

D R A F T

FOR DISCUSSION ONLY

**AGRICULTURAL AND AGRICULTURAL RELATED
COOPERATIVES ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

April 2005

*Changes Shown in Strike and Score
With Prefatory and Reporter's Notes*

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ON UNIFORM STATE LAWS

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AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

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AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT

PREFATORY NOTE

(1) Introduction and Process

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

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

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

(2) Coops: General Background Information

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

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

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

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

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

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

(3) Overview of Draft

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

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

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

The centers of gravity of this draft are:

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

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

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

1 **AGRICULTURAL ~~AND AGRICULTURAL RELATED~~ COOPERATIVES**

2 **ASSOCIATION ACT**

3 **ARTICLE 1**

4 **GENERAL PROVISIONS**

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

8 **Reporter’s Note**

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

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

17
18 Is it clear the act is not a “corporate” statute that does not foreclose cooperatives
19 organized pursuant to it to be treated as unincorporated entities for purposes of other law?
20

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

22 (1) ~~“Agricultural” and “Agricultural Related” means farming or related to~~
23 ~~farming including, but not limited to, the cultivation and tillage of soil, dairying, ranching, the~~
24 ~~production, planting, cultivation, growing, and the capture, harnessing or harvesting of~~
25 ~~agricultural, horticultural, or aquacultural commodities, including crops produced on trees, vines,~~
26 ~~bushes, the production and raising of timber, and raising, propagating, fattening or grazing~~
27 ~~livestock, born or unborn, including aquaculture, the storage, provision, marketing or processing~~

1 of the resultant products of farming; and the provision services and goods used in or helpful to
2 agricultural production of any type. These terms also include the forbearance of conducting any
3 such activities or production and the capture, harnessing or conversion of wind, sunlight, or
4 water.

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

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

13 (42) “Contribution” means any benefit provided by a person to a cooperative in
14 order to become a partner or in the person’s capacity as a ~~partner~~ member.

15 (53) “Cooperative” means an association organized under this ~~chapter conducting~~
16 ~~activity pursuant to a cooperative plan~~ Act.

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

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

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

22 (75) “Distribution” means a transfer of money or other property from a

1 cooperative to a member in the member’s capacity as a member or to a transferee on account of
2 an interest owned by the transferee.

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

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

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

10 (119) “Foreign entity” means an entity that is not a domestic entity.

11 (1210) “Foreign cooperative” means a foreign business entity organized to
12 conduct business on a cooperative plan consistent with this [act] or authorized to transact
13 business under [Article] 12.

14 (1311) “Member” means a person that is a member of a cooperative and includes
15 patron and nonpatron members. The term does not include a person that has dissociated.

16 (1412) “Membership interest” means patron membership interests and nonpatron
17 membership interests.

18 (1513) “Members’ meeting” means a regular or special members’ meeting.

19 (14) “Nonpatron member” means a member holding a nonpatronage membership
20 interest.

21 (1615) “Nonpatron membership interest” means a membership interest that does
22 not require the holder to conduct patronage business for or with the cooperative to receive

1 financial rights or distributions.

2 (1716) “Organic law” means the statute providing for the creation of an entity or
3 principally governing its internal affairs.

4 (1817) “Organic rules” means the ~~public organic document and private organic~~
5 ~~rules of an entity~~ articles of organization and the bylaws of the cooperative.

6 (1918) “Patron” means a person or entity ~~who~~ *that* conducts ~~patronage~~ activity
7 with the cooperative.

8 (2019) “Patronage” means ~~the quantity or value of business, transactions,~~
9 ~~services, or other activity~~ business, transactions, or services done for or with the cooperative as
10 defined by the cooperative.

11 (2120) “Patron member” means a member holding a patron membership interest.

12 (2221) “Patron membership interest” means the membership interest requiring
13 the holder to conduct patronage activity for or with the cooperative, as specified by the
14 cooperative to receive financial rights or distributions.

15 (2322) “Person” means an individual, corporation, business trust, estate, trust,
16 partnership, limited partnership, limited liability company, association, joint venture,
17 government; governmental subdivision, agency or instrumentality; public corporation, or any
18 other legal or commercial entity.

19 (2423) “Principal Office” means the office, whether or not in this State, where the
20 principal executive office of a domestic or foreign cooperative is located.

21 (2524) “Record” means information that is inscribed on a tangible medium or
22 that is stored in an electronic or other medium and is retrievable in perceivable form.

1 meaning. It is intended to include functions served by several industry categories of cooperatives
2 including service, supply purchasing, marketing, and processing cooperatives. Tough
3 definitional issues include whether this language includes such activities as farmers organizing to
4 pool farmland for carbon sequestration programs and “wind” harvesting on the marketing side or
5 health insurance purchasing groups on the supply side. Possible uses of cooperatives also
6 include private “ditch” companies in some states. This definition needs to be read in the context
7 of the definition of “entity.” Another fundamental but not substantive question raised by style is
8 whether this defined term, and the name of the Act, should be modified to “Agricultural and
9 Agriculturally Related.”

10
11 The definition of “Cooperative” requires activity “pursuant to a cooperative plan.”
12 “Cooperative plan” has intentionally been left undefined based on committee discussion. The
13 term “cooperative plan” appears in other cooperative acts without definition but acting in
14 conformity with a cooperative plan is required for definitional purposes in other law. Thus, a
15 plan is a basic cooperative notion that is not defined or described in this draft.

16 **SECTION 103. KNOWLEDGE AND NOTICE.**

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

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

19 (1) knows of it;

20 (2) has received notification of it; or

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

22 the time in question; or

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

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

27 (1) comes to the person’s attention; or

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

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

11 **Reporter's Note**

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

17 ~~SECTION 104. RESERVATION OF POWER TO AMEND OR REPEAL. The [name~~
18 ~~of state legislature] has the power to amend or repeal all or part of [this act] at any time and all~~
19 ~~domestic and foreign cooperatives subject to [this act] are governed by the amendment or repeal.~~
20 ~~A cooperative organized or governed by this [act] is subject to this reserved right.~~

21 **SECTION 104. COOPERATIVE SUBJECT TO AMENDMENT OR REPEAL OF**
22 **[ACT]. A cooperative governed by this [Act] is subject to any amendment or repeal of this**
23 **[Act].**

24 **Reporter's Note**

1 that should be informed by givers of legal opinion letters. It is intended to be a broad division.

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

4 **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF**
5 **INTEREST.**

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

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

10 **SECTION 109. NAME.**

11 (a) The name of a cooperative must contain the word association or its
12 abbreviation and may contain the word “cooperative” or its abbreviation. ~~“association”.~~
13 ~~“Cooperative” may be abbreviated as “Co-op” or “Coop”.~~

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

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

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

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

22 (c) A cooperative may apply to the [Secretary of State] for authorization to use a

1 name that is not distinguishable upon the records of the [Secretary of State] from one or more of
2 the names described in subsection (b). The [Secretary of State] shall authorize use of the name
3 applied for it if:

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

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

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

14 (1) merged with the other cooperative;

15 (2) been formed by reorganization with the other cooperative; or

16 (3) acquired substantially all of the assets, including the name, of the other
17 cooperative.

18 **Reporter's Note**

19 The use of the word "cooperative" under this draft is voluntary but may not be used by
20 organizations that are not cooperatives under Section 112 which has been modified. An issue
21 raised by the prior version of this section and its analogues under existing law is was that there is
22 no required designation or abbreviation to indicate the entity is a limited liability entity. For this
23 reason the April 2005 draft now requires the use of "association" or its abbreviation. The
24 required use of "association" also distinguishes this unincorporated agricultural cooperative from
25 cooperatives governed by other state law.

1 **SECTION 110. RESERVED NAME.**

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

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

11 **SECTION 111. REGISTERED NAME OF FOREIGN COOPERATIVE.**

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

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

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

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

22 (c) A foreign cooperative whose registration is effective may qualify as a foreign

1 cooperative under its name or consent in a record to the use of its name by a cooperative later
2 organized under this [act] or by another foreign cooperative later authorized to transact business
3 in this State. The registered name terminates when the cooperative is organized or the foreign
4 cooperative qualifies or consents to the qualification of another foreign cooperative under the
5 registered name.

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

7 (a) ~~No person other than a cooperative organized pursuant to [this act] or [other~~
8 ~~laws governing cooperatives in this State], or a similar law of another state, shall use the word~~
9 ~~“cooperative” as a part of its name or as a trademark, brand, or designation. The use of the term~~
10 ~~cooperative or its abbreviation under this [Act] is not a violation of the provisions restricting the~~
11 ~~use of the term under [other law of this State].~~

12 (b) ~~A cooperative organized pursuant to this article, or one or more members of~~
13 ~~the cooperative may bring an action for an injunction to enforce the provisions of this Section.~~
14 ~~Upon proof that the word “cooperative” is used in violation of this Section, the [court] shall enter~~
15 ~~an order permanently enjoining such use of the word. Cooperatives and members of~~
16 ~~cooperatives under this Act have the power to enforce the restrictions on the use of the term~~
17 ~~“cooperative” under [other law of this State].~~

18 **Reporter’s Note**

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

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

1 elsewhere in State law.

2 **SECTION 113. EFFECT OF ORGANIC RULES.**

3 (a) Except as otherwise provided in subsection (b), the organic rules govern relations
4 among the partners and between the members and the cooperative. To the extent the organic
5 rules do not otherwise provide, this [Act] governs relations between the members and board of
6 director members and the cooperative.

7 (b) The organic rules may not:

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

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

11 (3) vary the requirements of Section 208;

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

17 (5) eliminate the duty of loyalty under Section _____, but the organic rules may:

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

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

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

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

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

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

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

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

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

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

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

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

21 (12) a record stating:

22 (A) the amount of cash, and a description and statement of the agreed

1 value of the other benefits, contributed and agreed to be contributed by each member;

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

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

6 **Reporter's Note**

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

9
10 **SECTION 1145. BUSINESS TRANSACTIONS OF MEMBER WITH**
11 **COOPERATIVE.** A member may lend money to and transact other business with the
12 cooperative and has the same rights and obligations with respect to the loan or other transaction
13 as a person that is not a member.

14 **Reporter's Note**

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

17
18 **SECTION 1156. DUAL CAPACITY.** A person may be both a patron member and a
19 nonpatron member. A person that is both a patron and a nonpatron member has the rights,
20 powers, duties, and obligations provided by this [act] and the organic laws and rules in each of
21 those capacities. When the person acts as a patron member, the person is subject to the
22 obligations, duties and restrictions under this [act] and the organic laws and rules for patron
23 members. When the person acts as a nonpatron member, the person is subject to the obligations,
24 duties and restrictions under this [act] and the organic laws and rules for nonpatron members.

25 **SECTION 1167. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

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

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

3 and

4 (2) an agent for service of process.

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

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

10 **SECTION 1178. CHANGE OF REGISTERED OFFICE OR REGISTERED**
11 **AGENT FOR SERVICE OF PROCESS.**

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

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

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

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

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

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

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

3 **Reporter's Note**

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

8 **SECTION 1189. RESIGNATION OF REGISTERED AGENT FOR SERVICE OF**
9 **PROCESS.**

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

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

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

19 **SECTION 11920. SERVICE OF PROCESS.**

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

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

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

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

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

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

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

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

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

22 **Reporter's Note**

1

Source: ULP (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 **SECTION 202. FORMATION OF COOPERATIVE; ARTICLES OF**
7 **ORGANIZATION.**

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

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

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

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

1 **SECTION 203. AMENDMENT OR RESTATEMENT OF ARTICLES OF**
2 **ORGANIZATION.**

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

6 (1) the name of the cooperative;

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

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

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

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

16 (1) cause the articles to be amended; or

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

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

21 (e) Restated articles of organization may be delivered to the [Secretary of State]
22 for filing in the same manner as an amendment.

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

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

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

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

10 **Reporter's Note**

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

17
18 Formation under this draft presents a classic circularity problem concerning which comes
19 first: members or the cooperative. This same issue has been discussed in the context of limited
20 liability companies. There (probably) is no nice theoretical solution to this very practical
21 problem.

22 **SECTION 205. BYLAWS.**

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

25 (1) a statement of the capital structure of the cooperative, including a
26 statement of the classes and relative rights, preferences, and restrictions granted to or imposed
27 upon each group, class or other type of member interests, the rights to share in profits or

1 distributions of the cooperative, and the authority to admit members, which may be designated to
2 be determined by the board of directors;

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

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

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

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

15 Reporter's Note

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

21 **SECTION 206. EMERGENCY BYLAWS.**

22
23 (a) Unless the articles of organization provide otherwise, the board of directors
24 may adopt bylaws to be effective only in an emergency defined in subsection (d). The emergency
25 bylaws, which are subject to amendment or repeal by the members, may make all provisions

1 necessary for managing the corporation during the emergency, including:

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

3 (2) quorum requirements for the meeting; and

4 (3) designation of additional or substitute directors.

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

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

10 (1) binds the cooperative; and

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

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

15 **Reporter's Note**

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

21 **SECTION 207. STATEMENT OF ~~TERMINATION~~ DISSOLUTION.**

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

24 (1) the name of the cooperative;

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

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

6 **Reporter's Note**

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

14
15 The statement of dissolution simply indicates that the cooperative has entered winding-up
16 and this provision could be moved to Article 10. ULP (2001) does not do so but ULLCA
17 (1996) does place it there.

18
19 Termination is a very different creature than dissolution. Upon termination the entity,
20 and its liability shield, ends.

21 **SECTION 208. SIGNING OF RECORDS.**

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

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

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

28 (3) Any other amendment must be signed by the person or officer

1 designated for that purpose by the cooperative.

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

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

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

8 (1) the person to sign the record;

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

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

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

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

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

19 (a) A record authorized to be delivered to the [Secretary of State] for filing under
20 this [act] must be captioned to describe the record's purpose, be in a medium permitted by the
21 [Secretary of State] and be delivered to the [Secretary of State]. Unless the [Secretary of State]
22 determines that a record does not comply with the filing requirements of this [act], and if all

1 filing fees have been paid, the [Secretary of State] shall file the record and send a copy of the
2 filed record and a receipt for the fees to the person on whose behalf the record was filed.

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

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

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

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

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

16 (A) the specified date; or

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

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

20 (A) the specified date; or

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

22 **SECTION 211. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

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

21 (2) an organizer or director that has notice that the information was false
22 when the record was filed or has become false because of changed circumstances, if the organizer

1 or director has notice for a reasonably sufficient time before the information is relied upon to
2 enable the organizer or director to effect an amendment under Section 203, file a petition
3 pursuant to Section 209, or deliver to the [Secretary of State] for filing a statement of change
4 pursuant to Section 117 or a statement of correction pursuant to Section 211.

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

7 **Reporter's Note**

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

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

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

17 (1) the cooperative's name;

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

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 cooperative's most recent annual report required by
23 Section 214 has been filed by the [Secretary of State];

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (4) in the case of a foreign cooperative the State or other jurisdiction under
17 whose law the foreign cooperative is formed and any alternative name adopted under Section
18 [1205].

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

21 (c) The first annual report must be delivered to the [Secretary of State] between
22 [January 1 and April 1] of the year following the calendar year in which a domestic cooperative

1 was formed or a foreign cooperative was authorized to transact business. An annual report must
2 be delivered to the [Secretary of State] between [January 1 and April 1] of each subsequent
3 calendar year.

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

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

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

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

20 **Reporter's Note**

21 Consideration might be given to bracketing this Section. The obvious idea is to use the
22 same fee schedule as used for similar filings.
23

1 The base source for much of this Article is ULPA (2001) which is the latest
2 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 **SECTION 302. BECOMING MEMBER.** A person becomes a member:

9 (1) as provided in the organic rules;

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

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

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

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

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

17 **Reporter's Note**

18 Source: ULPA (2001).

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

20 **OBLIGATIONS.** Unless otherwise provided by the articles of organization, an obligation of a
21 cooperative whether arising in contract, tort, or otherwise, is not the obligation of a member. A
22 member is not personally liable, directly or indirectly, by way of contribution or otherwise, for an

1 obligation of the cooperative solely by reason of being a member.

2 **Reporter's Note**

3 Source: ULPA (2001).

4 **SECTION 305. RIGHT OF MEMBER AND FORMER MEMBER TO**
5 **INFORMATION.**

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

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

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

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

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

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

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

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

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

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

6 (1) the information pertains to the period during which the person was a
7 member;

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

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

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

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

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

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

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

22 (j) A member or person dissociated as a member may exercise the rights under

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

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

7 **Reporter’s Note**

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

15
16 308B.611. Nature of a membership interest and statement of
17 interest owned

18 ***

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

28
29 The interrelationship between this Section of the draft and the rights of dissociated
30 members and transferees has not yet been fully discussed.

31 **SECTION 306. ANNUAL MEMBERS’ MEETINGS.**

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

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

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

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

8 **Reporter's Note**

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

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

16 (a) Special members' meetings shall be called

17 (1) as provided in the organic rules;

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

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

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

24 (b) Any voting member may withdraw its demand under subsection (a)(3) and

1 (a)(4) prior to the receipt by the cooperative of demands sufficient to require a special members
2 meeting.

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

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

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

9 **Reporter's Note**

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

13
14 The MBCA allows the 10 percent minimum for demand to be varied upward to 25
15 percent if provided in the articles of incorporation.

16
17 **SECTION 308. EXPRESS AUTHORITY FOR DISTRICT MEETINGS.**

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

21 **Reporter's Note**

22 Query whether this section is (1) necessary or (2) should be limited to patronage
23 members.

24
25 Neither this draft nor the general cooperative statutes consulted provide for any type of
26 "fiduciary duties" for representatives of districts even though agency principles could apply. The
27 Committee has not yet discussed this issue though it has discussed whether members, generally,
28 have fiduciary duties. There exists strong sentiment on the Committee that members, solely by
29 reason of being members, should not have fiduciary duties. A finer issue is whether members

1 owe (or should owe) the cooperative or other members a duty of good faith or fair dealing.

2
3 For the notice required of district meetings *see* Section 309(d).

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

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

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

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

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

15 **Reporter's Note**

16 Query whether the members of a district, having elected a delegate, need to be given
17 notice of the meeting of delegates or whether those members may take part in the meeting. *See*
18 Reporter's Note, Section 308.

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

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

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

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

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

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

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

8 (b) The collective voting power of nonpatron members is subject to Section
9 312(c).

10 **SECTION 316. MANNER OF VOTING.**

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

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

15 **Reporter's Note**

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

19
20 (2) Members as such shall not vote by proxy; but a member that is
21 a corporation, association or partnership may designate a
22 representative to cast its vote. In the absence of written notice that
23 some person has been designated to represent a member which is
24 other than a natural person, such member may be represented by
25 any of its principal officers. If the bylaws of a cooperative provide
26 for the formation of districts and the election of delegates at district
27 meetings to represent their districts in member meetings, such
28 representation is not considered voting by proxy, and the delegates

1 so elected shall cast the votes to which members represented by
2 them are entitled on such matters as are not covered by mail ballots
3 submitted to all members.
4

5 (3) If the bylaws so provide, the board may cause to be submitted
6 by mail ballot any question to be voted on at any member meeting,
7 including the election of directors. In such event the secretary shall
8 mail to each member along with the notice of the meeting, the
9 ballot on each such question and a voting envelope. The ballot
10 may be cast only in a sealed envelope which is authenticated by the
11 member's signature. A vote so cast shall be counted as if the
12 member were present and voting in person.
13

14 Query whether member proxy voting should be allowed if the organic rules so state? As
15 a matter of analysis, member proxies are distinguishable from any sort of board member proxy.
16 Corporate law generally provides for the former but not the latter. The Uniform Limited
17 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 **SECTION 403. TRANSFERABILITY OF MEMBERSHIP INTERESTS.** Unless
15 otherwise provided in the organic rules and subject to Section 404 [Transfer of Financial
16 Interests] membership interests shall be nontransferable. The terms of the restriction on
17 transferability shall be set forth in the cooperative's organic rules, the interest transfer records of
18 the cooperative, and shall be conspicuously noted on any certificates evidencing a member's
19 interest if certificates are provided by the organic rules.

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

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

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

27 (c) The transferee shall not become a member upon transfer of a member's

1 financial rights unless it is admitted as a member by the cooperative.

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

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

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

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

13 **SECTION 405. RIGHTS OF CREDITOR OF MEMBER OR TRANSFEREE.**

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

22 (b) A charging order constitutes a lien on the judgment debtor's financial interest.

1 The court may order a foreclosure upon the interest subject to the charging order at any time.

2 The purchaser at the foreclosure sale becomes a transferee.

3 (c) At any time before foreclosure, an interest charged may be redeemed:

4 (1) by the judgment debtor;

5 (2) with property other than cooperative property, or by one or more of the
6 other members; or

7 (3) with members property, by the cooperative with the consent of all
8 partners whose interests are not so charged.

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

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

13 **Reporter's Note**

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

1 **ARTICLE 5**

2 **MARKETING CONTRACTS**

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

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

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

15 **Reporter’s Note**

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

18 **SECTION 502. MARKETING CONTRACTS.**

19 (a) The contract may provide for sale of the product or commodity to the
20 cooperative, and, if so, the sale shall transfer title absolutely to the cooperative except for security
21 interests properly perfected under other law, upon delivery or at any other specific time expressly
22 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 **SECTION 503. TERM OF CONTRACT.** A single term of a contract shall not exceed
22 ten years but may be renewable for additional periods not exceeding five years each subject to the
23 right of either party not to renew by giving record notice during a period of the current term as
24 specified in the contract.

25 **Reporter's Note**

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

27
28 **SECTION 504. REMEDIES FOR BREACH OF CONTRACT.**

29 (a) The contract or organic rules may establish a specific sum of money as

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

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

8 **Reporter's Note**

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

14 **~~SECTION 505. CONTRACT INTERFERENCE AND FALSE REPORTS.~~**

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

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

23 (1) ~~induces or attempts to induce a breach of contract with the cooperative~~
24 ~~under Section 501; or~~

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

1 cooperative.

1 number of directors by the holders of one or more groups or classes of membership interest.

2 (b) ~~The articles of organization or bylaws~~ organic rules may provide for the
3 nomination or election of directors by geographic district either directly or by district delegates
4 and if provided shall state: .

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

6 (2) ~~the manner and method of reapportioning the directors; and~~

7 (3) ~~the manner and method of redistricting the geographic territory covered~~
8 ~~by the cooperative.~~

9 (c) Cumulative voting is prohibited.

10 ~~(d) Except as provided in subsection (b) d~~Directors shall be elected at an annual
11 members meeting.

12 Reporter's Note

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

16
17 The Reporter was instructed to review cooperative law concerning the textual detail
18 necessary for subsection. There is frequently greater detail than set forth in this act as now
19 drafted. Shorter is frequently better. An example of such greater detail is Oregon Rev. Stat.
20 Section 62.255 (5) as follows:

21
22 (5) A cooperative may provide in its by-laws:

23 (a) For the formation of districts and the holding of member
24 meetings by districts and that elections of directors may be held at
25 district meetings.

26 (b) That district meetings may elect delegates who shall
27 represent their districts in annual and special meetings of the
28 members. Notice of district meetings shall be given in the same
29 manner as prescribed in this section for member meetings.

30 **SECTION 605. TERMS OF DIRECTORS.**

1 (a) ~~Unless otherwise provided in the articles of organization d~~Directors terms
2 shall expire at the annual members' meeting following their election ~~but in~~ unless otherwise
3 provided in the articles of organization. In no event shall the stated term of any director exceed
4 three years.

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

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

8 **Reporter's Note**

9 ~~This raises "staggered terms."~~ This draft reflects Committee direction given the Reporter.

10 **SECTION 606. RESIGNATION OF DIRECTORS.**

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

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

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

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

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

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

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

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

5 (d) The person or persons signing the petition shall have the same opportunity to
6 be heard provided the direction in subsection (c)(2).

7 (be) A director shall be removed by the same affirmative vote and in the same
8 manner as required for the director’s election.

9 (ef) A director shall be removed by the members at a special or ~~regular~~ annual
10 members meeting called for the purpose, or for one of the purposes, of removing the director.

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

13 **Reporter’s Note**

14 It was the sense of the Committee that the articles (or bylaws) could require removal “for
15 cause” only. This note is a reminder that sense for identifying “waivable and nonwaivable”
16 provisions at a later time.

17
18 Subsections (b), (c) and (d) are new. They generally follow the procedure established in
19 West’s California Code Annot. Section 54150 (it is unclear whether California requires “for
20 cause” removal only because its statute uses the term “charge” rather than petition.

21
22 **SECTION 608. REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING.**

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

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

1 (2) grossly abused of the position of director; or

2 (3) intentionally inflicted tion of harm on the cooperative.

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

5 **Reporter's Note**

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

9
10 **SUSPENSION OF DIRECTOR BY BOARD.**

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

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

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

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

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

19 **SECTION 609. BOARD VACANCY.**

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

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

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

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

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

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

3 **SECTION 610. COMPENSATION OF DIRECTORS.** Unless the organic rules
4 otherwise provide the board of directors may fix the ~~remuneration~~ remuneration of directors and
5 non-director committee members under section 617 (b).

6 **Reporter's Note**

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

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

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

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

27
28 **SECTION 611. MEETINGS.**

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

31 (b) Unless otherwise provided in the organic rules, the board may permit directors
32 to attend board of directors meetings or conduct board meetings through the use of any means of

1 communication if all directors attending the meeting can simultaneously ~~hear~~ communicate with
2 each other during the meeting.

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

4 (a) Unless ~~otherwise provided~~ prohibited by the organic rules, any action that may
5 be taken by the board of directors may be taken without a meeting if each director consents to
6 action in a record.

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

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

11 **SECTION 613. MEETINGS AND NOTICE.**

12 (a) Unless otherwise provided by the organic rules ~~The~~ the board of directors
13 ~~unless the organic rules otherwise provide,~~ may establish a time and place for regular board
14 meetings and notice of the time, place or purpose of those meetings is not required.

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

18 **Reporter's Note**

19 Subsection (b) has been more closely conformed to RMBCA Section 8.22 (b).

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

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

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

5 **SECTION 615. QUORUM.**

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

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

12 **Reporter's Note**

13 One of the observers has requested the Committee revisit this section.

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

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

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

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

1 **Reporter's Note**

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

4
5 The Reporter was directed at the February 2004 Committee meeting to move the
6 following subsection to a Reporter's Note as a matter of economy and for further discussion of
7 its necessity.

- 8
9 (d) A director who is present at a meeting of the
10 board of directors when action is taken shall be
11 deemed to have assented to the action taken unless:
12 (1) the director objects at the beginning of
13 the meeting or promptly upon the directors arrival at
14 the meeting and does not thereafter vote for or
15 assent to action taken at the meeting;
16 (2) the directors assent or abstention from
17 the action is made in a record
18 (A) in the minutes of the meeting; or
19 (B) the director
20 (I) does not vote for or assent
21 to the action taken at the meeting; and
22 (ii) delivers notice in a record
23 to the presiding officer of the meeting before
24 adjournment or to the cooperative immediately after
25 adjournment of the meeting.

26 **SECTION 617. COMMITTEES.**

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

29 (b) Unless otherwise provided by the organic rules, ~~the creation of a committee~~
30 ~~and appointment of directors to a committee shall be in accordance with Section 511 or Section~~
31 ~~515.~~ individuals appointed to serve on committees need not be directors or members of the
32 cooperative. Individuals serving on board committees have the same rights, duties, and
33 obligations as do directors serving on committees.

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

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

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

6 or

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

8 **Reporter's Note**

9 Special litigation committee, audit committee; Minnesota allows non-directors to be
10 members of a committee. There has been some support within the Committee (and from
11 suggestions received by the Reporter) to allow non-board member committee members (ala Sar-
12 Box?). The Committee has yet to discuss these suggestions at length. What are the appropriate
13 limits? This draft allows non-members to serve on committees. This is an important policy
14 decision.

15
16 _____ This draft does not expressly allow executive committees but many cooperative statutes
17 do so. Because this draft does not expressly contain reference to an executive board it does not
18 put a prohibition on nondirectors serving on that board.

19 **SECTION 618. STANDARD OF CONDUCT.**

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

22 (1) in good faith;

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

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

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

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

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

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

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

14 **Reporter's Note**

15 The current formulation of the standard of conduct for directors varies significantly from
16 the formulation used in unincorporated entity acts promulgated by the conference. See the
17 separate Reporter's Memo on Fiduciary Duties to the Drafting Committee dated March 27, 2005.
18

19 Subsection (a): The MBCA contains the language in (a)(1) and (a)(3). Its formulation of
20 (a)(2), however, is limited to its oversight function and to becoming informed with respect to the
21 decision-making function. The MBCA formulation also deletes all reference to "ordinarily
22 prudent person" because of the ambiguity of that phrase in the law of negligence. The MBCA
23 states a standard for liability in a subsequent section separately from the standard of conduct.
24 Generally it is the latter section (MBCA § 8.31) which contemplates, but does not expressly
25 state, the business judgment rule.
26

27 Neither the Minnesota Cooperative Associations Act, or this draft, contain the separate
28 liability section. The Minnesota Act's "conduct" section uses the phrase, "ordinarily prudent
29 person in a like position would exercise under similar circumstances" without including the

1 MBCA’s modification “would reasonably believe appropriate.” Oregon’s Cooperative
2 Corporation Act (general application) contains the same language as (a)(2).
3

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

7 **SECTION 619. CONFLICT OF INTEREST.**

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

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

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

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

17 (1) the conflict of interest was:

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

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

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

23 (c) If a director has a conflict of interest in a transaction but is neither a party to
24 the transaction nor has a familial interest to a party to the transaction and has a duty under law or

1 professional canon, or a duty of confidentiality to another person that prohibits disclosure under
2 subsection (b)(1)(A), then disclosure is sufficient if the director discloses to persons voting on
3 the transaction the existence and nature of his conflicting interest and the character and
4 limitations imposed by that duty before their vote on the transaction; and takes no part in the
5 deliberation or vote.

6 **Reporter's Note**

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

11 **SECTION 620. LIMITATION OF DIRECTORS DUTIES.** The articles of

12 organization may vary the standards under Sections 618 and 619 except it may not:

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

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

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

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

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

23 **Reporter's Note**

1 for preparing all records required by Section 113 ~~and by the rules~~ and for the authentication of
2 records.

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

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

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

9 **Reporter's Note**

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

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

15 (a) ~~Unless otherwise provided by the organic rules the~~ The board of directors has
16 the power to remove an officer at any time with or ~~without~~ with out cause.

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

20 **Reporter's Note**

21 The Reporter made a change to subsection (a) to focus on the provision for purposes of
22 discussion. Note that this draft contains no provision directly addressing the standard of conduct
23 of officers. This is, at the least, not unusual in the world of general cooperative statutes. At
24 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 **SECTION 702. PROHIBITED INDEMNIFICATION OF INDIVIDUAL. A**

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

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

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

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

9 **SECTION 704. ADVANCE FOR EXPENSES OF DIRECTOR OR OFFICER.**

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

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

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

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

22 **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, FEES ALLOCATIONS AND DISTRIBUTIONS**

3
4 **SECTION 801. MEMBERSHIP CONTRIBUTIONS ~~AND FEES.~~**

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 ~~fees~~ contributions.

11 ~~(b) The organic rules shall establish:~~

12 ~~(1) the amount, manner, or method of determining membership fees or~~
13 ~~may authorize the board of directors to establish the manner and terms of any fees; and~~

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

16 **Reporter's Note**

17 Source: Derived from the Oregon Cooperative Corporation Act and ULPAA (2001). This
18 draft does not expressly provide for stock or use the corporate capital accounting model which
19 allows the board of directors, for example, to establish par value. Rather this draft follows
20 unincorporated law which is far more general, and less detailed. The draft does contemplate that
21 the organic rules may establish a more corporate-like capital structure ~~and a different article~~
22 ~~contemplates "certificated" membership interests. See Section 205(a)(1). Although it does not~~
23 ~~expressly address certificated ownership interests is that enough? In that regard, is capital~~
24 ~~formation inhibited by "lack of stock like a corporation" and, if so, is there any way around the~~
25 ~~problem?~~ Thus, this draft more closely follows the unincorporated organizational model and is,
26 therefore, arguably more contractually or agreement based. Paradoxically, the entity
27 contemplated by this draft is more flexible upon formation but gives the board of directors less

1 power to establish new classes or voting interests than in a business corporation. This mix is
2 consistent with stronger member control.

3
4 At the direction of the Committee the word “fees” has been deleted. Will the deletion
5 cause problems in service cooperatives? How are such fees usually accounted in fee-based
6 cooperatives?

7
8 Does a comment to this section need to discuss equity certificates and, if so, suggestions?

9 **SECTION 802. FORMS OF CONTRIBUTION, ~~FEES~~ AND VALUATION.**

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

14 (b) The receipt and acceptance of contributions ~~or fees~~ and the valuation of
15 contributions or fees shall be reflected in the cooperative’s required records pursuant to Section
16 113.

17 (c) Unless otherwise provided in the organic rules, the board of directors shall
18 value the contributions ~~or fees~~ received or to be received. The determination by the board of
19 directors on valuation is conclusive for purposes of whether the ~~member is validly admitted and~~
20 fully paid member’s contribution obligation has been fully paid.

21 **Reporter’s Note**

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

27 The Comment (or is it more appropriate in a legislative note) needs to note that some

1 state constitutions may place restrictions on the types of property that may be contributed.

2 **SECTION 803. CONTRIBUTION AND ~~FEE~~ SUBSCRIPTION AGREEMENTS.**

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

5 (1) otherwise provided by the agreement; or

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

7 (b) Upon default by a party to a contribution or fee agreement entered into before
8 formation, the cooperative once formed may:

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

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

13 **Reporter's Note**

14 Source: Oregon Cooperative Corporation Act; conceptually similar to the Minnesota
15 Cooperative Associations Act, the MBCA and ULPA (2001).

16 **SECTION 804. ~~APPORTIONMENT~~ ALLOCATIONS OF NET PROCEEDS,
17 **SAVINGS OR PROFITS.****

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

21 (b) Patron members shall be apportioned not less than 50 percent of the net
22 proceeds, savings, margins or profits in any fiscal year but the articles of organization may reduce

1 the percentage ~~apportioned~~ allocated to patron members to not less than 30 percent.

2 **Reporter's Note**

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

9
10 **SECTION 805. DISTRIBUTIONS AND RESERVES.**

11 (a) Unless otherwise provided in the organic rules, the board of directors may
12 retain or set aside a portion of net proceeds, savings , margins or profits ~~apportioned to patron~~
13 whether or not allocated to members for purposes of the following:

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

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

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

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

24 (c) For purposes of ~~apportionment~~ allocation of net proceeds, savings , margins or
25 profits to patron members the organic rules may establish allocation units based on function,

1 division, district, department, or other methods, and may account for and distribute to patrons
2 based on allocation units or pooling arrangements.

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

6 **Reporter's Note**

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

11
12 The April 2005 draft deleted "patron" from the flush language of subsection (a).
13 Minnesota continues to restrict the application of this section to patron members. Why?

14
15 **SECTION 806. REDEMPTION OF EQUITY.** Subject to Section 807 and unless the
16 articles of organization otherwise provide, a cooperative may redeem member's equity upon
17 dissociation of the member or at any time. Consideration for such equity shall be the amount of
18 the member's contributions ~~or fees~~ as previously allocated or apportioned under Section 805 plus
19 any accrued allocations to the member's equity.

20 **Reporter's Note**

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

25
26 This Section may be needless repetition of other authority for distributions under this
27 draft but, on the other hand, it may make the draft more user-friendly for those cooperatives
28 which contemplate "stock" or certificated interests. It is important to note that this Section is
29 permissive at the discretion of the cooperative and does not give any member a put right.

30 **SECTION 807. ~~APPORTIONMENT~~ ALLOCATION OF LOSSES.** Unless

1 otherwise provided in the organic rules, losses shall be ~~apportioned~~ allocated and charged in the
2 same manner as net proceeds, savings, margins or profits.

3 **Reporter's Note**

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

5 **SECTION 808. LIMITATIONS ON DISTRIBUTIONS.**

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

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

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

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

15 (c) Except as otherwise provided in subsection (g~~f~~), the effect of a distribution
16 under subsection (b) is measured:

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

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

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

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

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

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

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

13 **Reporter's Note**

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

19
20 This Section also raises another issue specific to this draft: Who is liable? Under typical
21 unincorporated law it is possible to require members to return a proportionate amount of an
22 unlawful distribution. It is one of the few bright-line areas for director liability under corporate
23 law.

24
25 This act is not driven by tax law. Nonetheless is there a tax footfault in (e)?

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

27 **Reporter's Note**

1 See Section 1704 of this draft.

2
3 Several state cooperative laws provide an exception for the application of other law on
4 unclaimed property. For example, the Oregon Cooperative Corporation Act sets forth a
5 procedure for unclaimed property to revert to the cooperative and the Minnesota Cooperative
6 Associations Act allows the cooperative to designate another entity (“business” or “tax exempt”)
7 to receive the property. Committee has discussed these provisions but no decision has been
8 reached. By way of illustration relevant portion of the Oregon Act states:

9
10 ~~62.425. Unclaimed distribution, redemptions or payments. (1)~~
11 ~~Any distribution of net margins by a cooperative or any redemption~~
12 ~~of or payment based upon any indebtedness, capital stock of a~~
13 ~~cooperative or other equity interest which remains unclaimed four~~
14 ~~years after the date authorized for payment, redemption or~~
15 ~~retirement may be forfeited by the board. Any amount forfeited~~
16 ~~may revert to the cooperative, if, at least six months prior to the~~
17 ~~declared date of forfeiture, notice that the payment is available has~~
18 ~~been mailed to the last known address of the person shown by the~~
19 ~~cooperative’s records to be entitled thereto or, if the address is~~
20 ~~unknown, is published as provided by ORS 62.245....~~

1 suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of
2 dissolution or no reinstatement of its 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 ~~under~~
3 ~~[Article] 14, if the cooperative:~~ under the plan of merger as approved under [Article] 14,

4 ~~(A) is not the surviving entity, or~~

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

7 **Reporter's Note**

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

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

15
16 Subsection 901(5). It was suggested in November 2004 that the board should have this
17 power. Clarification is needed as to whether the board alone should have the power or whether
18 the board must go to court to expel a member. If it is the board alone, alternative language is
19 offered in the Reporter's Note following the provision on removal of a board member. Section
20 901(b) contemplates expulsion by the board assuming that 901 is not exclusive (e.g.
21 "modifiable" by the organic rules).

22 **SECTION 902. EFFECT OF DISSOCIATION AS MEMBER.**

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

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

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

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

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

7 **Reporter's Note**

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

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

20 **Reporter's Note**

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

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

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

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

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

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

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

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

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

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

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

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

23 **{Reserved}**

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
28 lesser extent, the consolidation or merger and sale of assets provisions (Article 14 and 15). Thus,
29 its drafting awaits further discussion on those items.

30 **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 10078. 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 10089. 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 ~~1009~~10. 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 An issue that needs to be discussed by the Committee is whether the number of days are
7 appropriate. The choice in the April 2005 draft conforms to ULPA (2001) and is not changed
8 from the 2004 annual meeting draft.

9
10 **SECTION 1010~~1~~. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
11 **DISSOLUTION.**

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

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

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

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

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

24 (c) When reinstatement becomes effective, it relates back to and takes effect as to

1 the effective date of the administrative dissolution and the cooperative may resume its activities
2 as if the administrative dissolution had never occurred.

3 **Reporter's Note**

4 Source: ULPA, ULLCA, generally follows the MBCA.

5 **SECTION 101H2. APPEAL FROM DENIAL OF REINSTATEMENT.**

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

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

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

16 **Reporter's Note**

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

1 cooperative and if:

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

5 (2) 90 days have expired from the date the demand was made unless the member
6 has earlier been notified that the demand has been rejected by the cooperative or unless
7 irreparable injury to the cooperative would result by waiting for the expiration of the time period.

8 **Reporter’s Note**

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

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

14 (1) that was a member when the conduct giving rise to the action occurred; or

15 (2) whose status as a member devolved upon the person by operation of law from
16 a person that was a member at the time of the conduct.

17 **Reporter’s Note**

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

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

23 (1) the date and content of plaintiff’s demand and the cooperative’s response to
24 the demand; and

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

3 **SECTION 1105. PROCEEDS AND EXPENSES.**

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

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

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

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

14 **Reporter's Note**

15 Source: § 1005 ULPA (2001).

16
17 Most cooperative statutes do not expressly provide for derivative actions. This draft
18 closely follows ULPA (2001) in providing for such actions.

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

- 1 member bringing the derivative suit “adequately represent” the cooperative should provide a
- 2 framework for the evolution of such concepts under the common law.

1 **ARTICLE 12**

2 **FOREIGN COOPERATIVES**

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

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

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

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

14 **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 ~~agricultural or agricultural related~~ cooperative may apply for a
22 certificate of authority to transact business in this State by delivering an application to the
23 [Secretary of State] for filing. The 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 ~~ARTICLES AND BYLAWS~~ ORGANIC RULES**

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

6 (a) A cooperative may amend its articles of organization and bylaws under ~~Section~~
7 ~~1302~~; this [Article].

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

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

11 **Reporter's Note**

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

18 **SECTION 1302. NOTICE AND ACTION ON AMENDMENT OF ARTICLES OF**
19 **ORGANIZATION OR BY-LAWS.** In order to amend the ~~articles of organization or bylaws~~
20 organic rules:

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

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

- 1 (1) the proposed amendment:
- 2 (2) a recommendation that the members approve the amendment unless the
- 3 board determines because of conflict of interest or other special circumstances it should not make
- 4 such a recommendation;
- 5 (3) if the board makes no recommendation, the basis of that decision;
- 6 (4) any condition of its submission of the amendment to the members; ~~and~~
- 7 (5) notice of the existence; and
- 8 ~~(5 6)~~ give notice of the meeting in the same manner as an annual or special
- 9 members meeting.

10 **SECTION 1303. METHOD OF VOTING.** Members may vote in person, by mail, or

11 proxy, or as provided in the organic rules.

12 **Reporter’s Note**

13 This section is derived from Colorado section 7-55-110.

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

15 (a) No substantive amendment of the proposed amendment of the organic rules

16 shall be allowed at the meeting that the vote occurs;

17 (b) Subject to (a) any amendment of the amendment need not be separately voted

18 upon by the board of directors; and

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

20 to pass the proposed amendment.

21 **Reporter’s Note**

22 At the November 2004 meeting the term “germane” was suggested. This draft uses the

1 term “substantive”.
2

3 **SECTION 13035. APPROVAL OF AMENDMENT.**

4 (a) Subject to Sections 13046 and 312, an amendment to the articles of
5 incorporation shall be approved by at least two-thirds vote of members ~~pursuant to~~ under Section
6 311.

7 (b) Subject to Sections 13046 and 312, an amendment to the bylaws shall be
8 approved by at least majority vote of members present at the meeting except that a two-thirds vote
9 of members pursuant to Section 311 is required for any amendment modifying:

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

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

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

15 (4) the transferability of membership interests; or

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

18 **Reporter’s Note**

19 The Reporter was requested to consider several suggested revisions at the November 2004
20 meeting included separate voting by patronage and nonpatronage members. There are two
21 reasons such revisions are not included in the April 2005 draft: (1) In many instances the desired
22 result would be attained by operation of section 1305; (2) The operation of section 312 was not
23 fully considered. SECTION 312 CONFOUNDS THE OPERATION OF THIS SECTION
24 because, in effect, it gives a majority of patron members absolute control over the ultimate
25 outcome of the vote. THIS MUST BE DISCUSSED and provides a very strong argument section
26 312 should be reduced to majority. On the other hand, providing for separate patronage/non-
27 patronage voting in any meaningful way gives non-patronage members, who are likely to be few

1 in number, blocking power.

2
3 Many cooperative acts allow the board of directors to amend the bylaws, some do not. It
4 is the initial general sense of the committee to be protective of members and this draft is
5 consistent with that sense.

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

14 **SECTION 13046. VOTING BY GROUP, CLASS, OR DISTRICT MEMBERSHIP.**

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

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

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

24 **Reporter's Note**

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

28
29 This section should not be interpreted to extend voting rights to transferees.

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

1
2 (a) Members may propose amendments to the organic rules be considered by the
3 board of directors by demand in a record signed by the members holding at least 10 percent of all
4 votes entitled to be cast on the matter.

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

7 **Reporter's Note**

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

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

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

1 (67) “Personal liability” means personal liability for a debt, liability, or other
2 obligation of an organization which is imposed on a person that co-owns, has an interest in, or is a
3 member of the organization:

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

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

11 (78) “Surviving organization” means an organization into which one or more other
12 organizations are merged. A surviving organization may preexist~~s~~e the merger or ~~be~~ is created by
13 the ~~merger~~ consolidation.

14 Reporter’s Note

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

21 22 **SECTION 1402. MERGER OR CONSOLIDATION.**

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

25 (1) the governing statute of each the other organizations authorizes the
26 merger;

1 (2) the consolidation or merger is not prohibited by the law of a jurisdiction
2 that enacted any of those governing statutes; and

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

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

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

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

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

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

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

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

20 **Reporter's Note**

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

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 the patron members if:~~ by at
22 least two-thirds vote of members under Section 311.

1 (1) ~~the quorum of the members eligible to vote under Section 311 is~~
2 registered as being present for the meeting; and

3 (2) ~~two-thirds of the patron members present for the meeting consent to the~~
4 plan.

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

8 (1) as provided in the plan; and

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

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

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

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

19 ~~**SECTION 1406. RESTRICTIONS ON APPROVAL OF MERGERS.** If a member of~~
20 ~~a constituent cooperative will have personal liability with respect to a converted or surviving~~
21 ~~organization, approval and amendment of a plan of conversion or merger are ineffective without~~
22 ~~the consent of the member to the specific plan in a record.~~

1 **SECTION 14076. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

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

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

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

8 (2) the name and form of the surviving organization, the jurisdiction of its
9 governing statute, and, if the surviving organization is created by the consolidation or merger, a
10 statement to that effect;

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

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

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

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

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

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

1 (7) if the surviving organization is a foreign organization not authorized to
2 transact business in this State, the street and mailing address of an office which the [Secretary of
3 State] may use for the purposes of Section ~~1207~~ [service of process]; and

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

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

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

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

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

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

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

15 **SECTION 14087. EFFECT OF CONSOLIDATION OR MERGER.**

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

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

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

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

22 (4) all debts, liabilities, and other obligations of each constituent

1 organization that ceases to exist continue as obligations of the surviving organization;

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

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

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

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

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

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

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

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

19 **Reporter's Note**

20 **Source:** ULPA (2001). The phrase “consolidation or” appears in combination with the
21 term “merger” in the April (2005) draft pursuant to discussion at the November 2004 meeting.
22

23 **SECTION 1408. METHOD OF VOTING.** Members may vote in person or, as

1 provided by the organic rules by mail or proxy.

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

4 **Reporter's Note**

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

13
14 One change ~~not~~ incorporated in this draft is the bifurcation between merger and
15 consolidation. The advisors to this act have urged that the term "consolidation" be used where the
16 surviving entity is a new organization. The term "new", unfortunately, is ambiguous and the ~~The~~
17 term has been deleted from the MBCA but remains in many state cooperative acts. The return of
18 the term consolidation should not raise substantive concerns beyond being somewhat inconsistent
19 with the laws of other organization.

20
21 The new definitions of consolidation and merger attempt to make the distinction clerical,
22 nonsubstantive, and bright-lined to avoid transaction and opinion letter complications.

1
2
3
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5
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 members of the cooperative for approval a plan of merger,
2 consolidation, or share or equity capital exchange and if following
3 the merger, consolidation, or share or equity capital exchange there
4 will be members of any cooperative involved in the proposed
5 transaction who would no longer be eligible for membership or
6 other voting interest in the surviving entity, the ineligible members
7 shall be entitled to repayment of their equity interests in the
8 cooperative in accordance with this section.
9

10 ***

11
12 (4) A cooperative that proposes to be a party to a merger,
13 consolidation, share or equity capital exchange, or a sale of assets,
14 as described in subsection (2) or (3) of this section, shall include in
15 the notice of the membership meeting at which the vote of the
16 members is taken thereon an explanation of the right to dissent and
17 the requirement to give written notice of intent to demand payment
18 by a member having the right to do so under this section.
19

20 (8) Within thirty days after receipt of a demand for payment, the
21 surviving or new entity or, in the case of a sale of assets subject to
22 this section, the cooperative selling its assets shall pay to the
23 dissenter:
24

25 (a) The stated value of the initial investment of the dissenter in
26 stock or membership fees in the cooperative as recorded in the
27 records of the cooperative made to qualify the dissenter to be a
28 member of the cooperative; and
29

30 (b) The stated value of all other equity capital of the dissenter in the
31 cooperative as recorded in the records of the surviving cooperative,
32 or in the case of a sale of assets subject to this section, of the
33 cooperative selling its assets; except that, in the case of any merger,
34 consolidation, or share or equity capital exchange, if the surviving
35 or new entity has, by written agreement or operation of law other
36 than this section, become liable to repay the other equity capital of
37 the dissenter, the repayment of other equity capital shall be made by
38 the surviving or new entity under the same conditions and time
39 frame, but not more than fifteen years, that would have applied if
40 the member or equity holder had withdrawn or been terminated
41 from the cooperative that is not the surviving or new entity
42 immediately prior to the effective date of the merger, consolidation,
43 or share or equity capital exchange. If payment is not made on the

1 date required by this subsection (8), the recipient shall be entitled to
2 interest from the date the payment should have been made until the
3 date payment is actually made.

4
5 (9) Notwithstanding any provisions of law to the contrary, holders
6 of equity capital who are not members of the cooperative shall
7 under no circumstances be entitled to dissenter's rights.
8

9 **Source:** 8(b) and 9 of the Colorado Act depart from corporate law.

10 **Preliminary Reporter's Note**

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

19
20 Unincorporated law, as a general rule, does not provide for dissenters' rights. RULPA
21 (1976/1985) and RUPA 1997 do provide for the purchase of a dissociated member's interest.
22 This draft does not extend dissenter's rights to dissociated members which is consistent with
23 NCCUSL current unincorporated products. This avoids the liquidity problem associated with
24 such "puts" and it is also consistent with the equity redemption ideas found in traditional
25 cooperative law.

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

33 **SECTION 1601. DEFINITIONS AND SCOPE.**

34
35 (a) In this [article]:

36 (1) "Dissenter" means a member having the right to dissent under section
37 1602.

38 (2) "Transaction means the proposed change to the cooperative's organic

1 rules that grants dissenter's rights to a member.

2 (b) Dissenter does not include transferee of mere financial interests under [Article
3 4 of this Act].

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

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

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

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

11 **SECTION 1603. PROCEDURE AND NOTICE.**

12 (a) A cooperative proposing an event under section 1602 shall include in its notice
13 of the membership meeting upon which the proposal is voted:

14 (1) an explanation of dissenters' rights;

15 (2) the method, manner, and the time that those rights may be exercised;

16 and

17 (3) the effect of failure to exercise those rights.

18 (b) In order to exercise dissenters' rights the member shall give the cooperative
19 notice in record form of the member's intention to exercise its dissenter's rights under subsection

20 (a) (2) before the meeting upon which the proposal is to be voted.

21 (c) The dissenter's notice to the cooperative shall include the name and address of
22 the member.

1 (d) Upon giving notice the dissenter shall no longer be entitled to vote on the
2 proposed transaction.

3 **SECTION 1604. VALUATION AND PAYMENT FOR NONTRANSFERABLE**
4 **MEMBERSHIP INTERESTS.**

5 (a) Unless the organic rules otherwise provide the dissenter is entitled to receive
6 payment in the amount determined under subsection (b) if the membership interest is not
7 transferable.

8 (b) The amount payable shall be the value of the dissenter's equity contribution and
9 the value of all other equity of the membership as of the date the cooperative approved the
10 transaction.

11 (c) The entire amount payable under subsection (b) shall paid to dissenter on or
12 before a date one-hundred twenty days from the date cooperative approved the transaction unless
13 the value of the equity other than the members equity contribution may be paid on by the
14 successor cooperative if:

15 (1) the successor cooperative is required by the plan to pay the value of the
16 equity other than the members equity contribution in the same manner that it would have been
17 paid immediately before the transaction; and

18 (2) payment in no event shall be made more than ten years from the date the
19 cooperative approved the merger.

20 **SECTION 1605. VALUATION AND PAYMENT FOR TRANSFERABLE**
21 **MEMBERSHIP INTERESTS.**

22 (a) Unless the organic rules otherwise provide the dissenter is entitled to receive

1 payment of the fair value of a transferable interest determined under subsection (b) as valued on
2 the date the cooperative approves the transaction.

3 (b) The cooperative must deliver a statement of fair value to the dissenter not later
4 than thirty days after the date determined under subsection (a). The statement must be
5 accompanied by:

6 (1) a statement of the cooperatives assets and liabilities as of the date
7 determined under subsection (a);

8 (2) the latest available balance sheet and income statement, if any;

9 (3) an explanation of how the fair value was determined; and

10 (4) the terms of payment of the fair value to the dissenter.

11 (c) A dissenter dissatisfied with the terms set forth under subsection (b) may
12 petition the [court] for a determination of fair value and the terms of payment on or before one
13 hundred twenty days from the date determined under subsection (a).

14 **SECTION 1606. DISSENTER’S RIGHTS AND DUTIES AFTER**
15 **CONSUMMATION OF TRANSACTION.**

16 (a) If the transaction is approved by the cooperative the dissenter is dissociated.

17 (b) The only financial rights of a dissociated dissenter are for payment under this
18 [Article].

1 latest available draft of the Uniform Trust Act but is absent from the current draft of the Uniform
2 Certification of Title Act. Thus, it needs to be discussed by the Drafting Committee.

3
4 **SECTION 17048. EFFECTIVE DATE.** This [act] takes effect [effective date].

5 **SECTION 17059. SAVINGS CLAUSE.** This [act] does not affect an action
6 commenced, proceeding brought, or right accrued before this [act] takes effect.