

D R A F T  
FOR DISCUSSION ONLY

# **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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April 2005

*With Prefatory and Reporter's Notes*

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ON UNIFORM STATE LAWS

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# **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

## **TABLE OF CONTENTS**

PREFATORY NOTE .....	1
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### **ARTICLE 1**

#### **GENERAL PROVISIONS**

SECTION 101. SHORT TITLE .....	5
SECTION 102. DEFINITIONS .....	5
SECTION 103. KNOWLEDGE AND NOTICE .....	9
SECTION 104. COOPERATIVE SUBJECT TO AMENDMENT OR REPEAL OF [ACT] ..	11
SECTION 105. NATURE, PURPOSE, AND DURATION OF ENTITY .....	11
SECTION 106. POWERS .....	11
SECTION 107. GOVERNING LAW .....	12
SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF INTEREST .....	12
SECTION 109. NAME .....	12
SECTION 110. RESERVED NAME .....	14
SECTION 111. REGISTERED NAME .....	14
SECTION 112. USE OF THE TERM “COOPERATIVE” .....	15
SECTION 113. EFFECT OF ORGANIC RULES .....	15
SECTION 114. REQUIRED RECORDS .....	17
SECTION 115. BUSINESS TRANSACTIONS OF MEMBER WITH COOPERATIVE ....	19
SECTION 116. DUAL CAPACITY .....	19
SECTION 117. OFFICE AND AGENT FOR SERVICE OF PROCESS .....	20
SECTION 118. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT FOR SERVICE OF PROCESS .....	20
SECTION 119. RESIGNATION OF REGISTERED AGENT FOR SERVICE OF PROCESS .....	21
SECTION 120. SERVICE OF PROCESS .....	21

### **ARTICLE 2**

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

SECTION 201. ORGANIZATION .....	24
SECTION 202. FORMATION OF COOPERATIVE; ARTICLES OF ORGANIZATION ...	25
SECTION 203. AMENDMENT OR RESTATEMENT OF ARTICLES OF ORGANIZATION .....	26
SECTION 204. ORGANIZATION OF COOPERATIVE .....	27
SECTION 205. BYLAWS .....	27
SECTION 206. EMERGENCY BYLAWS .....	28
SECTION 207. STATEMENT OF DISSOLUTION .....	29
SECTION 208. SIGNING OF RECORDS .....	30
SECTION 209. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER .....	31
SECTION 210. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY OF STATE]; EFFECTIVE TIME AND DATE .....	31
SECTION 211. CORRECTING FILED RECORD .....	33

SECTION 212. LIABILITY FOR FALSE INFORMATION IN FILED RECORD .....	33
SECTION 213. CERTIFICATE OF EXISTENCE OR AUTHORIZATION .....	34
SECTION 214. ANNUAL REPORT FOR [SECRETARY OF STATE] .....	36
SECTION 215. FILING FEES; RULES AND REGULATIONS; ANNUAL REPORTS AND LICENSE TAXES .....	37

### **ARTICLE 3 MEMBERS**

SECTION 301. MEMBERS .....	39
SECTION 302. BECOMING MEMBER .....	39
SECTION 303. NO RIGHT OR POWER AS MEMBER TO BIND COOPERATIVE .....	39
SECTION 304. NO LIABILITY AS MEMBER FOR COOPERATIVE OBLIGATIONS ....	39
SECTION 305. RIGHT OF MEMBER AND FORMER MEMBER TO INFORMATION ...	40
SECTION 306. ANNUAL MEMBERS' MEETINGS .....	43
SECTION 307. SPECIAL MEMBER'S MEETINGS .....	43
SECTION 308. EXPRESS AUTHORITY FOR DISTRICT MEETINGS .....	44
SECTION 309. NOTICE OF MEMBERS MEETINGS .....	45
SECTION 310. WAIVER OF MEETING NOTICE .....	45
SECTION 311. QUORUM OF MEMBERS .....	46
SECTION 312. VOTING BY PATRONAGE MEMBERS .....	46
SECTION 313. ACTION WITHOUT A MEETING .....	47
SECTION 314. DETERMINATION OF VOTING POWER OF PATRONAGE MEMBER OR DELEGATE .....	48
SECTION 315. VOTING BY NONPATRONAGE MEMBERS .....	48
SECTION 316. MANNER OF VOTING .....	48

### **ARTICLE 4 MEMBERSHIP INTERESTS**

SECTION 401. MEMBERS INTEREST .....	50
SECTION 402. TERMS OF MEMBERSHIP INTERESTS .....	50
SECTION 403. TRANSFERABILITY OF MEMBERSHIP INTERESTS .....	51
SECTION 404. TRANSFER OF FINANCIAL INTEREST .....	51
SECTION 405. RIGHTS OF CREDITOR OF MEMBER OR TRANSFEREE .....	52

### **ARTICLE 5 MARKETING CONTRACTS**

SECTION 501. AUTHORITY .....	54
SECTION 502. MARKETING CONTRACTS .....	54
SECTION 503. TERM OF CONTRACT .....	55
SECTION 504. REMEDIES FOR BREACH OF CONTRACT .....	55

### **ARTICLE 6 DIRECTORS AND OFFICERS**

SECTION 601. EXISTENCE AND POWERS OF BOARD OF DIRECTORS AND OFFICERS .....	57
---	----

SECTION 602. NO LIABILITY AS DIRECTOR FOR COOPERATIVE OBLIGATIONS . . .	57
SECTION 603. QUALIFICATIONS OF DIRECTORS AND COMPOSITION OF BOARD .	58
SECTION 604. ELECTION OF DIRECTORS . . . . .	58
SECTION 605. TERMS OF DIRECTORS . . . . .	59
SECTION 606. RESIGNATION OF DIRECTORS . . . . .	60
SECTION 607. REMOVAL OF DIRECTORS BY MEMBERS . . . . .	60
SECTION 608. REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING . . . . .	61
SECTION 609. BOARD VACANCY . . . . .	62
SECTION 610. COMPENSATION OF DIRECTORS . . . . .	62
SECTION 611. MEETINGS . . . . .	63
SECTION 612. ACTION WITHOUT A MEETING . . . . .	63
SECTION 613. MEETINGS AND NOTICE . . . . .	64
SECTION 614. WAIVER OF MEETING NOTICE . . . . .	64
SECTION 615. QUORUM . . . . .	65
SECTION 616. VOTING . . . . .	65
SECTION 617. COMMITTEES . . . . .	66
SECTION 618. STANDARD OF CONDUCT . . . . .	67
SECTION 619. CONFLICT OF INTEREST . . . . .	68
SECTION 620. LIMITATION OF DIRECTORS DUTIES . . . . .	70
SECTION 621. RIGHT OF DIRECTOR TO INFORMATION . . . . .	70
SECTION 622. OTHER CONSIDERATIONS OF DIRECTORS . . . . .	71
SECTION 623. APPOINTMENT AND AUTHORITY OF OFFICERS . . . . .	71
SECTION 624. RESIGNATION AND REMOVAL OF OFFICERS . . . . .	72

## **ARTICLE 7**

### **INDEMNIFICATION**

SECTION 701. PERMISSIBLE INDEMNIFICATION OF INDIVIDUAL . . . . .	73
SECTION 702. PROHIBITED INDEMNIFICATION OF INDIVIDUAL . . . . .	73
SECTION 703. MANDATORY INDEMNIFICATION OF DIRECTOR OR OFFICER . . . .	74
SECTION 704. ADVANCE FOR EXPENSES OF DIRECTOR OR OFFICER . . . . .	74
SECTION 705. DISCLOSURE TO MEMBERS . . . . .	74

## **ARTICLE 8**

### **CONTRIBUTIONS, ALLOCATIONS AND DISTRIBUTIONS**

SECTION 801. MEMBERSHIP CONTRIBUTIONS . . . . .	76
SECTION 802. FORMS OF CONTRIBUTION AND VALUATION . . . . .	76
SECTION 803. CONTRIBUTION AND SUBSCRIPTION AGREEMENTS . . . . .	77
SECTION 804. ALLOCATIONS OF NET PROCEEDS, SAVINGS OR PROFITS . . . . .	78
SECTION 805. DISTRIBUTIONS AND RESERVES . . . . .	78
SECTION 806. REDEMPTION OF EQUITY . . . . .	80
SECTION 807. ALLOCATION OF LOSSES . . . . .	80
SECTION 808. LIMITATIONS ON DISTRIBUTIONS . . . . .	80
[SECTION 809. DISTRIBUTIONS OF UNCLAIMED PROPERTY.] . . . . .	82

**ARTICLE 9  
DISSOCIATION**

SECTION 901. MEMBER DISSOCIATION .....	83
SECTION 902. EFFECT OF DISSOCIATION AS MEMBER .....	85
SECTION 903. POWER OF ESTATE OF MEMBER .....	86

**ARTICLE 10  
DISSOLUTION**

SECTION 1001. DISSOLUTION .....	87
SECTION 1002. NONJUDICIAL DISSOLUTION .....	87
SECTION 1003. JUDICIAL DISSOLUTION .....	88
SECTION 1004. VOLUNTARY DISSOLUTION BEFORE COMMENCEMENT OF ACTIVITY .....	89
SECTION 1005. VOLUNTARY DISSOLUTION BY THE BOARD AND MEMBERS ....	89
SECTION 1006. WINDING UP .....	89
SECTION 1007. DISTRIBUTION OF ASSETS IN WINDING UP COOPERATIVE .....	90
SECTION 1008. KNOWN CLAIMS AGAINST DISSOLVED COOPERATIVE .....	91
SECTION 1009. OTHER CLAIMS AGAINST DISSOLVED COOPERATIVE .....	92
SECTION 1010. ADMINISTRATIVE DISSOLUTION .....	93
SECTION 1011. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION .	94
SECTION 1012. APPEAL FROM DENIAL OF REINSTATEMENT .....	95

**ARTICLE 11  
ACTIONS BY MEMBERS**

SECTION 1101. DIRECT ACTION BY MEMBER .....	96
SECTION 1102. DERIVATIVE ACTION .....	96
SECTION 1103. PROPER PLAINTIFF .....	97
SECTION 1104. PLEADING .....	97
SECTION 1105. PROCEEDS AND EXPENSES .....	98

**ARTICLE 12  
FOREIGN COOPERATIVES**

SECTION 1201. GOVERNING LAW .....	100
SECTION 1202. APPLICATION FOR CERTIFICATE OF AUTHORITY .....	100
SECTION 1203. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS ....	101
SECTION 1204. FILING OF CERTIFICATE OF AUTHORITY .....	103
SECTION 1205. NONCOMPLYING NAME OF FOREIGN COOPERATIVE .....	103
SECTION 1206. REVOCATION OF CERTIFICATE OF AUTHORITY .....	103
SECTION 1207. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE .....	105
SECTION 1208. ACTION BY [ATTORNEY GENERAL] .....	105

**ARTICLE 13  
AMENDMENT OF ORGANIC RULES**

SECTION 1301. AUTHORITY TO AMEND ORGANIC RULES .....	106
SECTION 1302. NOTICE AND ACTION ON AMENDMENT OF ARTICLES OF	

ORGANIZATION OR BY-LAWS .....	106
SECTION 1303. METHOD OF VOTING .....	107
SECTION 1304. AMENDMENT TO AMENDMENT AT MEETING .....	107
SECTION 1305. APPROVAL OF AMENDMENT .....	107
SECTION 1306. VOTING BY GROUP, CLASS, OR DISTRICT MEMBERSHIP .....	109
SECTION 1307. PROPOSAL OF AMENDMENT BY MEMBERS .....	109
SECTION 1308. RESTATED ARTICLES .....	110

## **ARTICLE 14**

### **CONSOLIDATION AND MERGER**

SECTION 1401. DEFINITIONS .....	111
SECTION 1402. MERGER OR CONSOLIDATION .....	112
SECTION 1403. NOTICE AND ACTION ON PLAN OF CONSOLIDATION OR MERGER BY CONSTITUENT COOPERATIVE .....	114
SECTION 1404. APPROVAL AND ABANDONMENT OF CONSOLIDATION OR MERGER BY MEMBERS OF THE CONSTITUENT COOPERATIVE .....	114
SECTION 1405. CONSOLIDATION OR MERGER OF SUBSIDIARY .....	115
SECTION 1406. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE .....	115
SECTION 1407. EFFECT OF CONSOLIDATION OR MERGER .....	117
SECTION 1408. METHOD OF VOTING .....	118
SECTION 1409. [ARTICLE] NOT EXCLUSIVE .....	118

## **ARTICLE 15**

### **SALE OF SUBSTANTIALLY ALL THE ASSETS [RESERVED]**

## **ARTICLE 16**

### **DISSENTERS RIGHTS**

SECTION 1601. DEFINITIONS AND SCOPE .....	121
SECTION 1602. RIGHT TO DISSENT .....	122
SECTION 1603. PROCEDURE AND NOTICE .....	122
SECTION 1604. VALUATION AND PAYMENT FOR NONTRANSFERABLE MEMBERSHIP INTERESTS .....	123
SECTION 1605. VALUATION AND PAYMENT FOR TRANSFERABLE MEMBERSHIP INTERESTS .....	123
SECTION 1606. DISSENTER'S RIGHTS AND DUTIES AFTER CONSUMMATION OF TRANSACTION .....	124

## **ARTICLE 17**

### **MISCELLANEOUS PROVISIONS**

SECTION 1701. EXEMPTION FROM SECURITIES LAWS .....	125
SECTION 1702. EXEMPTION FROM RESTRAINT OF TRADE AND ANTITRUST LAWS .....	125
SECTION 1703. INDUCING BREACH OF MARKETING OR PURCHASE CONTRACTS .....	125

SECTION 1704. ALTERNATE DISTRIBUTION OF UNCLAIMED PROPERTY, DISTRIBUTIONS, REDEMPTIONS OR PAYMENTS .....	126
SECTION 1705. UNIFORMITY OF APPLICATION AND CONSTRUCTION .....	126
SECTION 1706. SEVERABILITY CLAUSE .....	126
SECTION 1707. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT .....	126
SECTION 1708. EFFECTIVE DATE .....	127
SECTION 1709. SAVINGS CLAUSE .....	127



# **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 COOPERATIVE ASSOCIATION ACT**

2   **ARTICLE 1**

3   **GENERAL PROVISIONS**

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

7   **Reporter’s Note**

8                   There has been informal discussion concerning the title of this project both within and  
9 outside the Committee. A position needs to be taken by the committee concerning whether to  
10 request a change. Another name alternative might be the Unincorporated Agricultural  
11 Cooperative Act. The Reporter continues to receive industry suggestions to drop all references to  
12 “cooperative” in the name and Act. *See also* section 109.

13  
14                   The date of promulgation and the determination of whether this is a uniform act will be  
15 reflected in later drafts.

16  
17                   Is it clear the act is not a “corporate” statute that does not foreclose cooperatives  
18 organized pursuant to it to be treated as unincorporated entities for purposes of other law?  
19

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

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

26                                   (2) “Contribution” means any benefit provided by a person to a cooperative in  
27 order to become a partner or in the person’s capacity as a member.

1 (3) “Cooperative” means an association organized under this Act.

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

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

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

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

10 (6) “Entity” means a company, corporation, limited liability company, limited  
11 liability partnership, limited partnership, cooperative or other legal entity, whether domestic or  
12 foreign, association, or body vested with the power or function of a legal entity whether or not for  
13 profit.

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

15 (8) “Domestic cooperative” means a cooperative organized under this [act] or  
16 [chapters].

17 (9) “Foreign entity” means an entity that is not a domestic entity.

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

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

1                   (12) “Membership interest” means patron membership interests and nonpatron  
2 membership interests.

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

4                   (14) “Nonpatron member” means a member holding a nonpatronage membership  
5 interest.

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

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

11                   (17) “Organic rules” means the articles of organization and the bylaws of the  
12 cooperative.

13                   (18) “Patron” means a person or entity *that* conducts activity with the  
14 cooperative.

15                   (19) “Patronage” means business, transactions, or services done for or with the  
16 cooperative as defined by the cooperative.

17                   (20) “Patron member” means a member holding a patron membership interest.

18                   (21) “Patron membership interest” means the membership interest requiring the  
19 holder to conduct patronage activity for or with the cooperative, as specified by the cooperative  
20 to receive financial rights or distributions.

21                   (22) “Person” means an individual, corporation, business trust, estate, trust,  
22 partnership, limited partnership, limited liability company, association, joint venture,

1 government; governmental subdivision, agency or instrumentality; public corporation, or any  
2 other legal or commercial entity.

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

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

7 (25) “Required information” means the information that a cooperative is required  
8 to maintain under this [Act].

9 (26) “Sign” means:

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

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

14 (27) “State” means a State of the United States, the District of Columbia, Puerto  
15 Rico, the United States Virgin Islands, or any territory or insular possession subject to the  
16 jurisdiction of the United States.

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

19 (29) “Voting member” means a member that under organic law or organic rules  
20 has a right to vote on matters subject to vote by members.

## 21 **Reporter’s Note**

22 The April 2005 draft reflects several technical drafting suggestions made at the 2004



1 Annual Meeting. One suggested change not made concerned the definition of “person.” It was  
2 suggested that the NCCUSL definition of person has changed but this definition appears in  
3 ULPA 2001. Likewise it was suggested that the terms “record” and “sign” are unnecessary  
4 because of UENTA. Nonetheless ULPA (2001) contains these definitions.  
5

6 The most significant changes are the deletion of any reference to cooperative plan and the  
7 definition of Agricultural or Agriculturally related in its entirety. The Drafting Committee has  
8 discussed the latter at length. It is a central issue that needs resolution. The balance of this Note  
9 is retained from the prior Draft for discussion purposes. *See* Section 105.  
10

11 “Agricultural and Agricultural Related” is informed by several sources including federal  
12 law. It is intended to be as broad as reasonably practicable and still retain some definitional  
13 meaning. It is intended to include functions served by several industry categories of cooperatives  
14 including service, supply purchasing, marketing, and processing cooperatives. Tough  
15 definitional issues include whether this language includes such activities as farmers organizing to  
16 pool farmland for carbon sequestration programs and “wind” harvesting on the marketing side or  
17 health insurance purchasing groups on the supply side. Possible uses of cooperatives also  
18 include private “ditch” companies in some states. This definition needs to be read in the context  
19 of the definition of “entity.” Another fundamental but not substantive question raised by style is  
20 whether this defined term, and the name of the Act, should be modified to “Agricultural and  
21 Agriculturally Related.”  
22

23 The definition of “Cooperative” requires activity “pursuant to a cooperative plan.”  
24 “Cooperative plan” has intentionally been left undefined based on committee discussion. The  
25 term “cooperative plan” appears in other cooperative acts without definition but acting in  
26 conformity with a cooperative plan is required for definitional purposes in other law. Thus, a  
27 plan is a basic cooperative notion that is not defined or described in this draft.  
28

### 29 **SECTION 103. KNOWLEDGE AND NOTICE.**

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

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

32 (1) knows of it;

33 (2) has received notification of it; or

34 (3) has reason to know it exists from all of the facts known to the person at  
35 the time in question; or

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

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

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

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

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

#### 18 **Reporter's Note**

19 Source: Derived from ULPA (2001). The LLC Act Drafting Committee has spent much  
20 time reworking and redrafting this Section. During that discussion, as in past meetings of this  
21 Drafting Committee, the necessity of including this provision was questioned. This section  
22 varies from ULPA (2001) because it does not need to deal with the unique statements under  
23 limited partnership law. Therefore it is approximately one-third shorter.

1           **SECTION 104. COOPERATIVE SUBJECT TO AMENDMENT OR REPEAL OF**

2   **[ACT].** A cooperative governed by this [Act] is subject to any amendment or repeal of this  
3   [Act].

4                           **Reporter's Note**

5           The revised language is taken from UPA (1997).  
6

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

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

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

11                  (c) A cooperative has a perpetual duration unless otherwise provided by the  
12   Articles of Organization.

13                           **Reporter's Note**

14           This is the leverage point for requiring the cooperative to be engaged in agriculture,  
15   however defined. Does (b) need to be expanded to include production, supply, service, or the  
16   transformation of agricultural goods through manufacturing or other processes?  
17

18           Subsection (b) states “any lawful purpose” which is consistent with the unincorporated  
19   acts promulgated by the Conference. It is also consistent with the general laws of cooperatives  
20   which in some states reference or are included in not-for-profit acts. Finally, it is consistent with  
21   the historical roots of cooperatives as mutual aid societies. Evidence of the ambivalence of the  
22   for-profit, not-for-profit distinction can be seen in the federal tax treatment of cooperatives.  
23

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

1 **Reporter's Note**

2 The formulation of powers in this draft is based upon unincorporated law models as  
3 opposed to a more detailed listing of powers contained in corporate law. The Committee has  
4 discussed this approach for powers only briefly and it is consistent with a general direction to  
5 draft as efficiently as possible even though most cooperative acts tend to follow the more detailed  
6 (and older) corporate model. The question of the level of detail in this section is probably one  
7 that should be informed by givers of legal opinion letters. It is intended to be a broad division.  
8

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

11 **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF**  
12 **INTEREST.**

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

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

17 **SECTION 109. NAME.**

18 (a) The name of a cooperative must contain the word association or its  
19 abbreviation and may contain the word “cooperative” or its abbreviation.

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

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

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

1 (3) a fictitious name approved under Section 1205 for a foreign  
2 cooperative authorized to transact business in this State because its real name is unavailable.

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

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

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

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

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

21 **Reporter's Note**

22 The use of the word "cooperative" under this draft is voluntary but may not be used by

1 organizations that are not cooperatives under Section 112 which has been modified. An issue  
2 raised by the prior version of this section and its analogues under existing law was that there is  
3 *no* required designation or abbreviation to indicate the entity is a limited liability entity. For this  
4 reason the April 2005 draft now requires the use of “association” or its abbreviation. The  
5 required use of “association” also distinguishes this unincorporated agricultural cooperative from  
6 cooperatives governed by other state law.  
7

#### 8 **SECTION 110. RESERVED NAME.**

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

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

#### 18 **SECTION 111. REGISTERED NAME OF FOREIGN COOPERATIVE.**

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

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

24 (1) setting forth its name, or its name with any addition required by  
25 Section 1205; the State or country and date of its organization, and a brief description of the

1 nature of the affairs in which it is engaged; and

2 (2) accompanied by a certificate of existence, or a record of similar import,  
3 from the State or country of organization.

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

#### 10 **SECTION 112. USE OF THE TERM “COOPERATIVE”.**

11 (a) The use of the term cooperative or its abbreviation under this [Act] is not a  
12 violation of the provisions restricting the use of the term under [other law of this State].

13 (b) Cooperatives and members of cooperatives under this Act have the power to  
14 enforce the restrictions on the use of the term “cooperative” under [other law of this State].

#### 15 **Reporter’s Note**

16 Cooperative statutes include name protection provisions unique among organizational  
17 law. The prior draft of this Section is typical of those provisions. Many such provisions also  
18 contain bond and attorney’s fees provisions but those provisions are not typically contained in  
19 other organizational law.

20  
21 The April 2005 draft attempts to coordinate the name restrictions contained in other  
22 cooperative law in the State, if any, with this Act without granting restrictions or rights not found  
23 elsewhere in State law.  
24

#### 25 **SECTION 113. EFFECT OF ORGANIC RULES.**

26 (a) Except as otherwise provided in subsection (b), the organic rules govern

1 relations among the partners and between the members and the cooperative. To the extent the  
2 organic rules do not otherwise provide, this [Act] governs relations between the members and  
3 board of director members and the cooperative.

4 (b) The organic rules may not:

5 (1) vary a cooperatives power under Section 106 to sue, be sued, and  
6 defend in its own name;

7 (2) vary the law applicable to a cooperative under Section 107;

8 (3) vary the requirements of Section 208;

9 (4) vary the information required under Section 111 or unreasonably  
10 restrict the right to information under Section \_\_\_\_ or 621, but the organic rules may impose  
11 reasonable restrictions on the availability and use of information obtained under those sections  
12 and may define appropriate remedies, including liquidated damages, for a breach of any  
13 reasonable restriction on use;

14 (5) eliminate the duty of loyalty under Section \_\_\_\_, but the organic rules  
15 may:

16 (A) identify specific types or categories of activities that do not  
17 violate the duty of loyalty, if not manifestly unreasonable; and

18 (B) specify the number or percentage of members which may  
19 authorize or ratify, after full disclosure to all members of all material facts, a specific act or  
20 transaction that otherwise would violate the duty of loyalty;

21 (6) unreasonably reduce the duty of care under Section \_\_\_\_;

22 (7) eliminate the obligation of good faith and fair dealing under Section



\_\_\_ and \_\_\_, but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(8) vary the power of a person to dissociate as a member under Section \_\_\_ except to require that the notice under Section \_\_\_ be in a record;

(9) vary the power of a court to decree dissolution in the circumstances specified in Section \_\_\_;

(10) vary the requirement to wind up the cooperative's business as specified in Section \_\_\_;

(11) unreasonably restrict the right to maintain an action under [Article] 10;

(12) restrict the right of a member under Section \_\_\_ to approve a conversion or merger; or

(13) restrict rights under this [Act] of a person other than a partner or a transferee.

#### **Reporter's Note**

Source: ULPA (2001). This section provides a framework in which to place nonwaivable (mandatory provisions) as this draft evolves. Provisions concerning voting and distributions obviously need to be included as nonwaivable.

**SECTION 114. REQUIRED RECORDS.** A cooperative shall maintain at its designated office the following information:

(1) a current list showing the full name and last known street and mailing address of each member, separately identifying the patronage members, in alphabetical order, and the

1 nonpatronage members, in alphabetical order;

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

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

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

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

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

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

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

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

18 (10) a copy of the minutes of director's meetings and records of all actions taken  
19 by directors without a meeting for the three most recent years;

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

22 (12) a record stating:

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

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

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

7 **Reporter's Note**

8 The Committee has not yet discussed the appropriate required retention time for the  
9 enumerated records.  
10

11 **SECTION 115. BUSINESS TRANSACTIONS OF MEMBER WITH**  
12 **COOPERATIVE.** A member may lend money to and transact other business with the  
13 cooperative and has the same rights and obligations with respect to the loan or other transaction  
14 as a person that is not a member.

15 **Reporter's Note**

16 This language is consistent with the language used in ULPA (2001). Is it unambiguous in  
17 the cooperative context?  
18

19 **SECTION 116. DUAL CAPACITY.** A person may be both a patron member and a  
20 nonpatron member. A person that is both a patron and a nonpatron member has the rights,  
21 powers, duties, and obligations provided by this [act] and the organic laws and rules in each of  
22 those capacities. When the person acts as a patron member, the person is subject to the  
23 obligations, duties and restrictions under this [act] and the organic laws and rules for patron  
24 members. When the person acts as a nonpatron member, the person is subject to the obligations,

duties and restrictions under this [act] and the organic laws and rules for nonpatron members.

#### **SECTION 117. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

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

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

(2) an agent for service of process.

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

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

#### **SECTION 118. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT FOR SERVICE OF PROCESS.**

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

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

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

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

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

(5) if the current agent for service of process or an address of the agent is

1 to be changed, the new information.

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

#### 4 **Reporter's Note**

5 The following comment was made at the annual meeting: "Do you need or desire an  
6 electronic mailing address? Some states are moving to electronic filing. Even if not, the email  
7 address would save state money by sending routine notices by electronic mail." This is a good  
8 point but probably does not belong in the service of process provision.  
9

### 10 **SECTION 119. RESIGNATION OF REGISTERED AGENT FOR SERVICE OF** 11 **PROCESS.**

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

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

19 (c) An agency for service of process is terminated on the 31<sup>st</sup> day after the  
20 [Secretary of State] files the statement of resignation.

### 21 **SECTION 120. SERVICE OF PROCESS.**

22 (a) An agent for service of process appointed by a cooperative or foreign  
23 cooperative is an agent of the cooperative or foreign cooperative for service of any process,  
24 notice, or demand required or permitted by law to be served upon the cooperative or foreign

1 cooperative.

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

6 (c) Service of any process, notice, or demand on the [Secretary of State] may be  
7 made by delivering to and leaving with the [Secretary of State] duplicate copies of the process,  
8 notice, or demand. If a process, notice, or demand is served on the [Secretary of State], the  
9 [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt  
10 requested, to the cooperative or foreign cooperative at its designated office.

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

12 (1) the date the cooperative or foreign cooperative receives the process,  
13 notice, or demand;

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

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

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

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

- 1 **Reporter's Note**
- 2 Source: ULP A (2001). Is the term "mail" in section 119 (c) ambiguous?

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 **Reporter's Note**

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 COOPERATIVE.** 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 **Reporter's Note**

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 **Reporter's Note**

18 Section 205(a)(1) goes beyond what is typically considered capital structure in the  
19 corporate setting. The Drafting Committee considered alternatives but because this Act is  
20 membership based; because the articles and bylaws together constitute the agreement in other  
21 unincorporated entities; and, on the other hand, because it desired the greater formality typical in  
22 cooperatives, this draft includes greater detail. *See* Article 13.  
23

#### 24 **SECTION 206. EMERGENCY BYLAWS.**

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

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

6 (2) quorum requirements for the meeting; and

7 (3) designation of additional or substitute directors.

8 (b) All provisions of the regular bylaws consistent with the emergency bylaws  
9 remain effective during the emergency. The emergency bylaws are not effective after the  
10 emergency ends.

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

13 (1) binds the cooperative; and

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

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

#### 18 **Reporter's Note**

19 Emergency bylaw provisions are common in cooperative law. Similar provisions are not  
20 typically found in unincorporated entity law. The Committee thought it important, therefore, to  
21 mirror existing cooperative law. Section 206(d) needs to be revisited by the Committee. This  
22 provision might be better placed in Article 13. "Amendment to Organic Rules".  
23

#### 24 **SECTION 207. STATEMENT OF DISSOLUTION.**

1 (a) A dissolved cooperative that has completed winding up may deliver to the  
2 [Secretary of State] for filing a statement of dissolution that states:

- 3 (1) the name of the cooperative;  
4 (2) the date of filing of its initial articles of organization; and  
5 (3) any other information as determined by the officer filing the statement  
6 or by a person appointed pursuant to Section 1006.

7 (b) The existence of a cooperative is not terminated by the filing of a statement of  
8 dissolution but the statement may specify a termination date.

9 **Reporter's Note**

10 There was discussion at the 2004 annual meeting suggesting that the statement of  
11 termination was a throwback to older versions of the MBCA and that this Act should follow the  
12 current MBCA provisions for filing the articles of dissolution. Because this is an unincorporated  
13 entity, however, it (now at least) follows ULPA (2001). No filing is required under this  
14 provision nor in Article 10 requiring a filing for dissolution or winding-up. This statement is  
15 simply an elective statement that may be filed. The November 2004 draft more closely followed  
16 ULLCA (1996).

17  
18 The statement of dissolution simply indicates that the cooperative has entered winding-up  
19 and this provision could be moved to Article 10. ULPA (2001) does not do so but ULLCA  
20 (1996) does place it there.

21  
22 Termination is a very different creature than dissolution. Upon termination the entity,  
23 and its liability shield, ends.  
24

25 **SECTION 208. SIGNING OF RECORDS.**

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

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

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

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

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

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

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

11 (1) the person to sign the record;

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

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

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

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

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

22 (a) A record authorized to be delivered to the [Secretary of State] for filing under

1 this [act] must be captioned to describe the record's purpose, be in a medium permitted by the  
2 [Secretary of State] and be delivered to the [Secretary of State]. Unless the [Secretary of State]  
3 determines that a record does not comply with the filing requirements of this [act], and if all  
4 filing fees have been paid, the [Secretary of State] shall file the record and send a copy of the  
5 filed record and a receipt for the fees to the person on whose behalf the record was filed.

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

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

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

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

17 (3) if the record specifies an effective time but not a delayed effective date,  
18 on the date the record is filed at the time specified in the record;

19 (A) the specified date; or

20 (B) the 90<sup>th</sup> day after the record is filed; or

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



1 (A) the specified date; or

2 (B) the 90<sup>th</sup> day after the record is filed.

3 **SECTION 211. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

22 (1) a person that signed the record, or caused another to sign it on the

1 person's behalf, and knew the information to be false at the time the record was signed; and  
2 (2) an organizer or director that has notice that the information was false  
3 when the record was filed or has become false because of changed circumstances, if the organizer  
4 or director has notice for a reasonably sufficient time before the information is relied upon to  
5 enable the organizer or director to effect an amendment under Section 203, file a petition  
6 pursuant to Section 209, or deliver to the [Secretary of State] for filing a statement of change  
7 pursuant to Section 117 or a statement of correction pursuant to Section 211.

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

#### 10 **Reporter's Note**

11 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee  
12 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it  
13 is appropriate to add director. An addition or an alternative to director might be officer though it  
14 may be difficult at times to demarcate between officers and mere agents.  
15

### 16 **SECTION 213. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

17 (a) The [Secretary of State], upon request and payment of the requisite fee, shall  
18 furnish a certificate of existence for a cooperative if the records filed in the [office of the  
19 Secretary of State] show that the [Secretary of State] has filed articles of organization and has  
20 not filed a statement of termination. A certificate of existence must state:

- 21 (1) the cooperative's name;  
22 (2) that it was duly formed under the laws of this State and the date of  
23 formation;  
24 (3) whether all fees, taxes, and penalties due to the [Secretary of State]

1 under this [act] or other law have been paid;

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

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

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

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

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

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

17 (1) the foreign cooperative's name and any alternate name adopted under  
18 Section 1205 for use in this State;

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

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

22 (4) whether the foreign cooperative's most recent annual report required

1 by Section 214 has been filed by the [Secretary of State];

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

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

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

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

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

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

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

17 (3) in the case of a domestic cooperative, the street and mailing address of  
18 its principal office if different than its designated office; and

19 (4) in the case of a foreign cooperative the State or other jurisdiction under  
20 whose law the foreign cooperative is formed and any alternative name adopted under Section  
21 [1205].

22 (b) Information in an annual report must be current as of the date the annual report

1 is delivered to the [Secretary of State].

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

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

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

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

18 **SECTION 215. FILING FEES; RULES AND REGULATIONS; ANNUAL**  
19 **REPORTS AND LICENSE TAXES.** Unless otherwise provided, the filing fee for documents  
20 filed under this article with the [Secretary of State] shall be subject to the provisions of [the  
21 general business corporation law of this state]. The [Secretary of State] shall promulgate rules  
22 and regulations necessary to implement the provisions of this article.

1 **Reporter's Note**

2 Consideration might be given to bracketing this Section. The obvious idea is to use the  
3 same fee schedule as used for similar filings.  
4

5 The base source for much of this Article is ULPA (2001) which is the latest  
6 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 **Reporter's Note**

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 **Reporter's Note**

19 Source: ULPA (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 **Reporter's Note**

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 **Reporter's Note**

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 any  
22 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                   **Reporter's Note**

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 **Reporter's Note**

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 **Reporter's Note**

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 **Reporter’s Note**

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 **Reporter's Note**

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 **Reporter's Note**

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 **Reporter's Note**

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                                   **Reporter's Note**



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 **Reporter's Note**

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 **Reporter's Note**

15 This Section is derived with minor modification from ULPAA (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.

## ARTICLE 5

## MARKETING CONTRACTS

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

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

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

## Reporter's Note

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

## SECTION 502. MARKETING CONTRACTS.

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

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

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

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

#### 7 **Reporter's Note**

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

15  
16 Many of the current statutes stress "title" which in other contexts has been ceded to UCC  
17 law so, at least arguably, language in the older statutes may be anachronistic though Committee  
18 discussion observed the importance of "insurable title" to the cooperative. The Committee has  
19 not vetted this particular language and the reporter has little confidence that this language is yet  
20 "dialed-in" appropriately.  
21

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

#### 26 **Reporter's Note**

27 The substance of this section is common to many cooperative statutes.  
28

29 **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 **Reporter's Note**

10 Source: *See generally* Minnesota Cooperatives Associations Act, Oregon Cooperative  
11 Corporations Act. Former section 505 was entitled "Contract Interference and False Reports". A  
12 version of section 505 now appears at section 1703 for ease of its discussion with related  
13 provisions. Dependent on the resolution of the policy (and legislative enactment) discussion the  
14 Committee is invited to decide where those provisions should appear in the act.  
15  
16



1 **ARTICLE 6**

2 **DIRECTORS AND OFFICERS**

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

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

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

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

12 **Reporter's Note**

13 It was suggested at the November (2004) meeting that this draft follow the law of  
14 California (and other states) and automatically reduce the number of board members if there are  
15 less than a specified number of members. However, because the number of directors may be  
16 reduced by the articles of organization adding that provision seems rather moot and complicates  
17 the section (and makes it longer).  
18

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

24 **Reporter's Note**  
25

1 Source: Derived from ULPA (2001). “New” to the law of cooperatives.  
2

3 **SECTION 603. QUALIFICATIONS OF DIRECTORS AND COMPOSITION OF**  
4 **BOARD.**

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

7 (b) A director must be an individual.

8 (c) A director need not be a resident of this state unless otherwise provided in the  
9 organic rules.

10 (d) If provided by the articles of organization or organic rules, one-fifth or less of  
11 the board of directors may be directors who are neither members of the cooperative nor  
12 designated by members who are not individuals. If there are four or fewer directors but there are  
13 two or more directors, there may be one director who is neither a member of the cooperative nor  
14 designated by members who are not individuals.

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

17 (f) A director may be an officer or employee of the cooperative.

18 **Reporter’s Note**

19 Subsection (d) reflects the consensus of the Committee but is rather clumsy. The word  
20 “representatives” has been replaced by the word “by” in an attempt to cause less confusion  
21 concerning to whom the director owes allegiance under this Act. There was no prohibition that  
22 officers may not serve as directors and subject to discussion at the November 2004 meeting  
23 subsection (f) has been added.  
24

25 **SECTION 604. ELECTION OF DIRECTORS.**

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

3 (b) The organic rules may provide for the nomination or election of directors by  
4 geographic district either directly or by district delegates.

5 (c) Cumulative voting is prohibited.

6 (d) Directors shall be elected at an annual members meeting.

### 7 **Reporter's Note**

8 Subsection (c) is new in the April 2005 draft pursuant to a decision by the Committee in  
9 November 2004. Corporate statutes typically no longer define "cumulative voting". Does this  
10 act require a definition?

11  
12 The Reporter was instructed to review cooperative law concerning the textual detail  
13 necessary for subsection. There is frequently greater detail than set forth in this act as now  
14 drafted. Shorter is frequently better. An example of such greater detail is Oregon Rev. Stat.  
15 Section 62.255 (5) as follows:

16  
17 (5) A cooperative may provide in its by-laws:

18 (a) For the formation of districts and the holding of member  
19 meetings by districts and that elections of directors may be held at  
20 district meetings.

21 (b) That district meetings may elect delegates who shall  
22 represent their districts in annual and special meetings of the  
23 members. Notice of district meetings shall be given in the same  
24 manner as prescribed in this section for member meetings.  
25

### 26 **SECTION 605. TERMS OF DIRECTORS.**

27 (a) Directors terms shall expire at the annual members' meeting following their  
28 election unless otherwise provided in the articles of organization. In no event shall the stated  
29 term of any director exceed three years.

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

1 (c) Each director shall continuously serve as director until a successor director is  
2 elected and qualified or until the director is removed or resigns.

3 **Reporter's Note**

4  
5 This draft reflects Committee direction given the Reporter.  
6

7 **SECTION 606. RESIGNATION OF DIRECTORS.**

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

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

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

13 (a) The members may remove one or more directors without cause.

14 (b) Any member or members holding an aggregate of ten percent of the voting  
15 power of the cooperative may require a vote on the removal of a director from the board of  
16 directors by submitting a petition for removal in a signed record to the officer of the cooperative  
17 charged with keeping its records.

18 (c) The director against whom a petition has been submitted:

19 (1) shall be informed in a record of the petition prior to the meeting at  
20 which the members will vote on the petition; and

21 (2) shall have an opportunity at the meeting to be heard in person or by  
22 representation and to present witnesses.

23 (d) The person or persons signing the petition shall have the same opportunity to

1 be heard provided the direction in subsection (c)(2).

2 (e) A director shall be removed by the same affirmative vote and in the same  
3 manner as required for the director's election.

4 (f) A director shall be removed by the members at a special or annual members  
5 meeting called for the purpose, or for one of the purposes, of removing the director.

6 (g) A director shall be subject to removal by members no more than once in any  
7 twelve month period.

#### 8 **Reporter's Note**

9 It was the sense of the Committee that the articles (or bylaws) could require removal "for  
10 cause" only. This note is a reminder that sense for identifying "waivable and nonwaivable"  
11 provisions at a later time.

12  
13 Subsections (b), (c) and (d) are new. They generally follow the procedure established in  
14 West's California Code Annot. Section 54150 (it is unclear whether California requires "for  
15 cause" removal only because its statute uses the term "charge" rather than petition.  
16

#### 17 **SECTION 608. REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING.**

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

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

22 (2) gross abuse of the position of director; or

23 (3) intentional infliction of harm on the cooperative.

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

1 **Reporter's Note**

2 The Reporter was requested at the November 2004 meeting to draft another removal of  
3 director alternative that would be the equivalent of "changing the locks" on cooperative  
4 management. The Reporter's first attempt follows:  
5

6 **SUSPENSION OF DIRECTOR BY BOARD.**

7 (a) The board of directors may suspend a director if considering the director's  
8 course of conduct and the inadequacy of other available remedies immediate suspension is  
9 necessary for the best interests of the corporation and the director is engaged in:

- 10 (1) fraudulent conduct with respect to the cooperative or its members;  
11 (2) gross abuse of the position of the director; or  
12 (3) intentional infliction of harm on the cooperative.

13 (b) Upon suspension of the director the board shall call a special members  
14 meeting under section 607 for the removal of the director.  
15

16 **SECTION 609. BOARD VACANCY.**

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

19 (1) by majority vote of the remaining directors until the next annual  
20 members' meeting or special meeting held for that purpose; and

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

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

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

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

28 **SECTION 610. COMPENSATION OF DIRECTORS.** Unless the organic rules

1 otherwise provide the board of directors may fix the remuneration of directors and non-director  
2 committee members under section 617 (b).

### 3 **Reporter's Note**

4 Source: MBCA section 8.11. Obviously this has become an important topic in publicly  
5 traded corporations. The fiduciary duties applicable to other board decisions are applicable here,  
6 too. Unlike many corporate acts this act does not give express power to make loans to insiders.  
7 An alternative provision is found in Or. Rev. Stat. Section 62.300 and is set forth below:

8  
9 62.300 Compensation and benefits to directors, officers and  
10 employees. (1) Unless the bylaws provide otherwise, only the  
11 members of the cooperative may establish compensation or other  
12 benefits for a director, not available generally to officers and  
13 employees, for services as a director.

14 (2) Unless the bylaws provide otherwise, no director shall hold  
15 during the term as director any position in the cooperative on  
16 regular salary.

17 (3) Unless the bylaws provide otherwise, the board may provide,  
18 for prior or future services of any officer or employee, reasonable  
19 compensation, pension or other benefits to such officer or employee  
20 and pension or other benefits to a member of the family of the officer  
21 or employee. No officer or employee who is a director may take part  
22 in any vote on the compensation of the officer or employee for  
23 services rendered or to be rendered the cooperative.  
24

### 25 **SECTION 611. MEETINGS.**

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

28 (b) Unless otherwise provided in the organic rules, the board may permit directors  
29 to attend board of directors meetings or conduct board meetings through the use of any means of  
30 communication if all directors attending the meeting can simultaneously communicate with each  
31 other during the meeting.

### 32 **SECTION 612. ACTION WITHOUT A MEETING.**

1 (a) Unless prohibited by the organic rules, any action that may be taken by the  
2 board of directors may be taken without a meeting if each director consents to action in a record.

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

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

### 7 **SECTION 613. MEETINGS AND NOTICE.**

8 (a) Unless otherwise provided by the organic rules the board of directors may  
9 establish a time and place for regular board meetings and notice of the time, place or purpose of  
10 those meetings is not required.

11 (b) Unless otherwise provided by the organic rules, special meetings of the board  
12 of directors must be preceded by at least three days notice of the time, date and place of the  
13 meeting and the notice need not describe the purpose of the special meeting.

#### 14 **Reporter's Note**

15 Subsection (b) has been more closely conformed to RMBCA Section 8.22 (b).  
16  
17

### 18 **SECTION 614. WAIVER OF MEETING NOTICE.**

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

21 (b) A director's participation in a meeting is waiver of notice of that meeting  
22 unless the director objects to the meeting at the beginning of the meeting or promptly upon the  
23 director's arrival at the meeting and does not thereafter vote for or assent to action taken at the



1 meeting.

2 **SECTION 615. QUORUM.**

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

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

9 **Reporter's Note**

10 One of the observers has requested the Committee revisit this section.  
12

13 **SECTION 616. VOTING.** Each director has one vote for purposes of decisions made  
14 by the board of directors.

15 **Reporter's Note**

16 The sense of the drafting committee is that one director, one vote as mandatory and  
17 cannot be varied by the organic rules.  
18

19 The reporter was directed at the February 2004 Committee meeting to move the following  
20 subsection to a Reporter's Note as a matter of economy and for further discussion of its  
21 necessity.  
22

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

26 (1) the director objects at the beginning of  
27 the meeting or promptly upon the directors arrival at  
28 the meeting and does not thereafter vote for or  
29 assent to action taken at the meeting;

30 (2) the directors assent or abstention from  
31 the action is made in a record

1 (A) in the minutes of the meeting; or  
2 (B) the director  
3 (I) does not vote for or assent  
4 to the action taken at the meeting; and  
5 (ii) delivers notice in a record  
6 to the presiding officer of the meeting before  
7 adjournment or to the cooperative immediately after  
8 adjournment of the meeting.  
9

10 **SECTION 617. COMMITTEES.**

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

13 (b) Unless otherwise provided by the organic rules, individuals appointed to serve  
14 on committees need not be directors or members of the cooperative. Individuals serving on  
15 board committees have the same rights, duties, and obligations as do directors serving on  
16 committees.

17 (c) Unless otherwise provided by the organic rules, each committee may exercise  
18 the powers as delegated by the board of directors except no committee shall have the power

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

21 (2) approve or propose to members action requiring approval of members;  
22 or

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

24 **Reporter's Note**

25 Special litigation committee, audit committee; Minnesota allows non-directors to be  
26 members of a committee. There has been some support within the Committee (and from  
27 suggestions received by the Reporter) to allow non-board member committee members (ala Sar-

1 Box?). The Committee has yet to discuss these suggestions at length. What are the appropriate  
2 limits? This draft allows non-members to serve on committees. This is an important policy  
3 decision.  
4

5 This draft does not expressly allow executive committees but many cooperative statutes  
6 do so. Because this draft does not expressly contain reference to an executive board it does not  
7 put a prohibition on nondirectors serving on that board.  
8

## 9 **SECTION 618. STANDARD OF CONDUCT.**

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

12 (1) in good faith;

13 (2) with the care of an ordinarily prudent person in a like position would  
14 reasonably believe appropriate under similar circumstances; and

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

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

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

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

25 (3) a committee of the board of directors of which the director is not a

1 member if the director reasonably believes the committee merits confidence.

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

### 5 **Reporter's Note**

6 The current formulation of the standard of conduct for directors varies significantly from  
7 the formulation used in unincorporated entity acts promulgated by the conference. See the  
8 separate Reporter's Memo on Fiduciary Duties to the Drafting Committee dated March 27, 2005.  
9

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

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

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

### 28 **SECTION 619. CONFLICT OF INTEREST.**

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

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

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

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

6 (1) the conflict of interest was:

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

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

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

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

### 19 **Reporter's Note**

20 This Section is taken almost directly from the MBCA. It's organization and style are,  
21 rather obviously, a problem. Attempts by the Reporter to reformulate it have been unsuccessful  
22 so far. Thus, for purposes of discussion, emphasis should be placed on the substance and  
23 necessity of the Section and not its specific language.  
24

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

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

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

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

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

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

13                           **Reporter's Note**

14           The committee has not discussed this controversial section as drafted. It mirrors the  
15 provisions found in the other uniform unincorporated acts and is somewhat similar to  
16 Minnesota's provision on limitation of director liability.  
17

18           **SECTION 621. RIGHT OF DIRECTOR TO INFORMATION.** A director may  
19 obtain, inspect and copy true and full information regarding the state of activities and financial  
20 condition of the cooperative and other information regarding the activities of the cooperative  
21 reasonably related to the performance of the director's duties as director but not for any other  
22 purpose or in any manner that would violate any duty to the cooperative would violate any duty  
23 to the cooperative.

**SECTION 622. OTHER CONSIDERATIONS OF DIRECTORS.** Unless otherwise provided in the organic rules a director may, in determining the best interests of the cooperative, consider the interests of employees, customers, and suppliers of the cooperative and on the communities in which the cooperative operates, and the long term and short term interests of the cooperative and its members.

## Reporter's Note

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

## SECTION 623. APPOINTMENT AND AUTHORITY OF OFFICERS.

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

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

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

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

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

## Reporter's Note

1           Almost all current cooperative acts follow pre-1984 business corporation law either  
2 requiring or expressly permitting named offices. This draft does not do so. Rather, it provides  
3 the flexibility present in many cooperative statutes in a more (word) efficient way which is closer  
4 to post-1984 business corporation law and with the law of unincorporated organizations.  
5

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

7                   (a) The board of directors has the power to remove an officer at any time with or  
8 with out cause.

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

12                                   **Reporter's Note**

13           The Reporter made a change to subsection (a) to focus on the provision for purposes of  
14 discussion. Note that this draft contains no provision directly addressing the standard of conduct  
15 of officers. This is, at the least, not unusual in the world of general cooperative statutes. At  
16 bottom, 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 **Reporter's Note**

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 **Reporter's Note**

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?

1 **ARTICLE 8**

2 **CONTRIBUTIONS, ALLOCATIONS AND DISTRIBUTIONS**

3  
4 **SECTION 801. MEMBERSHIP CONTRIBUTIONS.**

5 (a) The organic rules shall establish:

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

9 (2) the accounting procedures and methods for receiving and allocating  
10 those contributions.

11 **Reporter's Note**

12 Source: Derived from the Oregon Cooperative Corporation Act and ULPA (2001). This  
13 draft does not expressly provide for stock or use the corporate capital accounting model which  
14 allows the board of directors, for example, to establish par value. Rather this draft follows  
15 unincorporated law which is far more general, and less detailed. The draft does contemplate that  
16 the organic rules may establish a more corporate-like capital structure. See Section 205(a)(1).  
17 Although it does not expressly address certificated ownership interests is that enough? In that  
18 regard, is capital formation inhibited by "lack of stock like a corporation" and, if so, is there any  
19 way around the problem? Thus, this draft more closely follows the unincorporated  
20 organizational model and is, therefore, arguably more contractually or agreement based.  
21 Paradoxically, the entity contemplated by this draft is more flexible upon formation but gives the  
22 board of directors less power to establish new classes or voting interests than in a business  
23 corporation. This mix is consistent with stronger member control.

24  
25 At the direction of the Committee the word "fees" has been deleted. Will the deletion  
26 cause problems in service cooperatives? How are such fees usually accounted in fee-based  
27 cooperatives?

28  
29 Does a comment to this section need to discuss equity certificates and, if so, suggestions?  
30

31 **SECTION 802. FORMS OF CONTRIBUTION AND VALUATION.**

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

5 (b) The receipt and acceptance of contributions and the valuation of contributions  
6 or fees shall be reflected in the cooperative's required records pursuant to Section 113.

7 (c) Unless otherwise provided in the organic rules, the board of directors shall  
8 value the contributions received or to be received. The determination by the board of directors  
9 on valuation is conclusive for purposes of whether the member's contribution obligation has  
10 been fully paid.

#### 11 **Reporter's Note**

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

17  
18 The Comment (or is it more appropriate in a legislative note) needs to note that some  
19 state constitutions may place restrictions on the types of property that may be contributed.  
20

### 21 **SECTION 803. CONTRIBUTION AND SUBSCRIPTION AGREEMENTS.**

22 (a) A contribution agreement entered into before formation of the cooperative is  
23 irrevocable for six months unless:

24 (1) otherwise provided by the agreement; or

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

26 (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 **Reporter's Note**

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

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

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

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

16 **Reporter's Note**

17 The comment to this section needs to provide examples and illustrations of subsection (b)  
18 including a calculation where you might have "agency" cooperative arrangements but no sales.  
19 The 50/30 "solution" has questioned. The existing state statute at play in Minnesota is 50/15.  
20 Will there be uniformity? Consider for the been comment noting that, perhaps, debt will be  
21 replaced by equity such that the fixed return otherwise going to debt will need to pay for the use  
22 of equity money.  
23

24 **SECTION 805. DISTRIBUTIONS AND RESERVES.**

25 (a) Unless otherwise provided in the organic rules, the board of directors may  
26 retain or set aside a portion of net proceeds, savings , margins or profits whether or not allocated

1 to members for purposes of the following:

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

3 (2) to create or accumulate reserves for specific purposes including but not  
4 limited to expansion and replacement of capital assets; and

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

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

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

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

### 18 **Reporter's Note**

19 A shadow issues raised by the draft language is whether the cooperative may allocate or  
20 distribute "dividends" based on the amount of apportioned but retained member capital.

21  
22 The April 2005 draft deleted "patron" from the flush language of subsection (a).  
23 Minnesota continues to restrict the application of this section to patron members. Why?  
24

**SECTION 806. REDEMPTION OF EQUITY.** Subject to Section 807 and unless the articles of organization otherwise provide, a cooperative may redeem member's equity upon dissociation of the member or at any time. Consideration for such equity shall be the amount of the member's contributions as previously allocated or apportioned under Section 805 plus any accrued allocations to the member's equity.

**Reporter's Note**

Does the addition of "at any time" give the cooperative the right to call the equity in such a manner to capture good will and the value of appreciating assets? Is equity too broad a term? Would it be better to add according "to a plan" and have the comment specifically address revolving equity (*etc.*)?

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

**SECTION 807. ALLOCATION OF LOSSES.** Unless otherwise provided in the organic rules, losses shall be allocated and charged in the same manner as net proceeds, savings, margins or profits.

**Reporter's Note**

Consider a defined term for "net proceeds, savings, margins or profits".

**SECTION 808. LIMITATIONS ON DISTRIBUTIONS.**

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

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

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



1 liabilities.

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

6 (c) Except as otherwise provided in subsection (f), the effect of a distribution  
7 under subsection (b) is measured:

8 (1) in the case of distribution by purchase, redemption, or other  
9 acquisitions of a transferable interest in the cooperative, as of the date money or other property is  
10 transferred or debt incurred by the cooperative; and

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

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

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

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

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

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

4 **Reporter's Note**

5 This limiting language is from ULPA (2001) and, generally, cooperative acts do not deal  
6 with this issue with this level of detail. Nonetheless, it seems the same policy and governance  
7 issues are raised in cooperatives, limited partnerships, and corporations. The language of this  
8 section is difficult to read but it is consistent with ULPA (2001). Query the cost benefit in  
9 attempting to redraft it.

10  
11 This Section also raises another issue specific to this draft: Who is liable? Under typical  
12 unincorporated law it is possible to require members to return a proportionate amount of an  
13 unlawful distribution. It is one of the few bright-line areas for director liability under corporate  
14 law.

15  
16 This act is not driven by tax law. Nonetheless is there a tax footfault in (e)?  
17

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

19 **Reporter's Note**

20 See Section 1704 of this draft.

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## **SECTION 901. MEMBER DISSOCIATION.**

(C) the person is a corporation or a cooperative and, within 90 days after the cooperative notifies the person that it will be expelled as a member because it has filed a public document of dissolution, it has been administratively or judicially dissolved, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its

1 incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its  
2 charter or its right to conduct business; or

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

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

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

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

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

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

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

18 (8) in the case of a person that is an estate or is acting as a member by  
19 virtue of being a personal representative of an estate under section 903, distribution of the  
20 estate's entire financial interest in the cooperative, but not merely by reason of the substitution of  
21 a successor personal representative;

22 (9) termination of a member that is not an individual, partnership, limited

1 liability company, cooperative, corporation, trust, or estate;

2 (10) the cooperative's participation in a consolidation or merger, if under  
3 the plan of merger as approved under [Article] 14, the person ceases to be a member.

#### 4 **Reporter's Note**

5 Source: ULPA (2001) § 601. Subsection (b)(6) follows ULPA in that it does not state  
6 incompetency as an event of dissociation. The issue raised by incompetency needs yet to be  
7 vetted. See section 903 which as currently drafted is inconsistent with subsection (b)(8).  
8 Subsection (b)(4)(C) has been revised and the language is now different than ULPA (2001).  
9

10 Subsection 901(b)(4)(B) states "subject to Section 405" and it is now corrected to reflect  
11 it is subsection 404 (g) which is the security interest exception for transfers.  
12

13 Subsection 901(5). It was suggested in November 2004 that the board should have this  
14 power. Clarification is needed as to whether the board alone should have the power or whether  
15 the board must go to court to expel a member. If it is the board alone, alternative language is  
16 offered in the Reporter's Note following the provision on removal of a board member. Section  
17 901(b) contemplates expulsion by the board assuming that 901 is not exclusive (*e.g.*  
18 "modifiable" by the organic rules).  
19

#### 20 **SECTION 902. EFFECT OF DISSOCIATION AS MEMBER.**

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

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

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

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

29 (b) A person's dissociation as a member does not of itself discharge the person

1 from any obligation to the cooperative which the person incurred while a member.

## 2 **Reporter's Note**

3 Source: ULP A (2001) § 602. The ULP A (2001) counterpart to subsection (a)(2) refers  
4 only to specifically cross-referenced obligations of good faith and fair dealing. “[O]r other  
5 members” was also deleted in b, which is consistent, because under this act there is no specific  
6 member to member duty. The Comment to this section will include both reference and  
7 discussion of the four possible sources of financial return of a member: (1) under a production  
8 (or other) contract; (2) patronage distributions; (3) patronage retains; (4) return on invested  
9 capital.  
10

11 **SECTION 903. POWER OF ESTATE OF MEMBER.** If a member dies or is  
12 adjudged incompetent, the member’s personal representative or other legal representative may  
13 exercise the rights of a transferee and the member’s financial interest as provided in Section 405  
14 and, for the purposes of settling the estate of a deceased member, may exercise the informational  
15 rights of a current member under Section 305.

## 16 **Reporter's Note**

17 Source: ULP A (2001) § 704. *See* Reporter’s Note to section 901 concerning the absence  
18 of incompetency as a cause of dissociation by a member. What happens in producer cooperatives  
19 when a member becomes incompetent and has an outstanding contract? What happens if that  
20 same person is on the board of directors? Given the assumption that cooperatives formed under  
21 this Act will be more “personal” in nature it seems advisable to consider reintroducing  
22 incompetency as a cause of dissociation in the 2005 annual meeting draft.

1 **ARTICLE 10**

2 **DISSOLUTION**

3 **Preliminary Reporter's Note**

4 One issue under this article is whether there needs to be an explanation that the equity  
5 holders receive liquidating distributions of surplus as residual claimants. Such a provision is  
6 common in other law and appears in this April 2005 draft as section 1007.

7  
8 **SECTION 1001. DISSOLUTION.** A cooperative may be dissolved:

9 (1) nonjudicially under Section 1002;

10 (2) judicially under Section 1003; or

11 (3) administratively under Section 1010.

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

15 (1) the happening of an event or a time specified in the articles of organization;

16 (2) the vote of the organizers, board of directors, or members under Section 1004  
17 and 1005;

18 (3) the passage of 90 days after the dissociation of the last member, unless before  
19 the end of the period the cooperative admits at least one member in accordance with its organic  
20 rules; or

21 (4) the filing of a determination by the [Secretary of State] under Section 1009.

22 **Reporter's Note**

23 Subsection (3) of this Section again begs the fundamental question of how many  
24 members are required for the existence of a cooperative. This Section errs on the side of  
25 continuity of life though it is inconsistent with matters of formation. The "tough nut" scenario

1 seems to be where all the board members are also members (perhaps the prototypical  
2 arrangement contemplated by this act). Who would be in charge and admit? While a nice  
3 technical issue, however, the same issue arises under unincorporated law where this provision is  
4 regarded as providing both flexibility and key in maintaining perpetuity of life.  
5

6           **SECTION 1003. JUDICIAL DISSOLUTION.** The [court of competent jurisdiction]  
7 may dissolve a cooperative or order any action which under the circumstances is appropriate and  
8 equitable:

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

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

11                           (B) the cooperative has continued to exceed or abuse the authority

12 conferred upon it by law;

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

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

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

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

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

24                   (3) in a proceeding by the cooperative to have its voluntary dissolution continued



1 under court supervision.

2 **Reporter's Note**

3 This section on judicial dissolution is derived from the MBCA but conceptually tracks the  
4 current LLC draft being considered by the Conference. Substantively, note: (1) Subsection 2  
5 authorizes transferees of financial interests to bring an action to dissolve (in addition to  
6 members); (2) Subsection 2(A) does not include the MBCA phrase, "or the business and affairs  
7 of the [cooperative] can no longer be conducted to the advantage of the ... [members] generally";  
8 and (3) the MBCA provides for an action for dissolution by a creditor of the corporation (here the  
9 cooperative) if the claim has been reduced to judgment and the entity is insolvent.

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

15  
16 Finally, though it is included in the MBCA, the committee has not addressed subsection  
17 (2)(C) which does not require any showing of damage to the cooperative.  
18

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

22 **SECTION 1005. VOLUNTARY DISSOLUTION BY THE BOARD AND**  
23 **MEMBERS.**

24 **[RESERVED]**

25 **Reporter's Note**

26 This Article is reserved simply because it is anticipated it will mirror the language and  
27 procedure utilized for both amendment of the articles of organization (Article 13) and, to a lesser  
28 extent, the consolidation or merger and sale of assets provisions (Article 14 and 15). Thus, its  
29 drafting awaits further discussion on those items.  
30

31 **SECTION 1006. WINDING UP.**

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

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

4 (1) shall amend its articles of organization indicating it is winding-up  
5 pursuant to Section 203, preserve the cooperative or its property as a going concern for a  
6 reasonable time, prosecute and defend actions and proceedings, whether civil, criminal or  
7 administrative, transfer cooperative property, settle disputes by mediation or arbitration, and  
8 perform other necessary acts; and

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

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

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

16 (2) the applicant establishes other good cause.

17 **SECTION 1007. DISTRIBUTION OF ASSETS IN WINDING UP**  
18 **COOPERATIVE.**

19 (a) In winding up a cooperatives business, the assets of the cooperative must be  
20 applied to discharge its obligations to creditors, including members who are creditors. Any  
21 surplus must be applied to pay in money the net amount distributable to members in accordance  
22 with their right to distributions under subsection (b).

1 (b) Each member is entitled to a distribution upon the winding up of the  
2 cooperatives business consisting of a return of all contributions which have not previously been  
3 returned and a distribution of any remainder in the proportion of the member's financial interests  
4 of members of the cooperative.

5 **SECTION 1008. KNOWN CLAIMS AGAINST DISSOLVED COOPERATIVE.**

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

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

- 10 (1) specify the information required to be included in a claim;  
11 (2) provide a mailing address to which the claim is to be sent;  
12 (3) state the deadline for receipt of the claim, which may not be less than  
13 120 days after the date the notice is received by the claimant; and  
14 (4) state that the claim will be barred if not received by the deadline.

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

- 17 (1) the claim is not received by the specified deadline; or  
18 (2) in the case of a claim that is timely received but rejected by the  
19 dissolved cooperative, the claimant does not commence an action to enforce the claim against the  
20 cooperative within 90 days after the receipt of the notice of the rejection.

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

1                   **SECTION 1009. OTHER CLAIMS AGAINST DISSOLVED COOPERATIVE.**

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

4                   (b) The notice must:

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

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

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

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

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

17                         (2) a claimant whose claim was timely sent to the dissolved cooperative  
18 but not acted on; and

19                         (3) a claimant whose claim is contingent or based on an event occurring  
20 after the effective date of dissolution.

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

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

1 assets; or

2 (2) if the assets have been distributed in liquidation, against a member or  
3 transferee to the extent of that person's proportionate share of the claim or the cooperative's  
4 assets distributed to the member or transferee in liquidation, whichever is less, but a person's  
5 total liability for all claims under this paragraph does not exceed the total amount of assets  
6 distributed to the person as part of the winding up of the dissolved cooperative.

7 **SECTION 1010. ADMINISTRATIVE DISSOLUTION.**

8 (a) The [Secretary of State] may dissolve a cooperative administratively if the  
9 cooperative does not, within 60 days after the due date:

10 (1) pay any fee, tax, or penalty due to the [Secretary of State] under this  
11 [act] or other law; or

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

13 (b) If the [Secretary of State] determines that a ground exists for administratively  
14 dissolving a cooperative, the [Secretary of State] shall file a record of the determination and serve  
15 the cooperative with a copy of the filed record.

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

22 (d) A cooperative administratively dissolved continues its existence but may carry

1 on only activities necessary to wind up its activities and liquidate its assets under Section 1006  
2 and to notify claimants under Sections 1007 and 1008.

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

#### 5 **Reporter's Note**

6  
7 An issue that needs to be discussed by the Committee is whether the number of days are  
8 appropriate. The choice in the April 2005 draft conforms to ULPA (2001) and is not changed  
9 from the 2004 annual meeting draft.  
10

### 11 **SECTION 1011. REINSTATEMENT FOLLOWING ADMINISTRATIVE** 12 **DISSOLUTION.**

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

16 (1) the name of the cooperative and the effective date of its administrative  
17 dissolution;

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

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

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

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

4 **Reporter's Note**

5 Source: ULP, ULLCA, generally follows the MBCA.  
6  
7

8 **SECTION 1012. APPEAL FROM DENIAL OF REINSTATEMENT.**

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

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

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

19 **Reporter's Note**

20 Source: ULP § 811. This article is also conceptually consistent with existing  
21 cooperative law. It is also a point where the "unclaimed and abandoned property" provision  
22 might apply. See Art. 17 for how that provision is handled in this draft.

1 **ARTICLE 11**

2 **ACTIONS BY MEMBERS**

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

5 (a) Subject to subsection (b), a member may maintain a direct action against the  
6 cooperative or another member an officer or director for legal or equitable relief, to enforce the  
7 rights and otherwise protect the interests of the member, including rights and interests under the  
8 organic rules or 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 **Reporter's Note**

16 Source: § 1001 ULPA (2001) (modified). The direct right to sue other members is based  
17 on unincorporated entity law. Directors are included to raise the issue of “primary” shareholder  
18 litigation in the corporate context and to better reflect the operation of the provision under  
19 ULPA. Query whether this merely reflects current law; or causes or alleviates confusion.  
20 Finally, query whether the provision direct action is necessary. Current corporate and  
21 cooperative acts do not make this statutory distinction. Unincorporated laws, however, include  
22 this because historically the individual partner could not sue directly outside an accounting  
23 action. The direct-derivative distinction is currently in the ULLCA draft being discussed by  
24 another ULC committee.  
25

26 **SECTION 1102. DERIVATIVE ACTION.** A member may maintain a derivative



1 action to enforce a right of a cooperative if the member adequately represents the interests of the  
2 cooperative and if:

3 (1) the member first makes a demand in writing on the cooperative, requesting  
4 that it bring an action to enforce the right, and the cooperative does not bring the action within a  
5 reasonable time; and

6 (2) 90 days have expired from the date the demand was made unless the member  
7 has earlier been notified that the demand has been rejected by the cooperative or unless  
8 irreparable injury to the cooperative would result by waiting for the expiration of the time period.

9 **Reporter's Note**

10 Source: § 1002 ULPA (2001). Is 90 days too long, *but see* the Reporter's Note following  
11 section 1104. Oregon uses 20 days. *See* section 1104. This draft does not contain a futility  
12 exception.  
13

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

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

19 **Reporter's Note**

20 Source: § 1003 ULPA (2001). Query whether the requirement that the person bringing a  
21 suit be a member at the time of commencement is advisable or necessary. Most corporate  
22 statutes so provide.  
23

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

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

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

5 **SECTION 1105. PROCEEDS AND EXPENSES.**

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

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

10 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff  
11 shall  
12 immediately remit them to the cooperative.

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

16 **Reporter's Note**

17 Source: § 1005 ULPA (2001).

18  
19 Most cooperative statutes do not expressly provide for derivative actions. This draft  
20 closely follows ULPA (2001) in providing for such actions.

21  
22 Section 1102 modifies the ULPA (2001) formulation by adding the requirement that the  
23 member adequately represents the interests of the cooperative; by adding a 90 day time period  
24 after demand before suit may be commenced; and by deleting excused demand because of  
25 futility. The 90 day period may be excused if the waiting period would result in irreparable harm  
26 to the cooperative under subsection 1102(2). These modifications generally follow the law of the  
27 Model Business Corporations Act. This draft does not include the MBCA provision concerning

1 litigation committees and the authority of the committee to have the suit dismissed if the  
2 committee exercises good faith. One reason for not providing for such committees is because of  
3 the limited availability of outside or independent directors under this draft. Nonetheless the  
4 addition of the requirement that the member bringing the derivative suit “adequately represent”  
5 the cooperative should provide a framework for the evolution of such concepts under the  
6 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 cooperative  
6 is organized govern relations among the members of the foreign cooperative and between the  
7 members and the foreign cooperative.

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

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

14 **Reporter's Note**

15 "Cooperative" is defined in this draft as a cooperative organized under this Act which  
16 Section 105 states is "any lawful agricultural or agricultural related purpose". This is supported  
17 by sections 1204 and 1205. Therefore all references to "agricultural or agricultural related" have  
18 been deleted.  
19

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

21 (a) A foreign cooperative may apply for a certificate of authority to transact  
22 business in this State by delivering an application to the [Secretary of State] for filing. The  
23 application must state:

24 (1) the name of the foreign cooperative and, if the name does not comply

1 with Section 109, an alternate name adopted pursuant to Section 1205.

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

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

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

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

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

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

17 **SECTION 1203. ACTIVITIES NOT CONSTITUTING TRANSACTING**  
18 **BUSINESS.**

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

21 (1) maintaining, defending, and settling an action or proceeding;

22 (2) holding meetings of its members or carrying on any other activity

1 concerning its internal affairs;

2 (3) maintaining accounts in financial institutions;

3 (4) maintaining offices or agencies for the transfer, exchange, and  
4 registration of the foreign cooperative's own securities or maintaining trustees or depositories  
5 with respect to those securities;

6 (5) selling through independent contractors;

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

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

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

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

17 (10) transacting business in interstate commerce.

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

21 (c) This section does not apply in determining the contacts or activities that may  
22 subject a foreign cooperative to service of process, taxation, or regulation under any other law of

1 this State.

2 **SECTION 1204. FILING OF CERTIFICATE OF AUTHORITY.** Unless the  
3 [Secretary of State] determines that an application for a certificate of authority does not comply  
4 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,  
5 shall file the application, prepare, sign and file a certificate of authority to transact business in  
6 this State, and send a copy of the filed certificate, together with a receipt for the fees, to the  
7 foreign cooperative or its representative.

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

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

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

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

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

1 (c) if the foreign cooperative does not:

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

4 (2) deliver, within 60 days after the due date, its annual report required  
5 under Section 214;

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

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

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

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

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

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



1           **SECTION 1207. CANCELLATION OF CERTIFICATE OF AUTHORITY;**  
2           **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

3           (a) In order to cancel its certificate of authority to transact business in this State, a  
4           foreign cooperative must deliver to the [Secretary of State] for filing a notice of cancellation.  
5           The certificate is canceled when the notice becomes effective under Section 210.

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

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

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

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

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

1 **ARTICLE 13**

2 **AMENDMENT OF ORGANIC RULES**

3  
4 **SECTION 1301. AUTHORITY TO AMEND ORGANIC RULES.**

5 (a) A cooperative may amend its articles of organization and bylaws under this  
6 [Article].

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

9 **Reporter's Note**

10 This article attempts to consolidate the amendment and restatement procedures for both  
11 the articles of organization and bylaws. This section simply grants a general authority to amend.  
12 Subsection (c) is in the MBCA and is the analogue of the effect of a change or amendment of  
13 underlying law provided in Section 104. After discussion of this article the Committee needs to  
14 give its direction on whether this is a default or mandatory provision. It almost must be  
15 mandatory, doesn't it?  
16

17 **SECTION 1302. NOTICE AND ACTION ON AMENDMENT OF ARTICLES OF**  
18 **ORGANIZATION OR BY-LAWS.** In order to amend the organic rules:

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

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

23 (1) the proposed amendment:

24 (2) a recommendation that the members approve the amendment unless the  
25 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;

4 (5) notice of the existence; and

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

7 **SECTION 1303. METHOD OF VOTING.** Members may vote in person, by mail, or  
8 proxy, or as provided in the organic rules.

9 **Reporter's Note**

10 This section is derived from Colorado section 7-55-110.  
11  
12

13 **SECTION 1304. AMENDMENT TO AMENDMENT AT MEETING.**

14 (a) No substantive amendment of the proposed amendment of the organic rules  
15 shall be allowed at the meeting that the vote occurs;

16 (b) Subject to (a) any amendment of the amendment need not be separately voted  
17 upon by the board of directors; and

18 (c) The vote to adopt an amendment to the amendment is the same as that required  
19 to pass the proposed amendment.

20 **Reporter's Note**

21 At the November 2004 meeting the term "germane" was suggested. This draft uses the  
22 term "substantive".  
23

24 **SECTION 1305. APPROVAL OF AMENDMENT.**

1 (a) Subject to Sections 1306 and 312, an amendment to the articles of  
2 incorporation shall be approved by at least two-thirds vote of members under Section 311.

3 (b) Subject to Sections 1306 and 312, an amendment to the bylaws shall be  
4 approved by at least majority vote of members present at the meeting except that a two-thirds vote  
5 of members pursuant to Section 311 is required for any amendment modifying:

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

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

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

11 (4) the transferability of membership interests; or

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

#### 14 **Reporter's Note**

15 The Reporter was requested to consider several suggested revisions at the November 2004  
16 meeting included separate voting by patronage and nonpatronage members. There are two  
17 reasons such revisions are not included in the April 2005 draft: (1) In many instances the desired  
18 result would be attained by operation of section 1305; (2) The operation of section 312 was not  
19 fully considered. SECTION 312 CONFOUNDS THE OPERATION OF THIS SECTION  
20 because, in effect, it gives a majority of patron members absolute control over the ultimate  
21 outcome of the vote. THIS MUST BE DISCUSSED and provides a very strong argument section  
22 312 should be reduced to majority. On the other hand, providing for separate patronage/non-  
23 patronage voting in any meaningful way gives non-patronage members, who are likely to be few  
24 in number, blocking power.

25  
26 Many cooperative acts allow the board of directors to amend the bylaws, some do not. It  
27 is the initial general sense of the committee to be protective of members and this draft is  
28 consistent with that sense.  
29

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

9           **SECTION 1306. VOTING BY GROUP, CLASS, OR DISTRICT MEMBERSHIP.**

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

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.  
23

24           This section should not be interpreted to extend voting rights to transferees.  
25

26           **SECTION 1307. PROPOSAL OF AMENDMENT BY MEMBERS.**

27           (a) Members may propose amendments to the organic rules be considered by the  
28 board of directors by demand in a record signed by the members holding at least 10 percent of all

1 votes entitled to be cast on the matter.

2 (b) The Board of Directors shall report its action on the proposed amendment at the  
3 next annual shareholder's meeting or any special meeting for that purpose held under section 307.

4 **Reporter's Note**

5 Section 307 allows 10 percent of the votes of any class or group to call a special meeting  
6 so the board can be forced to report through the special meeting process. Note that the proposal  
7 under this section requires 10 percent of all votes (not of a class). Inconsistency in detail is a trap  
8 unless there is a substantive reason for doing so.

9  
10 This section, like corporate law and limited partnership law, provides a central role for the  
11 BOD and does not allow a pure referendum. The relationship between this section and the BOD  
12 removal provision needs to be discussed.  
13

14 **SECTION 1308. RESTATED ARTICLES.** A cooperative may, by action taken under  
15 [this Article] required for amendment of its organic rules adopt restated articles that contain the  
16 original articles as currently amended. Restated articles shall supercede the existing articles and  
17 all amendments upon filing under [Article 2].

1 **ARTICLE 14**

2 **CONSOLIDATION AND MERGER**

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

5 (1) “Consolidation” means the combination of two or more constituent  
6 organizations that results in the surviving organization having a different name than any of the  
7 constituent organizations.

8 (2) “Constituent cooperative” means a cooperative that is a party to a merger of  
9 consolidation.

10 (3) “Constituent organization” means an organization that is party to a  
11 consolidation or merger.

12 (4) “Governing statute” of an organization means the statute that governs the  
13 organization’s internal affairs.

14 (5) “Merger” the combination of two or more constituent organizations that results  
15 in the surviving cooperative having the name of one of the constituent organizations.

16 (6) “Organization” means a cooperative, a cooperative governed by law other than  
17 this [Act], general partnership, including a limited liability partnership; limited partnership,  
18 including a limited liability limited partnership; limited liability company; business trust;  
19 corporation; or any other person having a governing statute. The term includes domestic and  
20 foreign organizations whether or not organized for profit.

21 (7) “Personal liability” means personal liability for a debt, liability, or other  
22 obligation of an organization which is imposed on a person that co-owns, has an interest in, or is a

1 member of the organization:

2 (A) by the organization’s governing statute solely by reason of the person  
3 co-owning, having an interest in, or being a member of the organization; or

4 (B) by the organization’s organizational documents under a provision of the  
5 organization’s governing statute authorizing those documents to make one or more specified  
6 persons liable for all or specified debts, liabilities, and other obligations of the organization  
7 solely by reason of the person or persons co-owning, having an interest in, or being a member of  
8 the organization.

9 (8) “Surviving organization” means an organization into which one or more other  
10 organizations are merged. A surviving organization may preexists the merger or is created by the  
11 consolidation.

## 12 **Reporter’s Note**

13  
14 As a preliminary matter this Article allows a cooperative formed under this draft flexibility  
15 to combine with the full panoply of other organizations whether domestic or foreign. It does not  
16 include conversions but META would allow such transactions. Neither does it allow “share  
17 exchanges.” A separate Article (15) exists for the sale of assets but its drafting awaits action on  
18 Article 14.  
19

## 20 **SECTION 1402. MERGER OR CONSOLIDATION.**

21 (a) A cooperative may merge with one or more other constituent organizations  
22 pursuant to this [Article] and a plan of consolidation or merger, if:

23 (1) the governing statute of each the other organizations authorizes the  
24 merger;

25 (2) the consolidation or merger is not prohibited by the law of a jurisdiction



1 that enacted any of those governing statutes; and

2 (3) each of the other organizations complies with its governing statute in  
3 effecting the consolidation or merger.

4 (b) A plan of consolidation or merger must be in a record and must include:

5 (1) the name and form of each constituent organization;

6 (2) the name and form of the surviving organization and, if the surviving  
7 organization is to be created by the consolidation or merger, a statement to that effect;

8 (3) the terms and conditions of the consolidation or merger, including the  
9 manner and basis for converting the interests in each constituent organization into any  
10 combination of money, interests in the surviving organization, and other consideration;

11 (4) if the surviving organization is to be created by the consolidation or  
12 merger, the surviving organization's organizational documents;

13 (5) if the surviving organization is not to be created by the consolidation or  
14 merger, any amendments to be made by the merger to the surviving organization's organizational  
15 documents; and

16 (6) if a member or members of a constituent cooperative will have personal  
17 liability with respect to a surviving organization, the identity by descriptive class or other  
18 reasonable manner of the member.

19 **Reporter's Note**

20 Subsection (6) is derived from section 1406 in the November draft which was based on  
21 ULPA (2001). It is treated differently in this draft (April 2005) because of the addition of  
22 dissenters rights.  
23

1           **SECTION 1403. NOTICE AND ACTION ON PLAN OF CONSOLIDATION OR**  
2           **MERGER BY CONSTITUENT COOPERATIVE.**

3                   (a) The plan of consolidation or merger:

4                               (1) unless otherwise provided in the organic rules shall be approved by a  
5           majority vote of the board of directors; and

6                               (2) unless otherwise provided in the organic rules, approval of the plan  
7           shall require a two-thirds vote of all members of the board of directors.

8                   (b) The board of directors shall mail or otherwise transmit or deliver in a record to  
9           each member:

10                               (1) the plan;

11                               (2) a recommendation that the members approve the plan unless the board  
12           makes a determination because of conflicts of interest or other special circumstances it should not  
13           make such a recommendation;

14                               (3) if the board makes no recommendation, the basis for that decision;

15                               (4) any condition of its submission of the plan to the members; and

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

18           **SECTION 1404. APPROVAL AND ABANDONMENT OF CONSOLIDATION OR**  
19           **MERGER BY MEMBERS OF THE CONSTITUENT COOPERATIVE.**

20                   (a) Unless the organic rules otherwise provide for a greater quantum and subject to  
21           section 312, a plan of consolidation or merger shall be approved by at least two-thirds vote of  
22           members under Section 311.

(b) Subject to any contractual rights, after a consolidation or merger is approved, and at any time before a filing is made under Section 1407, a constituent cooperative may amend the plan or abandon the planned merger:

(1) as provided in the plan; and

(2) except as prohibited by the plan, with the same consent as was required to approve the plan.

#### **SECTION 1405. CONSOLIDATION OR MERGER OF SUBSIDIARY.**

(a) A cooperative that owns 90 percent of each class of the voting power of a subsidiary entity may consolidate or merge the subsidiary into itself or into another such subsidiary, unless the organic rules of the cooperative or the organic law or organic rules of the other entity otherwise provide, or

(b) The cooperative owning at least 90 percent of the subsidiary entity before the consolidation or merger shall notify each other owner of the subsidiary, if any, of the consolidation or merger within ten days after the effective date of the consolidation or merger.

#### **SECTION 1406. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

(a) After each constituent organization has approved the consolidation or merger, articles of consolidation or merger must be signed on behalf of each other preexisting constituent organization, by an authorized representative.

(b) The articles of consolidation or merger must include:

(1) the name and form of each constituent organization and the jurisdiction of its governing statute;

(2) the name and form of the surviving organization, the jurisdiction of its

governing statute, and, if the surviving organization is created by the consolidation or merger, a statement to that effect;

(3) the date the merger is effective under the governing statute of the surviving organization;

(4) if the surviving organization is to be created by the consolidation or merger:

(A) if it will be a cooperative, the cooperative's articles of organization; or

(B) if it will be an organization other than a cooperative, the organizational document that creates the organization;

(5) if the surviving organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the organization;

(6) a statement as to each constituent organization that the merger was approved as required by the organization's governing statute;

(7) if the surviving organization is a foreign organization not authorized to transact business in this State, the street and mailing address of an office which the [Secretary of State] may use for the purposes of Section [service of process]; and

(8) any additional information required by the governing statute of any constituent organization.

(c) Each constituent cooperative shall deliver the articles of consolidation or merger for filing in the [Office of the Secretary of State].

(d) A merger becomes effective under this [Article]:

1 (1) if the surviving organization is a cooperative, upon the later of:

2 (A) compliance with subsection (c); or

3 (B) subject to Section [210], as specified in the articles of  
4 consolidation or merger; or

5 (2) if the surviving organization is not a cooperative, as provided by the  
6 governing statute of the surviving organization.

7 **SECTION 1407. EFFECT OF CONSOLIDATION OR MERGER.**

8 (a) When a consolidation or merger becomes effective:

9 (1) the surviving organization continues or comes into existence;

10 (2) each constituent organization that consolidates or merges into the  
11 surviving organization ceases to exist as a separate entity;

12 (3) all property owned by each constituent organization that ceases to exist  
13 vests in the surviving organization;

14 (4) all debts, liabilities, and other obligations of each constituent  
15 organization that ceases to exist continue as obligations of the surviving organization;

16 (5) an action or proceeding pending by or against any constituent  
17 organization that ceases to exist may be continued as if the merger had not occurred;

18 (6) except as prohibited by other law, all of the rights, privileges,  
19 immunities, powers, and purposes of each constituent organization that ceases to exist vest in the  
20 surviving organization;

21 (7) except as otherwise provided in the plan of consolidation or merger, the  
22 terms and conditions of the plan take effect; and

(8) except as otherwise agreed, if a constituent cooperative ceases to exist, the merger does not dissolve the cooperative for the purposes of [the dissolution article];

(9) if the surviving organization is created by the consolidation or merger:

(A) if it is a cooperative, the articles of organization become effective; or

(B) if it is an organization other than a cooperative, the organizational document that creates the organization becomes effective; and

(10) if the surviving organization preexists the consolidation or merger, any amendments provided for in the articles of merger for the organizational document that created the organization become effective.

#### **Reporter's Note**

**Source:** ULPA (2001). The phrase “consolidation or” appears in combination with the term “merger” in the April (2005) draft pursuant to discussion at the November 2004 meeting.

**SECTION 1408. METHOD OF VOTING.** Members may vote in person or, as provided by the organic rules by mail or proxy.

**SECTION 1409. [ARTICLE] NOT EXCLUSIVE.** This [Article] does not preclude an entity from being converted or merged under other law.

#### **Reporter's Note**

Most of this article is based on the merger provisions found in Article 11, ULPA (2001). There are two major differences with the ULPA formulation. *First*, this draft does not provide for conversions although it provides for the same result through merger of a cooperative *into* another type of entity. *Second*, it allows for short-form merger where cooperative owns at least 90 percent of the voting power of the subsidiary. The first difference is a matter of degree depending on decisions made in the Model Entity Transactions Act currently before the Conference. It may be important to discuss the advisability of conversion-like processes here, however, squarely within

1 the context of cooperatives to identify any specific concerns.  
2

3 One change incorporated in this draft is the bifurcation between merger and consolidation.  
4 The advisors to this act have urged that the term “consolidation” be used where the surviving  
5 entity is a new organization. The term “new”, unfortunately, is ambiguous and the term has been  
6 deleted from the MBCA but remains in many state cooperative acts. The return of the term  
7 consolidation should not raise substantive concerns beyond being somewhat inconsistent with the  
8 laws of other organization.  
9

10 The new definitions of consolidation and merger attempt to make the distinction clerical,  
11 nonsubstantive, and bright-lined to avoid transaction and opinion letter complications.

1  
2  
3  
4  
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6

**ARTICLE 15**

**SALE OF SUBSTANTIALLY ALL THE ASSETS**

**[RESERVED]**

**Reporter's Note**

This Article will closely follow the language and format of the mergers article. Thus, it awaits further discussion of the provisions concerning consolidation or merger.



1 **ARTICLE 16**

2 **DISSENTERS RIGHTS**

3 **Preliminary Reporter's Note**

4  
5  
6 This article is new to the April 2005 draft and is drafted to comply with the Committee's  
7 charge to the Reporter to provide limited dissenters rights to avoid gross injustice upon  
8 fundamental change in the cooperative. To that end it is conceptually similar to dissenter's rights  
9 found in the Colorado cooperative statute (§ 7-56-608) and borrows conceptually from corporate  
10 law. Nonetheless it is drafted as efficiently as possible and, therefore, is less detailed than similar  
11 corporate provisions.  
12

13 Unincorporated law, as a general rule, does not provide for dissenters' rights. RULPA  
14 (1976/1985) and RUPA 1997 do provide for the purchase of a dissociated member's interest.  
15 This draft does not extend dissenter's rights to dissociated members which is consistent with  
16 NCCUSL current unincorporated products. This avoids the liquidity problem associated with  
17 such "puts" and it is also consistent with the equity redemption ideas found in traditional  
18 cooperative law.  
19

20 Arguably, dissenters' rights should, or at least could, be extended to voting on  
21 amendments to the organic rules. Doing so would make the entity far more brittle and would be at  
22 odds with the notion of strong centralized management, operational flexibility to respond to  
23 changed economic conditions, and perpetuity of life for the organization. Nonetheless, the  
24 Committee should make a policy decision concerning the availability of dissenters' rights upon  
25 amendment to the organic rules.  
26

27 **SECTION 1601. DEFINITIONS AND SCOPE.**

28 (a) In this [article]:

29 (1) "Dissenter" means a member having the right to dissent under section  
30 1602.

31 (2) "Transaction" means the proposed change to the cooperative's organic  
32 rules that grants dissenter's rights to a member.

33 (b) Dissenter does not include transferee of mere financial interests under [Article

1 4 of this Act].

2 **SECTION 1602. RIGHT TO DISSENT.** A member has the right to dissent and obtain  
3 payment for its membership interest upon the following transactions:

4 (a) Consolidation or merger of the cooperative under [Article 14] of this [Act]  
5 except for consolidations or mergers under section 1405;

6 (b) Sale of substantially all of the assets of the cooperative under [Article 15] of  
7 this [Act]; and

8 (c) Any other event set forth by the organic rules.

9 **SECTION 1603. PROCEDURE AND NOTICE.**

10 (a) A cooperative proposing an event under section 1602 shall include in its notice  
11 of the membership meeting upon which the proposal is voted:

12 (1) an explanation of dissenters' rights;

13 (2) the method, manner, and the time that those rights may be exercised;

14 and

15 (3) the effect of failure to exercise those rights.

16 (b) In order to exercise dissenters' rights the member shall give the cooperative  
17 notice in record form of the member's intention to exercise its dissenter's rights under subsection

18 (a) (2) before the meeting upon which the proposal is to be voted.

19 (c) The dissenter's notice to the cooperative shall include the name and address of  
20 the member.

21 (d) Upon giving notice the dissenter shall no longer be entitled to vote on the  
22 proposed transaction.

1           **SECTION 1604. VALUATION AND PAYMENT FOR NONTRANSFERABLE**  
2           **MEMBERSHIP INTERESTS.**

3                   (a) Unless the organic rules otherwise provide the dissenter is entitled to receive  
4           payment in the amount determined under subsection (b) if the membership interest is not  
5           transferable.

6                   (b) The amount payable shall be the value of the dissenter's equity contribution and  
7           the value of all other equity of the membership as of the date the cooperative approved the  
8           transaction.

9                   (c) The entire amount payable under subsection (b) shall paid to dissenter on or  
10          before a date one-hundred twenty days from the date cooperative approved the transaction unless  
11          the value of the equity other than the members equity contribution may be paid on by the  
12          successor cooperative if:

13                   (1) the successor cooperative is required by the plan to pay the value of the  
14          equity other than the members equity contribution in the same manner that it would have been  
15          paid immediately before the transaction; and

16                   (2) payment in no event shall be made more than ten years from the date the  
17          cooperative approved the merger.

18           **SECTION 1605. VALUATION AND PAYMENT FOR TRANSFERABLE**  
19           **MEMBERSHIP INTERESTS.**

20                   (a) Unless the organic rules otherwise provide the dissenter is entitled to receive  
21          payment of the fair value of a transferable interest determined under subsection (b) as valued on  
22          the date the cooperative approves the transaction.

1 (b) The cooperative must deliver a statement of fair value to the dissenter not later  
2 than thirty days after the date determined under subsection (a). The statement must be  
3 accompanied by:

4 (1) a statement of the cooperatives assets and liabilities as of the date  
5 determined under subsection (a);

6 (2) the latest available balance sheet and income statement, if any;

7 (3) an explanation of how the fair value was determined; and

8 (4) the terms of payment of the fair value to the dissenter.

9 (c) A dissenter dissatisfied with the terms set forth under subsection (b) may  
10 petition the [court] for a determination of fair value and the terms of payment on or before one  
11 hundred twenty days from the date determined under subsection (a).

12 **SECTION 1606. DISSENTER'S RIGHTS AND DUTIES AFTER**  
13 **CONSUMMATION OF TRANSACTION.**

14 (a) If the transaction is approved by the cooperative the dissenter is dissociated.

15 (b) The only financial rights of a dissociated dissenter are for payment under this  
16 [Article].

1 **ARTICLE 17**

2 **MISCELLANEOUS PROVISIONS**

3  
4 **SECTION 1701. EXEMPTION FROM SECURITIES LAWS.** Membership interests  
5 issued or sold by a cooperative as an investment in the cooperative are exempt from the securities  
6 laws of this [State] under [citation to the provision applicable to other existing forms of  
7 cooperatives.]

8 **Reporter's Note**

9 Exemptions are contained in every jurisdiction with which the Reporter is familiar.  
10 Nonetheless, the language of the statutes vary greatly by state. To avoid the necessity of each  
11 state renegotiating both the policy and nonuniform statutory language during the adoption of the  
12 Act this draft simply applies those existing exemptions by reference.  
13

14 **SECTION 1702. EXEMPTION FROM RESTRAINT OF TRADE AND**  
15 **ANTITRUST LAWS.** Cooperatives shall have the same immunities, rights and privileges  
16 provided cooperatives formed under [other law in this State] and are governed by [citation to the  
17 applicable restraint of trade and antitrust provisions].

18 **Reporter's Note**

19  
20 See the Note to Section 1701.  
21

22 **SECTION 1703. INDUCING BREACH OF MARKETING OR PURCHASE**  
23 **CONTRACTS.** The remedies provided by [citation to the applicable statutory provisions] apply  
24 to cooperatives.

25 **Reporter's Note**  
26

1 See the Note to Section 1701.  
2

3 **SECTION 1704. ALTERNATE DISTRIBUTION OF UNCLAIMED PROPERTY,**  
4 **DISTRIBUTIONS, REDEMPTIONS OR PAYMENTS.** A cooperative may distribute  
5 unclaimed property, distributions, redemptions or payments under [citation to the applicable  
6 provision in the law governing cooperatives not formed under this Act in this State].

7 **Reporter's Note**

8 This Section was discussed as a reserved issue at Section 809. The Preliminary Comments  
9 thereto formerly included the text of the Oregon Statute (§ 62.425). The substantive suggested  
10 text appears here for discussion purposes only. Article 8 is entitled "Contributions, Fees and  
11 Distributions".  
12

13 **SECTION 1705. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
14 applying and construing this Uniform Act, consideration must be given to the need to promote  
15 uniformity of the law with respect to its subject matter among States that enact it.

16 **SECTION 1706. SEVERABILITY CLAUSE.** If any provision of this [act] or its  
17 application to any person or circumstance is held invalid, the invalidity does not affect other  
18 provisions or applications of this [act] which can be given effect without the invalid provision or  
19 application, and to this end the provisions of this [act] are severable.

20 **SECTION 1707. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
21 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal  
22 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
23 this [act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic  
24 delivery of any of the notices described in Section 103(b) of that Act.

1 **Reporter's Note**

2  
3 At the November 2004 drafting meeting it was suggested that this language, taken from  
4 ULPA (2001) has been reformulated in more recent uniform acts. Nonetheless it appears in the  
5 latest available draft of the Uniform Trust Act but is absent from the current draft of the Uniform  
6 Certification of Title Act. Thus, it needs to be discussed by the Drafting Committee.  
7

8 **SECTION 1708. EFFECTIVE DATE.** This [act] takes effect [effective date].

9 **SECTION 1709. SAVINGS CLAUSE.** This [act] does not affect an action commenced,  
10 proceeding brought, or right accrued before this [act] takes effect.