

TO: Commissioner Harry Haynesworth, Chair,
Business Harmonization Drafting Committee (ULC)

CC: Carter Bishop & Daniel Kleinberger, Reporters

FROM: Tom Geu, Reporter, ULCAA

DATE: August 5, 2010

RE: The Uniform Limited Cooperative Association Act and Harmonization

I. INTRODUCTION

You have requested that I identify key characteristics of limited cooperatives and the sections that reflect policies that may be unique to ULCAA within unincorporated entities. As a matter of introduction and, for your interest, there are two good references that may aid the process of culling characteristics and sections. The first are the official comments including the rather extensive “prefatory note.” The second is a law review article cited as Thomas Earl Geu & Jim Dean, *The New Uniform Limited Cooperative Association Act: A Capital Idea for Principled Self-Help Value Added Firms, Community-Based Economic Development, and Low-Profit Joint Venture*, 44 REAL PROP. TRUST & EST. L. 55 (2009). The article contains a detailed table of contents as a finding aid and contains a chart (beginning on p. 199) that identifies the basic animating provisions (in a comparative format).

This Act varies a great deal from other uniform unincorporated products and, therefore, I project that less is available for inclusion in the hub.

II. PURPOSE & DESCRIPTIVE CHARACTERISTICS

Cooperatives are self-help organizations with a traditionally flat structure most closely similar to the law of nonprofit corporations in the “modern era.” In many ways current state organizational law has ceded regulation of cooperatives to Treasury and the Internal Revenue Service. The key regulatory phrase for tax purposes is “operating on a cooperative basis.” State law, in turn, reflects the tax definition (and the antitrust definition). This creates the same kind of feedback loop that locked in state unincorporated statutes before the check-the-box-regulations.

The literature on cooperatives frequently emphasizes (1) member democratic control; (2) limited or no return on capital; and (3) member economic participation proportional to use (patronage). Historically “open and voluntary membership” and “service at cost” have been popularly cited characteristics. The number of recognized cooperative principles varies from four to fourteen. There is, however, a great difference in the characteristics emphasized by different kinds of cooperatives. For example, housing cooperatives think it imperative that members be able to vote by proxy while most marketing cooperatives still prohibit proxy voting (or strictly limit the number of proxies held by a single member).

Over the years virtually every characteristic of “operating on a cooperative basis” has evolved with the formal exception of limited return on capital (which explains, in part, why value-added “cooperatives” are frequently either joint ventures between a finance group organized as an LLC and an existing cooperative or as a free-standing LLC picking the cooperative characteristics that can fit within the economics of the deal.

The primary purpose of ULCAA and its state law predecessors was to tweak the cooperative characteristics in a way to make capital formation possible. The injection of capital formation required modifications to democratic control and limited return on capital, and a redefinition of economic participation in proportion to use. As a practical matter it also required adding cooperative characteristics generally not addressed by state cooperative law.

III. CHARACTERISTICS & SPECIFIC PROVISIONS OR SECTIONS

A. PROVISIONS SUBJECT TO THE HUB AND EXEMPLARY EXCEPTIONS TO THOSE PROVISIONS

I think it is fair to say that the Drafting Committee tried to cleave to the “uniform” format and provisions wherever possible. Therefore, for example, *most* standard definitions can be harmonized to best practices. Some terms and their definitions are, however, unique to ULCAA including, but not limited to, “financial rights,” “governance rights,” “investor member” (and there might be a latent glitch with this definition but no one has found a way to fix it), “patron member,” “bylaws” and “voting power.”

The manner and method of filing and of designed agents and office can also be conformed with the best practices. The Act does vary the *old* “certificate of existence to “certificate of good standing” but that, too, can probably be conformed to best practices. The “General Provisions” do not contain the “Notice and Notification” provision. The deletion of that provision was a policy decision but I believe, for the sake of harmonization, the notice provision could apply to limited cooperatives.

At least most of “Dissociation,” as well as “Dissolution,” “Actions by Member,” “Foreign Cooperatives,” “Disposition of Assets” (with the exception of voting), and the “Miscellaneous Provisions” can all be conformed.

ULCAA has the basic corporate style “conversion and merger” provisions and the voting defaults need to be continued. Two aberrations of note are provisions on consolidation (§ 1611) and the absence of domestification. Both were policy decisions but, in my opinion, were not of driving importance in the Act.

B. UNIQUE PROVISIONS UNLIKELY CAPABLE OF MOVING TO HUB

Unfortunately few sections in the following articles are subject to moving to the hub:

Article 3 (“Formation, [etc]”); Article 5 (“Members”); Article 6 (“Members Interest in Limited Cooperative Association”); Article 7 (“Marketing Contracts”); Article 8 (“Directors and

Officers”); Article 9 (“Indemnification”); and Article 10 (“Contributions, Allocations, and Distributions”).

I will attempt a brief general explanation for distinguishing differences in these provisions in ULCAA and other unincorporated acts.

First is the existence of *governing* articles and *bylaws* is important beyond familiarity by existing cooperative members. One policy decision was to require more items to be in record form (in part, but only in part, out of populist sentiment). Another reason for bifurcation of the documents is to default to the directors the amendment of *most* bylaw provisions. This is important because marketing contracts and membership agreements are sometimes contained in the bylaws and those functions may very well need to be annual evergreen kinds of agreements.

Second, the marketing contract article is unique to cooperatives because members use (contract with) the association apart but closely related to their membership in the association. Of course, “use” doesn’t always require a marketing contract which is limited to one type of cooperative. The existence of this contract right/obligation adds an identifiable concept to membership interest and complicates it. This additional concept ripples through the Act. For example, because corporate based traditional cooperatives do not have the charging order concept the Conference chose to expressly subject membership interests to the UCC even though ULCAA is built on the unincorporated financial chassis that includes charging orders.

Finally, I believe the differences in Articles 8, 9, and 10 are self-evident.

IV. CONTACT INFORMATION

Please feel free to contact me with questions. My email is thomas.geu@usd.edu. My office phone is 605.677.6347 and my home phone is 605.232.8751. I will gladly give you my cell phone number but prefer not to do so “in record form.”