all of the rights, privileges,
6 immunities, powers, and purposes of each constituent organization that ceases to exist vest in the
7 surviving organization;

8 (7) except as otherwise provided in the plan of merger, the terms and
9 conditions of the plan of merger take effect; and

10 (8) except as otherwise agreed, if a constituent cooperative ceases to exist,
11 the merger does not dissolve the cooperative for the purposes of [the dissolution article];

12 (9) if the surviving organization is created by the merger:

13 (A) if it is a cooperative, the articles of organization become
14 effective; or

15 (B) if it is an organization other than a cooperative, the
16 organizational document that creates the organization becomes effective; and

17 (10) if the surviving organization preexists the merger, any amendments
18 provided for in the articles of merger for the organizational document that created the
19 organization become effective.

20 **Preliminary Comments**

21 **Source:** ULPA (2001).
22

1 **SECTION 1409. [ARTICLE] NOT EXCLUSIVE.** This [Article] does not preclude an
2 entity from being converted or merged under other law.

3 **Preliminary Comments**

4 Most of this article is based on the merger provisions found in Article 11, ULPA (2001).
5 There are two major differences with the ULPA formulation. *First*, this draft does not provide
6 for conversions although it provides for the same result through merger of a cooperative *into*
7 another type of entity. *Second*, it allows for short-form merger where cooperative owns at least
8 90 percent of the voting power of the subsidiary. The first difference is a matter of degree
9 depending on decisions made in the Model Entity Transactions Act currently before the
10 Conference. It may be important to discuss the advisability of conversion-like processes here,
11 however, squarely within the context of cooperatives to identify any specific concerns.
12

13 One change not incorporated in this draft is the bifurcation between merger and
14 consolidation. The advisors to this act have urged that the term “consolidation” be used where
15 the surviving entity is a new organization. The term has been deleted from the MBCA but
16 remains in many state cooperative acts. The return of the term consolidation should not raise
17 substantive concerns beyond being somewhat inconsistent with the laws of other organization.

ARTICLE 15

SALE OF SUBSTANTIALLY ALL THE ASSETS

[RESERVED]

Preliminary Comments

This Article will closely follow the language and format of the mergers article. Thus, it awaits further discussion of the provisions concerning merger.

1 **ARTICLE 16**

2 **DISSENTERS RIGHTS**

3
4 **[RESERVED]**

5 **Preliminary Comments**

6 The Committee has not reached a consensus on whether, and to what extent, dissenters
7 rights should be included in the act. Some cooperative statutes do contain dissenters (*e.g.*
8 Colorado set forth below). The issue is complicated by the “retained [member’s] equity” which
9 is an important source of capital.

10
11 The Conference’s unincorporated acts deal with dissenters’ rights two ways. First, they
12 provide for unanimous consent to amend the operative agreement (ULLCA) or partnership
13 agreement (RUPA) and require unanimity for mergers. Even though they provide, generally, that
14 a dissociating member receives its “transferrable interest” upon dissociation and no “put” right,
15 the unanimity requirement puts pressure on the entity to come to terms with potential dissenters.
16 In an at-will general partnership the partnership is subject to dissolution by will of any partner
17 leading to winding-up and the liquidation and distribution of assets.

18
19 Although long and generally similar to corporate law, the most relevant portion of the
20 dissenters’ rights provision from the Colorado Cooperative Act is set forth below for illustrative
21 purposes:

22
23 **§ 7-56-608. Dissenters’ rights - definitions.**

24
25 (1) As used in this section:

26
27 (a) “Dissenter” means a member eligible to vote who exercises the
28 right to dissent provided in this section at the time and in the
29 manner required by this section.

30
31 ***

32
33 (c) “Stated value” means the original cost paid by a person for
34 capital stock or membership fees, as recorded in the records of the
35 cooperative, in order to qualify for membership and the right to
36 vote in the cooperative, and for other equity capital the amount
37 stated in the records of the cooperative that is required to make a
38 payment under this section.

1 (2) If the board of a cooperative subject to this article submits to
2 the members of the cooperative for approval a plan of merger,
3 consolidation, or share or equity capital exchange and if following
4 the merger, consolidation, or share or equity capital exchange there
5 will be members of any cooperative involved in the proposed
6 transaction who would no longer be eligible for membership or
7 other voting interest in the surviving entity, the ineligible members
8 shall be entitled to repayment of their equity interests in the
9 cooperative in accordance with this section.

10 ***
11

12
13 (4) A cooperative that proposes to be a party to a merger,
14 consolidation, share or equity capital exchange, or a sale of assets,
15 as described in subsection (2) or (3) of this section, shall include in
16 the notice of the membership meeting at which the vote of the
17 members is taken thereon an explanation of the right to dissent and
18 the requirement to give written notice of intent to demand payment
19 by a member having the right to do so under this section.
20

21 (8) Within thirty days after receipt of a demand for payment, the
22 surviving or new entity or, in the case of a sale of assets subject to
23 this section, the cooperative selling its assets shall pay to the
24 dissenter:
25

26 (a) The stated value of the initial investment of the dissenter in
27 stock or membership fees in the cooperative as recorded in the
28 records of the cooperative made to qualify the dissenter to be a
29 member of the cooperative; and
30

31 (b) The stated value of all other equity capital of the dissenter in
32 the cooperative as recorded in the records of the surviving
33 cooperative, or in the case of a sale of assets subject to this section,
34 of the cooperative selling its assets; except that, in the case of any
35 merger, consolidation, or share or equity capital exchange, if the
36 surviving or new entity has, by written agreement or operation of
37 law other than this section, become liable to repay the other equity
38 capital of the dissenter, the repayment of other equity capital shall
39 be made by the surviving or new entity under the same conditions
40 and time frame, but not more than fifteen years, that would have
41 applied if the member or equity holder had withdrawn or been
42 terminated from the cooperative that is not the surviving or new
43 entity immediately prior to the effective date of the merger,

1 consolidation, or share or equity capital exchange. If payment is
2 not made on the date required by this subsection (8), the recipient
3 shall be entitled to interest from the date the payment should have
4 been made until the date payment is actually made.

5
6 (9) Notwithstanding any provisions of law to the contrary, holders
7 of equity capital who are not members of the cooperative shall
8 under no circumstances be entitled to dissenter's rights.

9
10 **Source:** 8(b) and 9 of the Colorado Act depart from corporate law.

1 **ARTICLE 17**

2 **MISCELLANEOUS PROVISIONS**

3
4 **SECTION 1701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
5 applying and construing this Uniform Act, consideration must be given to the need to promote
6 uniformity of the law with respect to its subject matter among States that enact it.

7 **SECTION 1702. SEVERABILITY CLAUSE.** If any provision of this [act] or its
8 application to any person or circumstance is held invalid, the invalidity does not affect other
9 provisions or applications of this [act] which can be given effect without the invalid provision or
10 application, and to this end the provisions of this [act] are severable.

11 **SECTION 1703. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
12 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal
13 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
14 this [act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic
15 delivery of any of the notices described in Section 103(b) of that Act.

16 **SECTION 1704. EFFECTIVE DATE.** This [act] takes effect [effective date].

17 **SECTION 1705. SAVINGS CLAUSE.** This [act] does not affect an action
18 commenced, proceeding brought, or right accrued before this [act] takes effect.