

D R A F T  
FOR DISCUSSION ONLY

# UNIFORM COOPERATIVE ASSOCIATION ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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October 2005  
Chicago, Illinois

*WITH PREFATORY AND REPORTER'S NOTES*

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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# UNIFORM COOPERATIVE ASSOCIATION ACT

## PREFATORY NOTE

### (1) Introduction and Process

The Committee is charged with drafting a Cooperative Association 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 was originally limited to "Agriculture and Agriculture Related" purposes. In effect, neither the Iowa nor Minnesota Acts are limited to agriculture.

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 or by stating that the cooperative must be operated pursuant to a cooperative plan, a term that is undefined and without fixed meaning even within the industry. A brief illustrative discussion of some of those definitions is contained in the next part of this preliminary note ("Cooperatives: 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 of Saskatchewan enacted an Act for similar purposes that predated the Wyoming law. Tennessee and Iowa have enacted statutes based on the Minnesota Act. Wisconsin has introduced similar legislation the past two years but it has not been passed. Vermont and Missouri have also introduced, but not passed, similar legislation.

### (2) Cooperatives: 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 the October 2005 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, and functionally. 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 “co-op brand.”

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                                   **UNIFORM COOPERATIVE ASSOCIATION ACT**

2

3                                   **ARTICLE 1**

4                                   **GENERAL PROVISIONS**

5                   **SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Cooperative  
6 Association Act.

7                                   **Reporter’s Note**

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

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

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

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

21                   (1) “Articles of organization” includes initial, amended, and restated articles of  
22 organization and articles of merger. In the case of a foreign cooperative, the term includes all  
23 records that:

24                                   (A) have a function similar to articles of organization and articles of  
25 merger; and

26                                   (B) are required to be filed in the office of the [Secretary of State] or other  
27 official having custody of articles of organization and articles of merger in the state or country

1 under whose law it is organized.

2 (2) “Contribution” means a benefit by that a person provides to a cooperative in  
3 order to become a member or in the person’s capacity as a member.

4 (3) “Cooperative” means an association organized under this [act].

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

6 (A) an order for relief under 11 U.S.C. Section 101 et seq.; or

7 (B) an order comparable to an order described in subparagraph (A) under  
8 federal, state, or foreign law governing insolvency.

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

12 (6) “Domestic cooperative” means a cooperative organized under this [act] or  
13 [chapters].

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

15 (8) “Entity” means a company, corporation, limited liability company, limited  
16 liability partnership, limited partnership, domestic or foreign.

17 (9) “Foreign cooperative” means a foreign business entity organized to conduct  
18 business under the cooperative law or other law similar to this [act] in another jurisdiction or  
19 authorized to transact business under [Article] 12.

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

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

1 member.

2 (12) “Members’ meeting” means a regular or special members’ meeting.

3 (13) “Membership interest” means patron and nonpatron membership interests.

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

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

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

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

13 (18) “Patron” means a person or entity that conducts economic activity with a  
14 cooperative on a patronage basis.

15 (19) “Patron member” means a member holding a patron membership interest.

16 (20) “Patron membership interest” means a membership interest allowing or  
17 requiring the holder to conduct on a patronage basis.

18 (21) “Patronage”:

19 (A) means business, transactions, or services:

20 (i) done for or with a cooperative, as specified by the cooperative;

21 (ii) entitling the person conducting the business, transactions, or  
22 services for or with the cooperative to receive financial rights, distributions, or payment from the

1 cooperative based on:

2 (I) the value of the business, transactions, or services and  
3 the financial performance of the cooperative; or

4 (II) the value added to the cooperative by such the  
5 business, transactions, or services; and

6 (B) includes any allocation to patronage members based on a patronage  
7 membership as well as participation in nonmember patron pools.

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

12 (23) “Principal office” means the office, whether or not in this state, where the  
13 principal executive office of a domestic or foreign cooperative is located.

14 (24) “Record”, used as a noun, means information that is inscribed on a tangible  
15 medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

16 (25) “Required information” means the information a cooperative is required to  
17 maintain under this [act].

18 (26) “Sign” means:

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

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

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

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

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

### **Reporter’s Note**

This draft reflects several technical drafting suggestions made at the 2004 Annual Meeting and suggestions by the style committee. It also contains changes made by the Reporter in an attempt to clarify the language used. One suggested change not made concerned the definition of “person.” It was suggested that the NCCUSL definition of person has changed but this definition appears in ULPA 2001. Likewise it was suggested that the terms “record” and “sign” are unnecessary because of UENTA. Nonetheless ULPA (2001) contains these definitions.

As discussed in greater detail in the Reporter’s Note to Section 404, the definitions need tuning. In particular, “patron”, “patron member” and “nonpatron member” are currently under reconsideration by the Drafting Committee. “Financial Interest” is used extensively in Article 4 but not defined. The term “financial interest”, as noted in the Reporter’s Note, is also being reconsidered. It performs the same function as “transferable interest” in ULLCA, ULPA (2001), and UPA (1997). Below are two rough definitional suggestions from the Reporter for discussion purposes:

- “Patron membership interest” means the membership interest providing a patron rights in governance and a transferable interest [financial interest] of the cooperative as a member as established by the [Act]; and
- “Transferable interest” means the right to receive distributions to members but does not include the right to receive payments based on a separate marketing contract, if any, between the member and the cooperative.

Note that distributions are distinct from allocations in virtually all organizational statutes. Distributions are actual payments of money or money’s worthwhile allocations are accounting concepts, *e.g.*, the capital accounts of partners in a partnership.



1 An observer has suggested that the definition of “patronage” (subsection 21) be revised to  
2 read as follows:

3  
4 “Patronage” means business transactions between a cooperative  
5 and a person which entitle the person to receive financial rights,  
6 distributions, or payment from the cooperative based on the value  
7 or quantity of such business, done with such person under a pre-  
8 existing legal obligation to receive the amount paid, which is  
9 determined by reference to the net earnings of the cooperative from  
10 all business done with or for such persons.  
11

12 Finally, all references to “cooperative plan” have been deleted in this draft consistent with  
13 prior and continuing committee discussion.  
14

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

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

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

18 (1) knows of it;

19 (2) has received notification of it; or

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

21 at the time in question.

22 (c) A person notifies or gives a notification to another person by taking steps

23 reasonably required to inform the other person in ordinary course, whether or not the other

24 person learns of the notification.

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

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

27 (2) is delivered at the person’s place of business or at any other place held

28 out by the person as a place for receiving communications.

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

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

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

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

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

The revised language is taken from UPA (1997).

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

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

1 (b) A cooperative may be organized under this [act] for any lawful purpose  
2 except [designate prohibited purposes].

3 (c) A cooperative has a perpetual duration unless otherwise provided by the  
4 articles of organization.

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

6 Subsection (b) states “any lawful purpose” which is consistent with the unincorporated  
7 acts promulgated by the Conference. It is also consistent with the general laws of cooperatives  
8 which in some states reference or are included in not-for-profit acts. Finally, it is consistent with  
9 the historical roots of cooperatives as mutual aid societies.

10  
11 Subsection (b) reflects the decision by the Uniform Law Commission at the 2005 Annual  
12 Meeting to delete any reference to “agricultural or agricultural related” and, instead, list specific  
13 purposes for which cooperatives may not be used. The “except” language is similar to the  
14 language in Section 3 of RULPA 1976/1985. The Committee may desire to consider inserting  
15 “subject to any law of this state governing or regulating business” which is included in ULLCA  
16 1996 (after the words “any lawful purpose”).

17  
18 The Minnesota Act states:

19  
20 “[F]or any other purposes that cooperatives are authorized to  
21 perform by law,” Minn. Stat. Ann. § 308B. 201(3).

22  
23 The Tennessee Act states:

24  
25 “[A]nd other purposes that are related to the business of the  
26 cooperatives; to provide supplies and services to its members and  
27 for purposes are authorized by law.” Tenn. Code. Ann. § 43-38-  
28 201.

29  
30 Minnesota’s general cooperative law has the following purpose:

31  
32 “[F]or the purposes of conducting an agricultural, dairy, marketing,  
33 transportation, warehousing, commission, mechanical, mercantile,  
34 electrical, heat, light, or power business, or for any other lawful  
35 purpose. Minn. Stat. Ann. § 308A.101(1).

36  
37 Even though it appears the general Minnesota Cooperative Act reflects a modern trend; at  
38 least some states, maintain different cooperative statutes for different types of cooperatives.

1 South Dakota's general cooperative statute (which was enacted in 1939 and amended in  
2 1968 and 1978 states:

3  
4 "Cooperatives may be organized under this chapter for any lawful  
5 purpose except banking and insurance." SDCL § 47-15-2.  
6

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

11 **Reporter's Note**

12 The formulation of powers in this draft is based upon unincorporated law models as  
13 opposed to a more detailed listing of powers contained in corporate law. The Committee has  
14 discussed this approach for powers only briefly and it is consistent with a general direction to  
15 draft as efficiently as possible even though most cooperative acts tend to follow the more detailed  
16 (and older) corporate model. The question of the level of detail in this section is probably one  
17 that should be informed by givers of legal opinion letters. It is intended to be a broad division.  
18

19 **SECTION 107. GOVERNING LAW.** The law of this state governs relations among  
20 the members of a cooperative and between the members and the cooperative.

21 **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF**  
22 **INTEREST.**

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

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

27 **Reporter's Note**

1           The Committee on Style, consistent with previous Committee discussion but not  
2 Committee resolution, has “suggested” deleting subsection (a) and queries whether subsection  
3 (b) is necessary.  
4

5           **SECTION 109. NAME.**

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

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

10                   (1) the name of any corporation, limited partnership, limited liability  
11 company, cooperative, or company incorporated, organized, or authorized to transact business in  
12 this state;

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

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

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

20                   (1) the present user, registrant, or owner of a name reserved or registered  
21 under Section 110 or 111 consents in a record to the use and submits an undertaking in a form  
22 satisfactory to the [Secretary of State] to change the name to a name that is distinguishable upon  
23 the records of the [Secretary of State] from the name applied for; or

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

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

- 7 (1) merged with the other cooperative;  
8 (2) been formed by reorganization with the other cooperative; or  
9 (3) acquired substantially all of the assets, including the name, of the other  
10 cooperative.

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

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

19  
20 The Style Committee would delete "of competent jurisdiction" in (c)(2).  
21

#### 22 **SECTION 110. RESERVED NAME.**

23 (a) A person may reserve the exclusive use of the name of a cooperative,  
24 including a fictitious name for a foreign cooperative whose name is unavailable, by delivering an  
25 application to the [Secretary of State] for filing. The application must set forth the name and  
26 address of the applicant and the name proposed to be reserved. If the [Secretary of State] finds

1 that the name applied for is available, it must be reserved for the applicant's exclusive use for a  
2 nonrenewable 60 day period.

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

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

7 (a) A foreign cooperative may register its name pursuant to Section 109 if the  
8 name is distinguishable upon the records of the [Secretary of State] from names that are  
9 unavailable under Section 109.

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

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

15 (2) accompanied by a certificate of existence, or a record of similar  
16 import, from the state or country of organization.

17 (c) A foreign cooperative whose registration is effective may qualify as a foreign  
18 cooperative under its name or consent in a record to the use of its name by a cooperative later  
19 organized under this [act] or by a foreign cooperative later authorized to transact business in this  
20 state. The registered name terminates when the cooperative is organized or the foreign  
21 cooperative qualifies or consents to the qualification of another foreign cooperative under the  
22 registered name.

1 **Reporter's Note**

2 From Style: "Isn't it the registration of the name that terminates?"  
3

4 **SECTION 112. USE OF THE TERM "COOPERATIVE".**

5 (a) The use of the term "cooperative" or its abbreviation under this [act] is not a  
6 violation of the provisions restricting the use of the term under [other law of this state].

7 (b) Cooperatives and members of cooperatives under this [act] have the power to  
8 enforce the restrictions on the use of the term "cooperative" under [other law of this state].

9 **Reporter's Note**

10 Cooperative statutes include name protection provisions unique among organizational  
11 law. The prior draft of this Section is typical of those provisions. Many such provisions also  
12 contain bond and attorney's fees provisions but those provisions are not typically contained in  
13 other organizational law.  
14

15 This draft attempts to coordinate the name restrictions contained in other cooperative law  
16 in the state, if any, with this Act without granting restrictions or rights not found elsewhere in  
17 State law.  
18

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

20 (a) Except as otherwise provided in subsection (b), the organic rules govern  
21 relations among and between the members, the board of directors and the cooperative.

22 (b) The organic rules may not:

23 (1) vary a cooperative's power under Section 106 to sue, be sued, and  
24 defend in its own name;

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

26 (3) vary the requirements of Section 208;



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

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

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

10 (B) specify the number or percentage of members necessary to  
11 authorize or ratify, after full disclosure to all members of all material facts, a specific act or  
12 transaction that otherwise would violate the duty of loyalty;

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

14 (7) eliminate the obligation of good faith and fair dealing under Sections  
15 \_\_\_\_ and \_\_\_\_, but the partnership agreement may prescribe the standards by which the  
16 performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

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

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

21 (10) vary the requirement to wind up the cooperative's business pursuant  
22 to Section \_\_\_\_;

(11) unreasonably restrict the right to maintain an action under [Article]  
10;  
(12) restrict the right of a member under Section \_\_\_\_ to approve a  
conversion or merger; or  
(13) restrict rights under this [act] of a person other than a member,  
transferee, or board of director member.

### Reporter's Note

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

Subsection (a) was criticized by both the Style Committee (as ambiguous) and by an observer since the April 2005 meeting. Thus, it has been reworked. As reworked the Reporter has a sense that it places even more emphasis on subsection (b) though the previous formulation was, at least, inartful. It may be time to form a subcommittee to assist the Reporter in a careful review of, and for, subsection (b)'s exceptions. The Style Committee suggests "reduce" in (b)(6) may not be the best word choice but it is retained in this draft because the language has been approved in other conference products.

An observer has suggested that identifying mandatory provisions and attempting to place them in subsection (b) seems to be "legislative quicksand" and suggested replacing (b) with a "couple of succinct sentences about conflicts between the organic documents and the act stating the law trumps. This, of course, would mean the final draft would retain myriad "unless otherwise provided in the organic documents." This and the former drafts have used those phrases merely in an attempt to *begin* to identify sections to place in (b). To a great extent, this is "only" a matter of drafting extent, this is "only" a matter of drafting style and reflects what is referred to in some CLEs on broader organizational law as the unincorporated (or uniform laws) approach versus the unincorporated (or Delaware) approach. On the other hand, to keep this draft "moving" a decision needs to be made as soon as possible.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (12) a record stating:

2 (A) the amount of cash contributed and agreed to be contributed by each  
3 member;

4 (B) a description and statement of the agreed value of other benefits  
5 contributed and agreed to be contributed by each member;

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

8 (D) for a person that is both a patron member and nonpatron member, a  
9 specification of the interest the person owns in each capacity.

10 **Reporter's Note**

11 The Committee has not yet discussed the appropriate required retention time for the  
12 enumerated records.

13  
14 The October 2005 draft reflects a suggestion by the Style Committee to bifurcate old  
15 (12)(A) into (A) and (B). The Committee needs to discuss this change because it seems to  
16 change the format of the information contemplated and because the original language is from  
17 ULPA (2001) §111(a)(A).  
18

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

23 **Reporter's Note**

24 This language is consistent with the language used in ULPA (2001). Is it unambiguous in  
25 the cooperative context?  
26

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

## Reporter's Note

Would it be ambiguous to delete the word “member” the first time it appears? Is this section ambiguous because there exist patron members, nonpatron members and nonmember patrons under the draft act? The same issue exists in Section 114 and elsewhere and revises a significant drafting issue that may reverberate as policy.

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

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

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

(2) an agent for service of process.

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

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

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

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

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

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

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

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

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

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

## Reporter's Note

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

**SECTION 119. RESIGNATION OF REGISTERED AGENT FOR SERVICE OF PROCESS.**

(a) To resign as an agent for service of process of a cooperative or foreign

1 cooperative, the agent must deliver to the [Secretary of State] for filing a statement of resignation  
2 containing the name of the cooperative or foreign cooperative.

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

7 (c) An agency for service of process terminates 30 days after the [Secretary of  
8 State] files the statement of resignation.

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

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

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

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

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

2 (1) the date the cooperative or foreign cooperative receives the process,  
3 notice, or demand;

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

6 (3) five days after the process, notice, or demand is deposited with the  
7 United States Postal Service, if mailed postpaid and correctly addressed.

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

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

13 **Reporter's Note**

14 Source: ULPA (2001). Is the term "mail" in section 120 (c) and (d)(3) ambiguous? The  
15 Style Committee suggested the change to "with the United States Postal Service" in (d)(3).



1 **ARTICLE 2**

2 **FILING AND ANNUAL REPORTS**

3 **Reporter's Preliminary Note**

4 Article 2 of the 2005 Annual Meeting Draft has been bifurcated into Art. 2 ("Filing and  
5 Annual Reports") and Art. 2A ("Formation and Articles of Organization"). This roughly follows  
6 the organizational scheme of Oregon's general cooperative act. Some sections originally  
7 contained in old Article 2 have been moved elsewhere: (1) "old" sections 203 and 206 have been  
8 moved to Article 13; and, (2) "old" section 207 has been moved to Article 10.

9  
10 "New Article 2 consists of "old sections 208 through 215. "Old" section 213  
11 ("Certificate of Existence") is included in this section simply because it doesn't seem to fit better  
12 anywhere else.

13  
14 The purpose of the reorganization is to make the draft more usable. It now follows a  
15 more transaction oriented scheme. For example "old" section 206 ("Emergency Bylaws") now  
16 appears in Article 13 ("Amendment of Organic Rules"). The Committee directed the Reporter to  
17 reorganize "old" Article 2 because it contained dissimilar types of provisions and was therefore  
18 confusing. The organization of this draft is similar to the organization of Oregon's general  
19 cooperative act.

20  
21 The numbering of the Sections in Articles 2 and 2A is for the October draft only. Article  
22 2A will become Article 3 and all the numbering of the other articles will be changed accordingly.

23  
24 **SECTION 201. SIGNING OF RECORDS.**

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

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

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

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

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

3 **Reporter's Note**

4 This is renumbered from "old" section 208.  
5

6 **SECTION 202. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

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

10 (1) the person to sign the record;

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

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

13 (b) If an aggrieved person under subsection (a) is not the cooperative or foreign  
14 cooperative to which the record pertains, the aggrieved person shall make the cooperative or  
15 foreign cooperative a party to the action. An aggrieved person under subsection (a) may seek any  
16 or all of the remedies provided in subsection (a) in the same action.

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

19 **Reporter's Note**

20 This section is renumbered from "old" section 209.  
21

22 **SECTION 203. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**  
23 **OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

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

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

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

18 (3) if the record specifies a delayed effective date but not an effective  
19 time, at 12:01 a.m. on the earlier of:

20 (A) the specified date; or

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

22 (4) if the record specifies an effective time and a delayed effective date, at

1 the specified time on the earlier of:

2 (A) the specified date; or

3 (B) 90 days after the record is filed.

4 **Reporter's Note**

5 This section is renumbered from "old" section 210.

6  
7 **SECTION 204. CORRECTING FILED RECORD.**

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

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

13 (1) describe the record to be corrected, including its filing date, or contain  
14 an attached copy of the record as filed;

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

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

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

22 **Reporter's Note**

1 This section is renumbered from “old” section 211.  
2

3 **SECTION 205. LIABILITY FOR FALSE INFORMATION IN FILED RECORD.**

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

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

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

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

17 **Reporter’s Note**

18 This section is renumbered from “old” section 212.  
19

20 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee  
21 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it  
22 is appropriate to add director. An addition or an alternative to director might be officer though it  
23 may be difficult at times to demarcate between officers and mere agents.  
24  
25

1                   **SECTION 206. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

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

- 6                               (1) the cooperative's name;
- 7                               (2) that the cooperative was formed under the laws of this state and the  
8                   date of formation;
- 9                               (3) whether all fees, taxes, and penalties due to the [Secretary of State]  
10                  under this [act] or other law have been paid;
- 11                              (4) whether the cooperative's most recent annual report required by  
12                  Section 214 has been filed by the [Secretary of State];
- 13                              (5) whether the [Secretary of State] has administratively dissolved the  
14                  cooperative;
- 15                              (6) whether the cooperative's articles of organization have been amended  
16                  to state that the cooperative is dissolved;
- 17                              (7) that a statement of termination has not been filed by the [Secretary of  
18                  State]; and
- 19                              (8) other facts of record in the [office of the Secretary of State] which are  
20                  requested by the applicant.

21                   (b) The [Secretary of State], upon request and payment of the required fee, shall  
22                   furnish a certificate of authorization for a foreign cooperative if the records filed in the [office of

1 the Secretary of State] show that the [Secretary of State] has filed a certificate of authority, has  
2 not revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of  
3 authorization must state:

4 (1) the foreign cooperative's name and any alternative name adopted  
5 under Section 1205 for use in this state;

6 (2) that the foreign cooperative is authorized to transact business in this  
7 state;

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

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

12 (5) that the [Secretary of State] has not revoked the foreign cooperative's  
13 certificate of authority and has not filed a notice of cancellation; and

14 (6) other facts of record in the [Office of the Secretary of State] which are  
15 requested by the applicant.

16 (c) Subject to any qualification stated in the certificate, a certificate of existence  
17 or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence that  
18 the domestic cooperative or foreign cooperative is in existence or is authorized to transact  
19 business in this state.

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

21 In (a)(8) and (b)(6): Is applicant "clear enough"?  
22

1                   **SECTION 207. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

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

5                               (2) the street and mailing addresses of its designated office and the name  
6 and street and mailing addresses of its agent for service of process in this state;

7                               (3) in the case of a domestic cooperative, the street and mailing addresses  
8 of its principal office if different than its designated office; and

9                               (4) in the case of a foreign cooperative, the state or other jurisdiction  
10 under whose law the foreign cooperative is formed and any alternative name adopted under  
11 Section 1205.

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

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

19                   (d) If an annual report does not contain the information required in subsection (a),  
20 the [Secretary of State] shall promptly notify the reporting domestic cooperative or foreign  
21 cooperative and return the report for correction. If the report is corrected to contain the  
22 information required in subsection (a) and delivered to the [Secretary of State] within 30 days



1 after the effective date of the notice, it is timely delivered.

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

6 (f) A cooperative that fails to file a registration under this Section must be  
7 dissolved by the [Secretary of State] under Section 1009.

8 **Reporter's Note**

9 This section is renumbered from "old" section 214.  
10

11 **SECTION 208. FILING FEES; RULES AND REGULATIONS; ANNUAL**  
12 **REPORTS AND LICENSE TAXES.** Unless otherwise provided, the filing fee for documents  
13 filed under this [Article] with the [Secretary of State] is subject to [the general business  
14 corporation law of this state]. The [Secretary of State] shall promulgate rules and regulations  
15 necessary to implement this [Article].

16 **Reporter's Note**

17 This section is renumbered from "old" section 215.  
18

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

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

1 **ARTICLE 2A**

2 **FORMATION AND ARTICLES OF ORGANIZATION**

3  
4 **Reporter's Note**

5 Article 2 of the 2005 Annual Meeting Draft has been bifurcated into Art. 2A "Formation  
6 and Articles of Organization" and Art. 2. Article 2A will become a new Article 3 if the  
7 Committee agrees with the division. The original Art. 2 numbers are retained in Article 2A  
8 simply for ease of following the reorganization.

9  
10 Article 2A consists of old sections 201, 202, 204 and 205. Each section in Art. 2A is  
11 directly related to the organization of the cooperative.

12  
13 "Old" Section 203 "Amendment or Restatement of Articles of Organization" has been  
14 moved to Art. 13 as "new" Section 1309.

15  
16 The numbering of the Sections in Articles 2 and 2A is for the October draft only. Article  
17 2A will become Article 3 and all the numbers of the other articles will be changed accordingly.  
18

19 **SECTION 201A. ORGANIZATION.**

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

22 (b) Each organizer under subsection (a) must in good faith:

23 (1) intend to become a member of the cooperative; or

24 (2) represent entities that intend to become members of the cooperative.

25 **Reporter's Note**

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

28  
29 The *first* issue raised in conjunction with this Section is whether the formation of "shelf"  
30 cooperatives *should* be allowed. "Shelf" entities are those entities formed by promoters, or  
31 others for possible future use without a specific current need for the entity. The tentative

1 conclusion of the Committee was not to allow for shelf cooperatives because they are  
2 inconsistent with the member focus of cooperatives. For the same reason, multiple organizers  
3 are required under this draft.  
4

5 The Committee recognizes that the execution of that tentative conclusion is difficult and  
6 raises other issues including the number of members necessary to avoid dissolution. This draft  
7 requires only a single member for the latter purposes, in part, because of the current use of  
8 wholly owned subsidiaries of cooperatives which are themselves cooperatives and because  
9 requiring more than a single member increases the risk of inadvertent dissolution. On the other  
10 hand, like under partnership law, it is difficult to conceive of a “cooperative” without more than  
11 one member.  
12

13 The use of “good faith” as a standard raises practical concerns for opinions concerning  
14 “valid organization.” Some standard, however, is necessary to avoid using straw persons as  
15 organizers as became the practice under corporate law when more than one incorporator was  
16 required.  
17

18 This draft raises those, and no doubt other, fundamental issues. The Minnesota  
19 Cooperative Associations Act allows for “one or more organizers... [who] need not be members.”  
20 The Colorado Cooperative Act too, allows for one or more “incorporators.”  
21

## 22 **SECTION 202A. FORMATION OF COOPERATIVE; ARTICLES OF** 23 **ORGANIZATION.**

24 (a) To form a cooperative, articles of organization must be delivered to the  
25 [Secretary of State] for filing. The articles must state:

- 26 (1) the name of the cooperative;
- 27 (2) the purposes for which the cooperative was formed;
- 28 (3) the street and mailing addresses of the initial designated office and the  
29 name; and street and mailing addresses of the agent for service of process;
- 30 (4) the name and the street and mailing addresses of each organizer;
- 31 (5) the term for which the cooperative is to exist if other than perpetual;
- 32 (6) the number and terms of directors; and

1 (7) any additional information required by [Article] 14.

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

3 (c) Unless the articles of organization state a delayed effective date, a cooperative  
4 is formed when there is substantial compliance with subsection (a) and the [Secretary of State]  
5 files the articles of organization. If the articles state a delayed effective date, a cooperative is not  
6 formed if, before the articles take effect, one or more organizers sign and deliver to the [Secretary  
7 of State] for filing a statement of cancellation.

8 **Reporter's Note**

9 The October 2005 draft reorders the first sentence.  
10

11 **SECTION 203A. ORGANIZATION OF COOPERATIVE.** After the effective date  
12 of the articles of organization:

13 (1) if initial directors are named in the articles, the initial directors shall hold an  
14 organizational meeting to appoint officers, adopt initial bylaws, and carry on any other business  
15 brought before the meeting; and

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

18 **Reporter's Note**

19 Two observers have asked if this act should follow traditional cooperative statutes drafted  
20 in the corporate style to allow the organizer to appoint the initial board and providing that board  
21 to adopt the initial bylaws.  
22

23 The locus of authority of this draft are the members of the cooperative. Thus, it varies  
24 from corporate theory reflected in most existing cooperative laws which give directors and  
25 incorporators broad discretion. This locus of authority is also reflected in this draft by requiring  
26 members to amend bylaws. This requirement causes dissonance in the formation stage of the

1 cooperative but is consistent with industry practice under which the bylaws are the primary  
2 governance document.

3  
4 Formation under this draft presents a classic circularity problem concerning which comes  
5 first: members or the cooperative. This same issue has been discussed in the context of limited  
6 liability companies. There (probably) is no nice theoretical solution to this very practical  
7 problem.  
8

#### 9 **SECTION 204A. BYLAWS.**

10 (a) If not stated in the articles of organization, the bylaws must be in a record and  
11 include:

12 (1) a statement of the capital structure of the cooperative, including a  
13 statement of the classes and relative rights, preferences, and restrictions granted to or imposed  
14 upon each group, class, or other type of member interest, the rights to share in profits or  
15 distributions of the cooperative, and the authority to admit members, which may be designated to  
16 be determined by the board of directors;

17 (2) a statement designating the voting and governance rights, including  
18 which members have voting power and any limitations or restrictions on the voting power under  
19 Section 312;

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

23 (4) if nonpatron members are authorized, a statement concerning how  
24 profits and losses are apportioned and how distributions are made as between patron members  
25 and nonpatron members.

1 (b) The bylaws of the cooperative may contain any provision for managing and  
2 regulating the affairs of the cooperative which is not inconsistent with organic law or the articles  
3 of organization.

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

5 In (a)(1): Does "which may be designated to be determined by the board of directors"  
6 apply only to the authority to admit members, or to all items in this paragraph?  
7

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

#### 14 **SECTION 205A. SIGNING OF RECORDS.**

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

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

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

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

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

#### 25 **SECTION 206A. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

26 (a) If a person required by this [act] to sign or deliver a record to the [Secretary of

1 State] for filing does not do so, any other person that is aggrieved person may petition the  
2 [appropriate court] to order:

3 (1) the person to sign the record;

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

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

6 (b) If the an aggrieved person aggrieved under subsection (a) is not the  
7 cooperative or foreign cooperative to which the record pertains, the aggrieved person shall make  
8 the cooperative or foreign cooperative a party to the action. A An aggrieved person aggrieved  
9 under subsection (a) may seek any or all of the remedies provided in subsection (a) in the same  
10 action in combination or in the alternative.

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

13 **SECTION 207A. DELIVERY TO AND FILING OF RECORDS BY**  
14 **[SECRETARY OF STATE]; EFFECTIVE TIME AND DATE.**

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

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

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

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

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

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

(A) the specified date; or

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

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

(A) the specified date; or

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

#### **SECTION 208A. CORRECTING FILED RECORD.**

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



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

2 (1) describe the record to be corrected, including its filing date, or attach a  
3 contain an attached copy of the record as filed;

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

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

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

11 **SECTION 209A. LIABILITY FOR FALSE INFORMATION IN FILED**  
12 **RECORD.**

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

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

18 (2) an organizer or director that has notice that the information was false  
19 when the record was filed or has become false because of changed circumstances, if the organizer  
20 or director has notice for a reasonably sufficient time before the information is relied upon to  
21 enable the organizer or director to effect make an amendment under Section 203, file a petition  
22 pursuant to Section 209, or deliver to the [Secretary of State] for filing a statement of change

1 pursuant to Section 117 or a statement of correction pursuant to Section 211.

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

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

5  
6 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee  
7 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it  
8 is appropriate to add director. An addition or an alternative to director might be officer though it  
9 may be difficult at times to demarcate between officers and mere agents.  
10

### 11 **SECTION 210A. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

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

16 (1) the cooperative's name;

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

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

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

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

25 (6) whether the cooperative's articles of organization have been amended

1 to state that the cooperative is dissolved;

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

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

6 (b) The [Secretary of State], upon request and payment of the requisite required  
7 fee, shall furnish a certificate of authorization for a foreign cooperative if the records filed in the  
8 [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of  
9 authority, has not revoked the certificate of authority, and has not filed a notice of cancellation.

10 A certificate of authorization must state:

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

13 (2) that it the foreign cooperative is authorized to transact business in this  
14 State;

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

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

19 (5) that the [Secretary of State] has not revoked its the foreign  
20 cooperative's certificate of authority and has not filed a notice of cancellation; and

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

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

**SECTION 211A. ANNUAL REPORT FOR [SECRETARY OF STATE].**

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

- (1) the name of the domestic cooperative or foreign cooperative;
- (2) the street and mailing address addresses of its designated office and the name and street and mailing address addresses of its agent for service of process in this State;
- (3) in the case of a domestic cooperative, the street and mailing address addresses of its principal office if different than its designated office; and
- (4) in the case of a foreign cooperative, the State or other jurisdiction under whose law the foreign cooperative is formed and any alternative name adopted under Section [1205].

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

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

1 calendar year.

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

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

11 (f) A cooperative that has failed fails to file a registration under the requirements  
12 of this Section must be dissolved by the secretary of state [Secretary of State] under Section  
13 1009.

14 **SECTION 212A. FILING FEES; RULES AND REGULATIONS; ANNUAL**  
15 **REPORTS AND LICENSE TAXES.** Unless otherwise provided, the filing fee for documents  
16 filed under this article [Article] with the [Secretary of State] shall be is subject to the provisions  
17 of [the general business corporation law of this state]. The [Secretary of State] shall promulgate  
18 rules and regulations necessary to implement the provisions of this article [Article].

19 **Reporter's Note**

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

22  
23 The base source for much of this Article is ULPA (2001) which is the latest  
24 pronouncement of the Conference on these matters.

1 **ARTICLE 3**

2 **MEMBERS**

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

5 **Reporter's Note**

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

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

10 (1) as provided in the organic rules;

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

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

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

15 **Reporter's Note**

16 The Reporter has been informally asked to justify this section.

17 This Section centralizes and simply states how a person becomes a member and, by  
18 referencing Section 1002, what happens when there are no members. While this Section sounds  
19 in unincorporated law subsections (1) and (3) seem to state the law in traditional cooperative  
20 statutes. Subsections (2) and (4) are common in unincorporated law and reflect the notion that  
21 persons using this cooperative may very well be in the start-up phase of a business and, therefore,  
22 have fewer members where the identity of each member is more important than in large  
23 established co-ops under existing acts. In that regard it can at least be argued the most  
24 appropriate model in this and selected other provisions comes from unincorporated law. Other  
25 sections, probably most, are based on either traditional cooperative acts or corporate acts (*e.g.*  
26 meeting requirements, the existence of a board of directors, etc.) Subsection (4) does raise an  
27 interesting question in redundancy. Nonetheless it vests authority in members which seems  
28 inherently consistent with cooperative principles.  
29

1           It is important to remember that this act does not replace any existing state co-op laws  
2 and, therefore, fulfills a different niche in the cooperative economic ecosystem. Thus, some  
3 provisions will be different than the more corporate-like framework of existing traditional  
4 statutes. It is intended to provide a cooperative structure as an alternative to the LLC or to  
5 combination entities. It seeks to provide an alternative which protects cooperative principles to a  
6 *greater* extent, with *less* room for design abuse than can be engineered in combination entities.  
7 Thus rests the justification. This policy decision, however, should be discussed; as should the  
8 technical operation of this particular section. The justification just helps inform the discussion.  
9

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

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

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

14           Source: ULPA (2001).  
15

### 16           **SECTION 304. NO LIABILITY AS MEMBER FOR COOPERATIVE**

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

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

22           Source: ULPA (2001). There has been some discussion about modifying the ULPA  
23 (2001) language to include the word “personal” in an attempt to make the provision clearer but it  
24 is not certain it does so and there is a cost associated with changing the language from one Act to  
25 another if the intent is the same.  
26

27           **SECTION 305. RIGHT OF MEMBER AND FORMER MEMBER TO**  
28 **INFORMATION.**

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

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

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

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

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

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

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

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

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

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



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

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

4                   (3) the person complies with subsection (b).

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

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

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

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

13                  (i) Whenever this [act] or the organic rules provide for a member to give or  
14 withhold consent to a matter, before the consent is given or withheld, the cooperative shall,  
15 without demand, provide the member with all information material to the member's decision  
16 which the cooperative knows.

17                  (j) A member or person dissociated as a member may exercise the rights under  
18 this Section through an attorney or other agent. A restriction imposed under subsection (g) or by  
19 the organic rules on a member or person dissociated as a member applies both to the attorney or  
20 other agent and to the member or person dissociated as a member.

21                  (k) The rights stated in this Section do not extend to a person as transferee, but  
22 may be exercised by the legal representative of an individual under legal disability who is a

1 member or person dissociated as a member.

## 2 **Reporter's Note**

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

10  
11 308B.611. Nature of a membership interest and statement of  
12 interest owned

13 \*\*\*

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

23  
24 Since the last drafting meeting an advisor has suggested revisiting subsections (c) and (e)  
25 noting legislative experience on traditional cooperatives in Washington and Oregon. Would  
26 including a "statement of interest" obviate the need for many rules on information rights?

27  
28 The interrelationship between this Section of the draft and the rights of dissociated  
29 members and transferees has not yet been fully discussed.  
30

## 31 **SECTION 306. ANNUAL MEMBERS' MEETINGS.**

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

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

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

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

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

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

Although in the MBCA, could subsection (a) be deleted without harm?

Is (d) awkward? One suggestion received by the Reporter is as follows: "The board of directors shall report, or cause to be reported, the financial condition of the cooperative as of the close of the most recent fiscal year."

#### **SECTION 307. SPECIAL MEMBERS' MEETINGS.**

(a) Special members' meetings shall be called:

(1) as provided in the organic rules;

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

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

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

1 (b) Any voting member may withdraw its demand under subsection (a)(3) or  
2 (a)(4) before the receipt by the cooperative of demands sufficient to require a special members'  
3 meeting.

4 (c) A special members' meeting may be held in or outside this state at the place  
5 stated in the organic rules or by the board of directors in accordance with the organic rules.

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

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

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

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

15 The MBCA allows the 10 percent minimum for demand to be varied upward to 25  
16 percent if provided in the articles of incorporation. As drafted, the 10 percent requirement here is  
17 probably mandatory. Should it be?  
18

19 **SECTION 308. EXPRESS AUTHORITY FOR DISTRICT MEETINGS.** The  
20 articles of organization of a cooperative may provide that district members may elect delegates at  
21 district member meetings who shall represent the district in annual and special members'  
22 meetings.

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

24 Query whether this section is (1) necessary or (2) should be limited to patronage  
25 members. It appears in this draft because it authorizes district meetings. If it is deleted the  
26 authority would need to be implied from Sections 309 and 312. Therefore it may make the act  
27 clearer and aid opinion givers.

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

8 For the notice required of district meetings *see* Section 309(d).  
9

## 10 **SECTION 309. NOTICE OF MEMBERS' MEETINGS.**

11 (a) The cooperative shall notify each member of the time, date, and place of any  
12 annual or special members' meeting not less than [15] days before the meeting.

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

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

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

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

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

## 26 **SECTION 310. WAIVER OF MEETING NOTICE.**

27 (a) A member may waive notice of any meeting of the members either before,

1 during, or after the meeting.

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

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

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

9 The interaction of Sections 310 and 311 means that a member objecting to a meeting  
10 under Section 310 is present for purposes of the quorum under 311. The quorum is low. The  
11 quorum requirement could, of course, be bifurcated by the number of the cooperative's members.  
12 Is "voting power" a confusing term? Could it be replaced with "votes"?  
13

#### 14 **SECTION 312. VOTING BY PATRON MEMBERS.**

15 (a) Each patron member has one vote but the organic rules may provide  
16 additional voting power to members on the basis of patronage under Section 314(a) and may  
17 provide for voting by district, group, or class under subsection (b).

18 (b) The organic rules may provide:

19 (1) for the formation of districts and the conduct of member meetings by  
20 districts and that elections of directors may be held at district meetings; or

21 (2) that districts may elect district delegates to represent and vote for the  
22 district in annual and special members' meetings.

23 (c) A delegate selected under subsection (b) has one vote subject to Section  
24 314(b).

1 (d) If a cooperative has both patron and nonpatron members:

2 (1) the aggregate voting power of all patron members may not be less than  
3 [two-thirds] [three-fourths] of the entire voting power entitled to vote [but the organic rules may  
4 reduce the collective voting power of patron members to not less than a majority of the entire  
5 voting power entitled to vote]; and

6 (2) the entire aggregate voting power of patron members shall be voted as  
7 determined by the majority vote of patron members voting at the members' meeting.

8 **Reporter's Note**

9 Subsection (b) has been reformulated and redrafted. The general meeting notice  
10 provisions should be equally applicable to (b)(2).  
11

12 The quantum of voting reserved to patron members under Section 312(d) is controversial  
13 because it is a departure from the general law of cooperatives. It has been controversial in  
14 Committee discussion. It is also one of the primary changes that allows for greater flexibility for  
15 capital formation. Other "new generation" cooperative laws are far less restrictive than this draft.  
16 For example, Minnesota substitutes fifteen (15) percent for the two bracketed alternatives and the  
17 "majority" floor.  
18

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

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

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

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

1 **Reporter's Note**

2 What about the possibility of nonvoting members? This Section states the general rule of  
3 unincorporated law and at least some traditional co-op statutes. Under unincorporated law this  
4 provision is a default rule. Should it be mandatory in this organization. *See* Or. Rev. Stat.  
5 §62.305.  
6

7 **SECTION 314. DETERMINATION OF VOTING POWER OF PATRON**  
8 **MEMBER OR DELEGATE.**

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

- 11 (1) actual, estimated, or potential patronage or any combination thereof;  
12 (2) equity allocated or held by a patron member in the cooperative; [or]  
13 [(3) if the patron member is a cooperative, the number of patron members  
14 of the member cooperative]; or]  
15 [(3)] [(4)] any combination of paragraphs (1), (2), and (3).

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

19 **Reporter's Note**

20 A question has been raised concerning (a)(2). It was suggested that “equity investments  
21 by patron members must reflect an established patronage obligation”. The Reporter needs  
22 additional explanation before suggesting any alteration.  
23

24 **SECTION 315. VOTING BY NONPATRON MEMBERS.**

25 (a) If the organic rules provide for nonpatron members, each nonpatron member



1 has one vote except as otherwise provided by the organic rules.

2 (b) The collective voting power of nonpatron members is subject to Section  
3 312(c).

4 **SECTION 316. MANNER OF VOTING.**

5 (a) Proxy voting by members is prohibited.

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

8 (c) The organic rules may provide for member voting by secret ballot delivered  
9 by the United States Postal Service.

10 **Reporter's Note**

11 In some states proxy voting is not available and in others it is allowed. Perhaps most  
12 traditionally, cooperative law often provides for mail ballots. For example, the Oregon general  
13 cooperative statute, in part, states:

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

27  
28 (3) If the bylaws so provide, the board may cause to be submitted  
29 by mail ballot any question to be voted on at any member meeting,  
30 including the election of directors. In such event the secretary shall  
31 mail to each member along with the notice of the meeting, the  
32 ballot on each such question and a voting envelope. The ballot  
33 may be cast only in a sealed envelope which is authenticated by the

1 member's signature. A vote so cast shall be counted as if the  
2 member were present and voting in person.  
3

4 Query whether member proxy voting should be allowed if the organic rules so state? As  
5 a matter of analysis, member proxies are distinguishable from any sort of board member proxy.  
6 Corporate law generally provides for the former but not the latter. The Uniform Limited  
7 Partnership Act (2001) provides for proxy voting (section 118). Any voting by proxy, however,  
8 seems to dilute the deliberative function of a required meeting and is at odds with traditional co-  
9 op values even though currently allowed by a significant number of states.

1 **ARTICLE 4**

2 **MEMBERSHIP INTERESTS**

3  
4 **SECTION 401. MEMBERSHIP INTEREST.** A member's interest in the cooperative  
5 is the member's membership interest. A membership interest:

6 (1) consists of participation in governance under [Article] 3 and participation in  
7 allocation and distributions under [Article 8];

8 (2) is personal property; and

9 (3) may be in certificated or uncertificated form.

10 **Reporter's Note**

11 The purpose of the first sentence is meant to state that a member has no rights to the  
12 underlying property of the cooperative. It seems the proposition is self-evident...  
13

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

15 (a) Subject to subsection (b), membership interests must be patron membership  
16 interests with equal rights unless the organic rules establish patron membership groups, districts,  
17 or classes with differing rights or authorize the board of directors to establish patron membership  
18 groups, districts, or classes.

19 (b) The organic rules may establish nonpatron membership interests and all  
20 nonpatron membership interests must have equal rights with all other nonpatron membership  
21 interests unless the organic rules:

22 (1) establish different classes of nonpatron membership interests; or

23 (2) authorize the board of directors to establish different classes of

1 membership interests.

## 2 **Reporter's Note**

3 Note that the draft give the organic rules broad flexibility to vest power in the board. One  
4 of the hallmarks of the act is flexibility but is this “too much”? Suggestions on how to make the  
5 language in (a) and (b) more parallel would be appreciated.

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

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

18  
19 In order to understand Article 4 it is necessary to reference Article 8 (“Contributions,  
20 Allocations and Distributions”). It may be necessary to add a definition (Section 102) for  
21 financial rights to clarify the intent of Articles 4 and 8. *See*, Section 404, Reporter's Note.  
22

23 **SECTION 403. TRANSFERABILITY OF MEMBERSHIP INTERESTS.** Unless  
24 otherwise provided in the organic rules and subject to Section 404, membership interests are  
25 nontransferable. The terms of the restriction on transferability must be set forth in the  
26 cooperative's organic rules and the interest transfer records of the cooperative, and must be  
27 conspicuously noted on certificates evidencing a member's interest ~~if~~ certificates, if any.

## 28 **SECTION 404. TRANSFER OF FINANCIAL INTEREST.**

29 (a) A member may transfer its financial interests in the cooperative unless the  
30 transfer is restricted by the organic rules. A restriction on the member's right to transfer its  
31 financial interest may not be manifestly unreasonable.

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

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

6 (d) Subject to Section 901, a member transferring the interest continues to have  
7 the power to exercise its governance rights in the cooperative unless otherwise provided in the  
8 organic rules.

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

11 (f) A transfer of a member's financial interest in violation of a restriction on  
12 transfer contained in the organic rules is ineffective as to a person having notice of the restriction  
13 at the time of transfer.

14 (g) Unless otherwise provided by the organic rules, the granting of a security  
15 interest in the financial interest by a member is not considered a transfer for purposes of this  
16 Section.

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

18 Although the balance of this Note is far more important, the Reporter first notes that as a  
19 matter of style he much prefers "shall" in this Section rather than "may" which appears in this  
20 "styled" draft.

21  
22 This Section (and article) is based on unincorporated organizational law. For purposes of  
23 the 2005 Annual Meeting it remains unchanged; however, that should not be interpreted as a  
24 Drafting Committee decision to confirm this language. There was much concern expressed  
25 about the intent, operation, and drafting of this Article. As stated in the Reporter's Notes to other  
26 sections the confusion is definitionally rooted. At least to some extent, any ambiguity in the

1 current draft reflects overlapping use of the terms in the industry.

2  
3 Most broadly the solution rests in the following concepts: value given, allocated, or paid  
4 based on:

5  
6 (i) the use of the cooperative (*e.g.*, in a supply co-op the amount paid by a person  
7 for petroleum products during the year) relative to the financial performance of the cooperative;

8  
9 (ii) the delivery of products sold to (*e.g.*, marketing cooperatives) or services  
10 rendered (*e.g.*, worker cooperatives) to or on behalf of the cooperative;

11  
12 (iii) an allocation and/or distribution based on membership or investment in the  
13 cooperative.

14  
15 Even under existing traditional law there is a great deal of flexibility given cooperatives  
16 to fashion these payments. For example: entering into a marketing contract (direct payment) with  
17 a producer might require that producer to be a member of the cooperative (and membership may  
18 require an investment – nominal or otherwise) and that any member may receive a year-end  
19 allocation based on the value of product delivered under the contract (and any other additional  
20 product accepted outside the contract) relative to the performance of the cooperative. Further,  
21 under current corporate based statutes, “investors” might purchase preferred stock and, subject to  
22 legal capital constraints, be guaranteed a return.

23  
24 On the other hand, the cooperative may not require membership for entering to a  
25 marketing contract but under its contractual terms promise participation in a defined financial  
26 pool based on the value of the product at time of delivery.

27  
28 Given these two scenarios a reasonable interpretation is that there can be *patron members*  
29 (the producer with the marketing contract requiring membership); *nonpatron members*  
30 (analogous to the preferred shareholder); and, *nonmember patrons* (the producer with the  
31 marketing contract that does not require membership but whom receives a *contractual* payment  
32 based on “business done”).

33  
34 Under the current draft “membership” is not transferable. Thus the member cannot  
35 transfer her voting rights. If a marketing contract *requires* membership as a condition precedent  
36 then, as a practical matter the contract could not be assigned. (Note, however, that payments *on*  
37 *account* of the contract would be subject to other law). If, however, the marketing contract does  
38 *not* require membership; the assignability of the contract or the delegation of its performance  
39 would be governed by contract law outside this draft (personal contract?, anti-assignment  
40 clauses?, *etc.*).

41  
42 Of course, the contract itself could state it is assignable with or without consent of the  
43 cooperative. Likewise, the articles could allow transfer of the membership interest with or

1 without consent of the cooperative.  
2

3 So the financial interest of the membership is highly contextual on the organic documents  
4 and the “deal”. Nonetheless, there is a dichotomy between the membership interest and the  
5 marketing contract and it seems in the typical the financial interest of the member would *not*  
6 include right to payment under the marketing contract because that would be governed by  
7 contract law.  
8

9 The right *of a member as a member* to receive an allocation based on patronage (or  
10 otherwise) under the default rule, however, would be a financial right.  
11

12 Other uniform unincorporated acts use the term “transferable interest” which might cause  
13 less confusion.  
14

#### 15 **SECTION 405. RIGHTS OF CREDITOR OF MEMBER OR TRANSFEEE.**

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

23 (b) A charging order constitutes a lien on the judgment debtor’s financial interest.  
24 The court may order a foreclosure upon the interest subject to the charging order at any time.  
25 The purchaser at the foreclosure sale becomes a transferee.

26 (c) At any time before foreclosure, an interest charged may be redeemed:  
27 (1) by the judgment debtor;  
28 (2) with property other than cooperative property, or by one or more of the

1 other members; or

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

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

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

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

9 This Section is derived with minor modification from ULP (2001). The charging order  
10 provision has been the subject of much discussion in conjunction with the Conference's current  
11 LLC drafting project. Because of the significant work being done on this issue in the LLC  
12 Committee, this Section is not yet ripe for discussion beyond inclusion of the charging order  
13 concept in the context of the agriculture or agricultural cooperative. Minnesota does have an  
14 analogue to the charging order provision. *See*, Section 404, Reporter's Note. There is an ever  
15 growing body of literature (but only a few cases) addressing charging orders of member's  
16 interests when the member is in bankruptcy. The Reporter will be happy to discuss those cases at  
17 the October 2005 meeting if so requested.

18  
19 Many cooperative acts address set-off by the cooperative of obligations owed it by the  
20 members and establish priority in the cooperative for such set-off. This draft leaves set-offs to  
21 other law. Several advisors remain uncomfortable with this decision but it has not been revisited  
22 by the Drafting Committee. The Committee will do so sometime in 2005-2006. The issue  
23 interrelates with UCC Art. 9, and other state creditor rights statutes. Set-off is expressly  
24 provided under some banking law statutes. For purposes of uniformity, a more extensive search  
25 of "modern" corporate-based cooperative statutes will be undertaken by the Reporter.

26  
27 The same distinction between *member's* financial interest and contractual rights under a  
28 marketing contract (in those marketing cooperatives which choose to have marketing contracts)  
29 discussed in the Reporter's Note to Section 404 are applicable to this Section and is extended  
30 below.

31  
32 The case where membership is required in order to enter into a marketing contract is  
33 probably the most difficult case. If the cooperative chooses to make membership transferable (a  
34 derivation from the default rule) it needs to carefully define the "entitlement". For example, it  
35 might desire a consent right for the transfer of the membership interest based on proven ability to



1 produce its articles might more clearly delimit that membership is a necessary but not sufficient  
2 precondition for actually entering the contract.  
3

4 Nonetheless: If the membership interest *entitles* the member to enter into a contract and  
5 the membership interest and the underlying contract are freely transferable; THEN those rights  
6 and the value of those rights would be subject to sale at foreclosure. Payments made under an  
7 existing contract, however, would be contract rights not financial rights not subject to this  
8 Section and would be governed by that law.  
9

10 Any other amounts allocated to a member *as a member* or any return of contributed  
11 capital would also be subject to this Section (when paid in a charging order without foreclosure).  
12

13 The assumption in the foregoing illustration:  
14

15 (i) will occur only in marketing cooperatives that enter into marketing contracts;  
16 and  
17

18 (ii) will occur only where the cooperative has made a decision to deviate from the  
19 default rule of nontransferability of membership interests (caveat: the bankruptcy courts are  
20 currently struggling with this issue as a matter of LLC law).  
21

22 In sum, it is highly contextual and most confusion will not be caused by the act under the  
23 default rules because the cooperative has the ability to formulate the rules that frame the context.

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; and

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

19 **SECTION 502. MARKETING CONTRACTS.**

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

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

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

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

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

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

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

**SECTION 503. TERM OF CONTRACT.** A single term of a contract may not exceed 10 years but may be renewable for additional periods not exceeding five years each subject to the right of either party not to renew by giving record notice during a period of the current term as specified in the contract.

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

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

1                   **SECTION 504. REMEDIES FOR BREACH OF CONTRACT.**

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

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

10                                   **Reporter's Note**

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

1 [ARTICLE] 6

2 DIRECTORS AND OFFICERS

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

5 (a) A cooperative must have a board of directors consisting of three or more  
6 directors as set forth in the organic rules unless the number of members is less than three. If  
7 there are fewer than three members, the number of directors may not be less than the number of  
8 members in the cooperative.

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

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

13 Reporter's Note

14 The Reporter deleted "as set forth in the organic rules" at the end of (a) as surplusage.

15  
16 The language used in subsection 601(a) is modeled on section 62.280(2) of the Oregon  
17 Cooperative Corporation Act. Some statutes, for example, the California Nonprofit Association  
18 Act require a minimum of three directors. This subsection allows the articles to establish the  
19 number of directors at a number greater than three in all cases. The subsection does not limit the  
20 number of directors to the number of members where there are fewer than three members.

21  
22 The flexibility afforded to deviate below three directors recognizes the industry practice  
23 of having wholly owned cooperative subsidiaries of a cooperative. In those circumstances the  
24 Committee saw little necessity of having more than one director. Further, if there are two  
25 members the Committee decided that it would be ill-advised to require a minimum of three  
26 directors. Thus, subsection 601(a) provides the members great flexibility, but not unfettered  
27 flexibility, in organizing their own board governance structure.

28  
29 The word "may" in subsection (a) following "the number of directors" replaces the word  
30 "shall" as a matter of style. The Committee may want to discuss this change.

## SECTION 602. NO LIABILITY AS DIRECTOR FOR COOPERATIVE'S

**OBLIGATIONS.** An obligation of a cooperative, whether arising in contract, tort, or otherwise, is not the obligation of a director. A director is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the cooperative solely by reason of being a director.

## Reporter's Note

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

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

- (a) A director must be an individual.
- (b) The organic rules may provide for qualification of directors subject to this Section.
- (c) Unless otherwise provided in the organic rules a director may be an officer or employee of the cooperative.
- (d) Except as otherwise provided in the organic rules and subject to subsection (e), each director must be a member of the cooperative or a designee of a member that is not an individual.
- (e) The number of nonmember directors under subsection (d) may not exceed:
  - (1) one director if there are two, three, or four directors; and
  - (2) one-fifth of the total number of directors if there are five or more directors.

1 **Reporter's Note**

2 Subsections (d) and (e) reflect the consensus of the Committee. The word  
3 "representative" in a prior draft has been replaced by the word "designate" in an attempt to cause  
4 less confusion concerning to whom the director owes allegiance under this Act. There was no  
5 prohibition that officers may not serve as directors and subject to discussion at the November  
6 2004 meeting subsection (c) has been added. Note the importance of the word "appointed".  
7 Also note that the number of nonmember directors is severely restricted and reflects a  
8 cooperative policy that is different than corporate policy and at odds with the general thrust of  
9 federal securities laws for publicly traded corporations.

10  
11 An observer has suggested that the Committee should discuss the advisability of being  
12 more explicit about both the election and the removal of classified directors.  
13

14 **SECTION 604. ELECTION OF DIRECTORS.**

15 (a) At least two-thirds of the board of directors of a cooperative must be elected  
16 exclusively by patron members.

17 (b) The articles of organization may provide for the election of all or a specified  
18 number of directors by the holders of one or more groups or classes of member's interest.

19 (c) The organic rules may provide for the nomination or election of directors by  
20 geographic district directly or by district delegates.

21 (d) Cumulative voting is prohibited unless otherwise provided in the articles of  
22 organization.

23 (e) Except as otherwise provided in Section 609, member directors must be  
24 elected at an annual members' meeting.

25 (f) Nonmember directors must be elected in the same manner as member  
26 directors unless the organic rules provide for a different manner of selection.  
27

1 **Reporter's Note**

2 Subsection (c) was new in the April 2005 draft and has been revised pursuant to  
3 discussion at that meeting. Corporate statutes typically no longer define "cumulative voting".  
4

5 Subsection (e) is new. The advisors to the drafting committee suggested that the act  
6 specifically acknowledge the use of an appointment process for nonmember directors. These  
7 directors are used to provide special expertise on cooperative boards.  
8

9 Subsection (f) allows the organic rules to provide for the selection of special directors but  
10 such selection is not subject to further default rules. Because this section is subject to the other  
11 general "member" restrictions it may not "work". The Committee should consider this provision.  
12 Is Section 617 helpful in this regard?  
13

14 **SECTION 605. TERMS OF DIRECTORS.**

15 (a) A director's term expires at the annual members' meeting following the  
16 director's election unless otherwise provided in the articles of organization. The term of a  
17 director may not exceed three years.

18 (b) Unless otherwise provided in the organic rules, a director may be reelected for  
19 subsequent terms.

20 (c) A director continues to serve as director until a successor director is elected  
21 and qualified or until the director is removed, resigns, or dies.

22 **Reporter's Note**

23  
24 If a successor is not elected the director previously in the position would continue to serve  
25 under the operation of this section. This section coordinates with section 608 ("Board Vacancy")  
26 Is "may" the correct choice in subsection (a) second sentence (again a matter of style more than  
27 substance).  
28

29 **SECTION 606. RESIGNATION OF DIRECTORS.**

30 (a) A director may resign at any time by giving notice in a record to the



1 cooperative.

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

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

5 Subsection (a) states a "director has the power to resign". The use of the power language  
6 probably implies the director does not necessarily have the right to resign. The language is  
7 consistent with ULLCA but the power-right dichotomy may cause more substantive confusion  
8 than is necessary. The quoted phrase could, consistent with style be replaced by "may".  
9

### 10 **SECTION 607. REMOVAL OF DIRECTORS BY MEMBERS.**

11 (a) The members may remove a director only for cause unless the organic rules  
12 provide for removal without cause.

13 (b) A member or members holding an aggregate of 10 percent of the voting  
14 power of the cooperative may petition the board of directors for the removal of a director by  
15 submitting a signed record to the officer of the cooperative charged with keeping its records,  
16 stating the alleged causes for removing the director, unless the organic rules provide for removal  
17 without cause.

18 (c) Upon receipt of the petition for removal, the board of directors shall call a  
19 special board meeting to determine whether the director should be removed.

20 (d) The director against whom a petition has been submitted:

21 (1) must be informed in a record of the petition before the board meeting  
22 at which the board considers the petition; and

23 (2) is entitled to an opportunity at the meeting to be heard in person or by  
24 representation and to present witnesses.

1 (e) The member or members signing the petition are entitled to the same  
2 opportunity to be heard as provided the director in subsection (d)(2).

3 (f) A director may be removed by a majority vote of the directors not subject to  
4 removal. If all directors are subject to removal, then removal for cause must be determined:

5 (1) by a nonmember director appointed pursuant to the organic rules; or

6 (2) if the organic rules do not provide for the appointment of a  
7 nonmember director, by appointment of a committee composed of individuals who are not  
8 directors under Section 617 or by independent legal counsel retained by the cooperative for that  
9 purpose.

10 (g) A director removed for cause under subsection (f) may require a special  
11 members' meeting to determine removal by submitting a signed record to the cooperative. The  
12 procedure of the special members' meeting must comply with subsections (d) and (e). The  
13 director may be removed by the same affirmative vote and in the same manner as the director's  
14 election.

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

16 Subsections (a) through (f) have been revised. They generally follow the procedure  
17 established in West's California Code Annot. section 54150 (it is unclear whether California  
18 requires "for cause" removal only because its statute uses the term "charge" rather than petition)  
19 and Colorado Revised Statute section 7-56-404 (Colorado includes that the meeting must be held  
20 within 90 days of receipt of the petition). Should "cause" removal be modifiable by organic  
21 rule?  
22

23 Subsection (g) should probably be revisited. The quantum of vote it requires is a vestige  
24 from a prior version of this section that provided for both "cause" and "no cause" removal. The  
25 Committee has not yet fully discussed the quantum requirement. Is "may" the correct word  
26 choice in the last sentence of (g)?  
27

28 The intent of the section as drafted is that the "10 percent" in (b) be members of any class

1 but that the vote would be by only those members who elected the director. Is that the  
2 Committee's intent?  
3

#### 4 **SECTION 608. SUSPENSION OF DIRECTOR BY BOARD.**

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

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

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

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

11 (b) After suspension, a director may be removed pursuant to Section 607.

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

13 The Reporter was requested at the November 2004 meeting to draft different judicial  
14 removal of director alternative that would be the equivalent of "changing the locks" on  
15 cooperative management was instructed at the April 2005 meeting to delete judicial removal.  
16 The absence of judicial removal is inconsistent with other cooperative statutes, ULLCA, and  
17 RULPA. The reason for the deletion is to avoid the time and expense of going to court which is  
18 consistent with the *values* of cooperatives but not necessarily the cooperative statutes. Below is  
19 an example of a very short judicial removal proceeding provision. For purposes of discussion: (I)  
20 There is room for "control group" (oligarchy) abuse and majoritarian tyranny if judicial removal  
21 is not allowed; but, (ii) abuse through minority threat if it is allowed assuming it is not statutorily  
22 allowed would a court find a way to nonetheless remove a director. Should the act do something  
23 more affirmative?  
24

#### 25 **REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING.**

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

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

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

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

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

1                   **SECTION 609. VACANCY ON BOARD.**

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

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

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

8                   (b) If the vacating director was elected by a group or class of members' interest or  
9 by district:

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

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

13                   **SECTION 610. COMPENSATION OF DIRECTORS.** Unless the organic rules  
14 otherwise provide, the board of directors may fix the remuneration of directors and nondirector  
15 committee members appointed under Section 617(b).

16   **Reporter's Note**

17                   Source: MBCA section 8.11. In effect this is an "opt-out" statute, *i.e.*, unless the organic  
18 rules prohibit. It could also be drafted as an opt-in, *i.e.*, the organic rules would need to allow the  
19 directors to set their own remuneration. One question concerns whether the term "remuneration"  
20 is the best word choice. It is intended to be a broad term including both director's fees and  
21 expenses. Obviously this has become an important topic in publicly traded corporations. The  
22 fiduciary duties applicable to other board decisions are generally applicable here, too. Unlike  
23 many corporate acts this act does not give express power to make loans to insiders. An example  
24 of an alternative provision discussed by the Committee is found in Or. Rev. Stat. Section 62.300  
25 and is set forth below:

26   62.300 Compensation and benefits to directors, officers and  
27

1 employees. (1) Unless the bylaws provide otherwise, only the  
2 members of the cooperative may establish compensation or other  
3 benefits for a director, not available generally to officers and  
4 employees, for services as a director.

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

8 (3) Unless the bylaws provide otherwise, the board may provide,  
9 for prior or future services of any officer or employee, reasonable  
10 compensation, pension or other benefits to such officer or employee  
11 and pension or other benefits to a member of the family of the officer  
12 or employee. No officer or employee who is a director may take part  
13 in any vote on the compensation of the officer or employee for  
14 services rendered or to be rendered the cooperative.  
15

#### 16 **SECTION 611. MEETINGS.**

17 (a) The board of directors shall meet at least annually and may hold meetings in  
18 or outside this state.

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

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

24 The purpose of this section is to provide maximum meeting flexibility.  
25

#### 26 **SECTION 612. ACTION WITHOUT MEETING.**

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

29 (b) Consent under subsection (a) may be withdrawn by a director in a record at

1 any time before the cooperative receives a record of consent from each director.

2 (c) The record of consent for any action may specify the effective date or time of  
3 the action.

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

5 The definition of record is in Section 102 and includes electronic medium.  
6

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

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

11 (b) Unless otherwise provided by the organic rules, special meetings of the board  
12 of directors must be preceded by at least three days notice of the time, date, and place of the  
13 meeting. The notice must contain a statement of the purpose of the special meeting and the  
14 meeting must be limited to the matters contained in the statement.

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

16 Subsection (b) was more closely conformed to RMBCA Section 8.22 (b). At its April  
17 (2005) drafting meeting, however, the Committee decided to require the notice to state the  
18 purpose of the meeting.  
19

20 Best practices might suggest that at least some reminder of a regular meeting and a  
21 proposed agenda be given directors prior to the meeting. This draft does not require any such  
22 notice because (1) any additional requirements subvert certainty of action taken at meetings; and,  
23 (2) it conforms to the purpose of this act to provide a flexible entity to meet the unique needs of  
24 different groups organized under it.  
25

26 Section 614 (a) requires a waiver for the notice in 613(b) to be in a record. This is new  
27 following the April (2005) drafting meeting. How well does this work if the meeting is by  
28 telephone or other nontraditional means?  
29

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

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

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

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

14 (A) in the minutes of the meeting; or

15 (B) the director

16 (i) does not vote for or assent  
17 to the action taken at the meeting; and

18 (ii) delivers notice in a record  
19 to the presiding officer of the meeting before  
20 adjournment or to the cooperative immediately after  
21 adjournment of the meeting.  
22

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

24 (a) Unless otherwise provided in the organic rules, a director may waive any  
25 required notice of a meeting of the board of directors in a record before, during, or after the  
26 meeting.

27 (b) Unless otherwise provided in the organic rules, a director's participation in a  
28 meeting is waiver of notice of that meeting unless the director objects to the meeting at the  
29 beginning of the meeting or promptly upon the director's arrival at the meeting and does not  
30 thereafter vote for or assent to action taken at the meeting.

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

32 This Section is typical of corporate-like statutes. There has been strong minority dissent  
33 in the Committee concerning "and does not thereafter vote for or...".

1                   **SECTION 615. QUORUM.**

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

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

8                   **Reporter's Note**

9                   The Committee is concerned that “attendance” in subsection (b) may not be the correct  
10 word choice. Given the waiver provisions of section 614 the term “presence” seems even less  
11 satisfying. As a point of reference, “attendance” is used in the RMBCA.  
12

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

15                  **Reporter's Note**

16                  The sense of the drafting committee is that one-director/one-vote as mandatory and  
17 cannot be varied by the organic rules. A prior draft allowed weighted voting and would have  
18 moved a cooperative under this act closer to a manager-managed LLC in form. Such flexibility,  
19 however, creates both drafting and conceptual operational concerns concerning the voting  
20 restrictions protecting patron members. It is also inconsistent with traditional cooperative law  
21 and may be seen as a tool to abuse traditional cooperative values.  
22

23                  **SECTION 617. COMMITTEES.**

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

26                  (b) Unless otherwise provided by the organic rules, an individual appointed to



1 serve on committees need not be a director or member of the cooperative. An individual serving  
2 on a committee has the same rights, duties, and obligations as a director serving on a committee.

3 (c) Unless otherwise provided by the organic rules, each committee may exercise  
4 the powers as delegated by the board of directors except that no committee may:

5 (1) approve allocations or distributions except according to a formula or  
6 method prescribed by the board of directors;

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

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

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

11 Special litigation committee, audit committee; Minnesota allows non-directors to be  
12 members of a committee. This draft allows non-members to serve on committees. *See* section  
13 607(f). This is an important policy decision.

14  
15 This draft does not expressly allow executive committees but many cooperative statutes  
16 do so. Nothing herein intentionally prohibits establishing an executive committee. Because this  
17 draft does not expressly contain reference to an executive committee it does not put a prohibition  
18 on nondirectors serving thereon.

19  
20 Subsection (c)(1): The Reporter was directed by the Committee to replace the word  
21 “distribution” with “allocation”. For discussion purposes both terms remain in this draft. It  
22 seems the approval of distributions would be the kind of decision that should be made by the  
23 entire board just as the allocation is such a decision.

24  
25 There was an interesting discussion concerning cooperative practice and tradition as it  
26 relates to nondirector members observing board meetings. The comments to this section will  
27 reference that issue. In part it appears both the historical roots of some cooperatives in the  
28 nonprofit sector and, perhaps, other regulatory law for cooperatives performing regulated  
29 functions might be the source of this tradition. This draft implicitly allows the board to “close”  
30 board meetings and other law (*e.g.* employment law) might, in effect, require the board to do so.  
31 Speculatively, the presence of nondirectors *may* help explain the relatively broad use of executive  
32 committees by cooperatives.

1                   **SECTION 618. STANDARDS OF CONDUCT AND LIABILITY.**

2                   (a) Except as provided in Sections 620 and 622, the discharge of the duties of a  
3                   director or a member of a committee of the board of directors is governed by [the State  
4                   Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General Business  
5                   Corporation Act of this State] [as amended].

6                   (b) Except as otherwise provided in Sections 620 and 622, the liability of a  
7                   director or a member of a committee of the board of directors is governed by [the State  
8                   Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General Business  
9                   Corporation Act of this State] [as amended].

10                                   **Reporter's Note**

11                   The substance of sections 618 (“Standards of Conduct and Liability”), 619 (“Conflict of  
12                   Interest”), 620 (“Limitations of Directors’ Duties”), and 622 (“Other Considerations of  
13                   Directors”) have been discussed extensively by the Committee. Together these sections form the  
14                   core of fiduciary duties in this entity.

15  
16                   The approach taken to sections 618 and 619 recognizes that (1) states take fundamentally  
17                   different approaches to fiduciary duties within unincorporated organizations of the same kind; (2)  
18                   there is variety among the states in their approach within corporate statutes; and (3) there is  
19                   variety among the states in their approach in cooperative laws. The existing cooperative statutes  
20                   appear to follow corporate fiduciary duty formulations. The enactment dates of exiting  
21                   traditional cooperative statutes, however, result in very little uniformity in either detail or  
22                   language.

23  
24                   The Minnesota Cooperatives Associations Act (a non-corporate cooperative act) cleaves  
25                   closely to the corporate model. This draft act, too, establishes an unincorporated cooperative.  
26                   Although an unincorporated entity, the board of directors function more analogously to the  
27                   corporate board than the managers in a manager-managed LLC or general partners in a limited  
28                   partnership (and, indeed, the flexibility of the LLC allows the operating agreement to establish a  
29                   corporate-like board). Finally, the Committee considered the traditional operation of a  
30                   cooperative, member expectation, and advice that the insurance industry was comfortable with  
31                   the standards, liability and indemnification provided by the more corporate formulation.

Unfortunately, the wide variety among the states makes uniformity difficult to achieve and creates adoption difficulty. For these reasons the Committee has adopted a “junction box” approach similar to META. These sections need a legislative note but that note has not yet been drafted pending further discussion on the approach taken.

This approach makes the draft significantly shorter than including detailed provisions. Moreover, it allows the fiduciary duty of cooperatives to keep pace with statutory changes made in corporation law.

The Minnesota Act’s “conduct” section uses the phrase, “ordinarily prudent person in a like position would exercise under similar circumstances” without including the MBCA’s modification “would reasonably believe appropriate.”

The phrase “as amended” has been placed in brackets in this Section and throughout the 2005 Annual Meeting Draft for the first time because the Style Committee saliently pointed-out that it (unintentionally) raises a delegation issue in some states. This change has not yet been vetted by the Drafting Committee.

**SECTION 619. CONFLICT OF INTEREST.** Except as otherwise provided in Section 620, [the State Cooperative Corporation Act] [the State Nonprofit Corporation Act of this State] [the General Business Corporation Act of this State] [as amended] governs conflicts of interests between a director or member of a committee of the board of directors and the cooperative.

## Reporter's Note

See the Reporter's Note to Section 618.

**SECTION 620. LIMITATION OF DIRECTOR’S DUTIES.** The articles of organization may vary the standards under Sections 618 and 619 except that the articles may not:

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

(A) identify specific types of categories or activities that are not conflicts

1 of interest, if not manifestly unreasonable; and

2 (B) specify the number or percentage of voting power necessary to  
3 authorize or ratify, after disclosure, a specific act or transaction that would otherwise be a  
4 conflict of interest;

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

6 (3) eliminate any obligation of good faith under Section 618, but the articles may  
7 prescribe the standards by which the performance of the obligation is to be measured, if the  
8 standards are not manifestly unreasonable.

9 **Reporter's Note**

10 This Section, but for a couple style changes, mirrors the provisions found in the other  
11 uniform unincorporated acts and is somewhat similar to Minnesota's provision on limitation of  
12 director liability. It allows greater flexibility than corporate law consistent with the uniqueness  
13 of an unincorporated cooperative association.  
14

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

20 **Reporter's Note**

21 Should this "right" be extended to non-board committee members under 617?  
22

23 Similar provisions are found in most entity laws. It limits the use of the information, as  
24 well as a directors access, to the director acting as director. Duties would include confidentiality,  
25 professional privilege, etc.  
26

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

## Reporter's Note

The Minnesota Cooperative Associations Act, like this draft, does not limit this provision to mergers; but Oregon’s Cooperative Corporation Act does. The language suggests that the original source of this provision is from corporate “anti-takeover acts” in various states (*e.g.* Pennsylvania). The Committee noted that this is consistent with traditional cooperative values. It may be another, though incomplete, way of communicating the idea of a “cooperative plan” which is used in state law without definition (the term “cooperative plan” is not used in this draft).

## SECTION 623. APPOINTMENT AND AUTHORITY OF OFFICERS.

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

(b) The organic rules or the board of directors must designate one of the officers for preparing all records required by Section 114 and for the authentication of records.

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

(d) The election or appointment of an officer does not of itself create a contract with the officer.

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

1 **Reporter's Note**

2 Almost all current cooperative acts follow pre-1984 business corporation law either  
3 requiring or expressly permitting named offices. This draft does not do so. Rather, it is  
4 consistent with the flexibility of the law of unincorporated organizations and provides the  
5 flexibility present in many cooperative statutes in a more (word) efficient way. Thus it is closer  
6 to post-1984 business corporation law than the existing cooperative statutes based on pre-1984  
7 corporate law. It also follows unincorporated law in the flexibility it provides. Nonetheless,  
8 because directors are not agents because of director status, the cooperative (through its board)  
9 will be required to have agents. The language of this draft requires at least one of these agents to  
10 be designated an officer under subsection (b).  
11

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

13 (a) The board of directors may remove an officer at any time with or without  
14 cause.

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

17 **Reporter's Note**

18 Note that this draft contains no provision directly addressing the standard of conduct of  
19 officers. This is, at the least, not unusual in the world of general cooperative statutes. Thus, this  
20 draft leaves much of the law governing officers to contract and agency principles.  
21

22 There is a distinction between the power to remove an officer and the right to do so. This  
23 section is intended to give complete discretion to the board of directors to remove officers (the  
24 power). The exercise of that power; however, may very well lead to a damage claim by the  
25 officer if, for example, the officer has a separate employment contract. The exercise of the power  
26 could also violate other law (*e.g.* Title VII of the Civil Rights Act).  
27

28 The “power” language in Subsection (a) raises a power-right dichotomy similar to the one  
29 raised in Section 606. As a matter of style, it has been urged to delete such language and replace  
30 it with the word “may”.

1 [ARTICLE] 7

2 INDEMNIFICATION

3  
4 **SECTION 701. INDEMNIFICATION.** Indemnification of any individual who has  
5 incurred liability, is a party, or is threatened to be made a party because of the performance of  
6 duties to, or activity on behalf of, the cooperative is governed by [the State Cooperative  
7 Corporation Act] [the State Nonprofit Cooperative Act] [the General Business Corporation of  
8 this State] [as amended].

9 **Reporter's Note**

10 The topic of indemnification has been discussed at length by the Committee and it  
11 compared corporate, unincorporated, and cooperative statutes as well as agency law. It  
12 concluded that any formulation not referencing other law in adopting states would lead to lack of  
13 uniformity not only in substance but also as a matter of style. Moreover, because state's have an  
14 existing body of law reflecting unique policy decisions there was strong opinion that any other  
15 formulation might inhibit enactability. Finally, every other alternative added *pages* to the text of  
16 the Draft.

1 [ARTICLE] 8

2 CONTRIBUTIONS, ALLOCATIONS, AND DISTRIBUTIONS

3

4 SECTION 801. MEMBERSHIP CONTRIBUTIONS. The organic rules may

5 establish the amount, manner, or method of determining any membership contribution

6 requirements for members or may authorize the board of directors to establish the manner and

7 terms of any contributions for members.

8 Reporter's Note

9 Source: Derived from the Oregon Cooperative Corporation Act and ULP (2001). The

10 Committee has not discussed a suggested change from "shall" to "may". This Draft continues

11 the use of "shall" because there are no default rules. The intent of the Reporter is to aggregate all

12 these "shall" requirements in Article 2 after the substance of the provisions is fully discussed.

13

14 A prior draft expressly contained a provision requiring the organic rules to set forth

15 "accounting procedures". The Committee directed it be taken out (and therefore made

16 permissive) because of possible confusion. The comment to this section needs to point out that

17 using a corporate-like structure without "checking-the-box" to be taxed as a corporation under

18 the current tax scheme may cause unintended consequences and is a relatively sophisticated

19 technique that is already bedeviling under LLC law.

20

21 This draft contemplates but does not mandate capital accounts based on decisions made

22 by the Conference and individual estates in other unincorporated acts.

23

24 This draft does not expressly provide for stock or use the corporate capital accounting

25 model which allows the board of directors, for example, to establish par value. This draft

26 follows unincorporated law which is far more general, and less detailed than corporate law. The

27 draft does contemplate that the organic rules may establish a more corporate-like capital

28 structure. See Section 205(a)(1). Although it does not expressly address certificated ownership

29 interests is that enough? In that regard, is capital formation inhibited by "lack of stock like a

30 corporation" and, if so, is there any way around the problem? Thus, this draft more closely

31 follows the unincorporated organizational model and is, therefore, arguably more contractually or

32 agreement based. Paradoxically, the entity contemplated by this draft is more flexible upon

33 formation but gives the board of directors less power to establish new classes or voting interests

34 than in a business corporation. This mix is consistent with stronger member control.

35



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

5           Does a comment to this section need to discuss equity certificates and, if so, suggestions?  
6

## 7           **SECTION 802. FORMS OF CONTRIBUTION AND VALUATION.**

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

12           (b) The receipt and acceptance of contributions and the valuation of contributions  
13 must be reflected in the cooperative’s required records pursuant to Section 114.

14           (c) Unless otherwise provided in the organic rules, the board of directors shall  
15 value the contributions received or to be received. The determination by the board of directors  
16 on valuation is conclusive for purposes of determining whether the member’s contribution  
17 obligation has been fully paid.

### 18           **Reporter’s Note**

19           The Minnesota Cooperative Associations Act contains detailed provisions requiring the  
20 restatement of the value of contributions under certain circumstances. Those provisions effect  
21 both liquidating distributions and federal partnership income tax consequences (the so-called  
22 “book-up”). This draft follows the Conference’s general treatment of such matters in its other  
23 unincorporated entity acts by leaving them to agreement among the members in an organic rule.  
24 Even a default rule could cause unintended consequences though a book-up would *generally*  
25 seem admissible given the purpose of the draft.  
26

27           The Comment (or is it more appropriate in a legislative note) needs to note that some  
28 state constitutions may place restrictions on the types of property that may be contributed.  
29

1                   **SECTION 803. CONTRIBUTION AGREEMENTS.**

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

4                               (1) otherwise provided by the agreement; or

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

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

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

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

12   **Reporter's Note**

13  
14                   Source: Oregon Cooperative Corporation Act; conceptually similar to the Minnesota  
15                   Cooperative Associations Act, the MBCA and ULPA (2001).  
16

17                   **SECTION 804. ALLOCATIONS OF NET PROCEEDS, MARGINS, SAVINGS,**  
18                   **PROFITS, AND LOSSES.**

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

21                   (b) Unless the articles of organization otherwise provide, patron members must  
22                   be allocated at least 50 percent of the net proceeds, savings, margins, profits, and losses in any  
23                   fiscal year. The articles may not reduce the percentage allocated to patron members to less than  
24                   30 percent.

1 (c) Unless otherwise provided in the organic rules, the board of directors may  
2 retain or set aside a portion of net proceeds, savings, margins, and profits for purposes of:

- 3 (1) creating or accumulating a capital reserve; and  
4 (2) creating or accumulating reserves for specific purposes, including  
5 expansion and replacement of capital assets.

6 (d) Subject to subsection (e) and the organic rules, the board of directors shall  
7 allocate the amount remaining after the allocation under subsection (a) to patron members  
8 annually in accordance with the ratio of each member's patronage during the period to total  
9 patronage of all members during the period.

10 (e) For purposes of allocation of net proceeds, savings, margins, and profits to  
11 patron members, the organic rules may establish allocation units based on function, division,  
12 district, department, allocation units, pooling arrangements, members' contributions, or other  
13 methods.

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

15  
16 Subsections (c), (d) and (e) are carried over from a separately numbered section in a  
17 previous draft. Patron members' allocations under the default rule are based on patronage  
18 business done with the cooperative. The alternative default is to allocate based on member's  
19 contribution and carve out a patronage pool that is shared by all patrons of the cooperative  
20 whether patron members or nonmember patrons ("participating patrons"). This draft certainly  
21 allows the organic rules to accomplish the foregoing (subsection (e)), but the default is patronage  
22 business. This is true to the fundamental cooperative principles but may differ from industry  
23 practice in at least larger corporate cooperatives. It also differs from the Minnesota model and  
24 needs to be revisited by the Committee.

25  
26 The organization contemplated by this draft is flexible enough to allow a patronage  
27 member to also own nonpatronage membership interests just as a general partner may also own  
28 limited partnership interests. Under this draft it is the nonpatronage members whom receive a  
29 return on "invested capital".  
30

1 A question has been raised concerning why losses is included in (a) but not in (e). Is it a  
2 scrivener's error or substantive?  
3

4 The comment to this section needs to provide examples and illustrations of subsection (b)  
5 including a calculation where you might have "agency" cooperative arrangements but no sales.  
6 The 50/30 "solution" been questioned and subject to much discussion. Legislation introduced in  
7 Wisconsin is consistent. The existing state statute at play in Minnesota is 50/15. Consider a  
8 comment noting that, perhaps, debt will be replaced by equity such that the fixed return  
9 otherwise going to debt will need to pay for the use of equity money. In the latter regard the  
10 general purpose of this act mirrors the original historical purpose of limited partnership law. The  
11 language used to express this decision in subsection (b) still seems somewhat inartful.  
12

13 "Allocated" is a term of art in both cooperative and unincorporated law. "Net proceeds"  
14 is a term of art in cooperative law. The comment to this section will need to address those terms.  
15

## 16 **SECTION 805. DISTRIBUTIONS.**

17 (a) Unless otherwise provided by the organic rules and subject to Section 807, the  
18 board of directors may authorize, and the cooperative may make, distributions to members.

19 (b) Unless otherwise provided by the organic rules, distributions to members may  
20 be made in the form of cash, capital credits, allocated patronage equities, revolving fund  
21 certificates, the cooperative's own or other securities, or in any other manner.

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

23 This draft does not provide a default for annual patronage dividends. Thus, it differs  
24 from current cooperative law but is consistent with making the cooperative a flexible entity that  
25 has the ability to accumulate capital and it recognizes that each cooperative formed will have  
26 unique needs. This distribution default rule is consistent with both corporate and unincorporated  
27 entity law and, consistent with unincorporated law practice, it is anticipated that both  
28 distributions and allocations will be the subject of the organic rules.  
29

30 **SECTION 806. REDEMPTION OF EQUITY.** Subject to Section 807 and unless the  
31 articles of organization otherwise provide, a cooperative may redeem a patron member's equity  
32 at any time.

1 **Reporter's Note**

2 Does the addition of “at any time” give the cooperative the right to call the equity in such  
3 a manner to capture good will and the value of appreciating assets? As a result, is a valuation  
4 procedure advisable? Is equity too broad a term? Would it be better to add according “to a plan”  
5 and have the comment specifically address revolving equity?  
6

7 This Section may be needless repetition of other authority for distributions under this  
8 draft but, on the other hand, it may make the draft more user-friendly for those cooperatives  
9 which contemplate “stock” or certificated interests. It is important to note that this Section is  
10 permissive at the discretion of the cooperative and does not give any member a put right.  
11

12 **SECTION 807. LIMITATIONS ON DISTRIBUTIONS.**

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

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

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

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

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

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

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

2 (A) the distribution is authorized, if the payment occurs within  
3 120 days after that date; or

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

6 (d) If indebtedness is issued as a distribution, each payment of principal or  
7 interest on the indebtedness is treated as a distribution, the effect of which is measured on the  
8 date the payment is made.

9 **Reporter's Note**

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

15  
16 This Section also raises another issue specific to this draft: Who is liable? Under typical  
17 unincorporated law it is possible to require members to return a proportionate amount of an  
18 unlawful distribution. It is one of the few bright-line areas for director liability under corporate  
19 law.  
20

21 **[SECTION 808. ALTERNATIVE DISTRIBUTION OF UNCLAIMED**  
22 **PROPERTY, DISTRIBUTIONS, REDEMPTIONS, OR PAYMENTS.** A cooperative may  
23 distribute unclaimed property, distributions, redemptions, or payments under [citation to the  
24 applicable provision in the law governing cooperatives not formed under this [act] in this state].

25 **Reporter's Note**

26  
27 The Reporter's Note formerly included the text of the Oregon Statute (§ 62.425). The  
28 Committee determined this is an important substantive provision for states which already include  
29 it in their cooperative statutes and many of the leading cooperative states have a provision

1 dealing with a cooperative's unclaimed property. On the other hand it is unique to cooperative  
2 law and the provision could be a major adoption stumbling block in those states which do not  
3 already have existing cooperative law.]

1 [ARTICLE] 9

2 DISSOCIATION

3  
4 SECTION 901. MEMBER'S DISSOCIATION.

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

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

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

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

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

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

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

17 (B) subject to Section 404(g), there has been a transfer of all of the  
18 person's financial interest in the cooperative;

19 (C) the person is a corporation or cooperative and:

20 (i) the cooperative notifies the person that it will be  
21 expelled as a member because it has filed a public document of dissolution, it has been  
22 administratively or judicially dissolved, its charter has been revoked, or its right to conduct



1 business has been suspended by the jurisdiction of its incorporation; and

2 (ii) within 90 days after the person receives the notification  
3 in described in subsubparagraph (i), there is no revocation of the certificate of dissolution or no  
4 reinstatement of its charter or its right to conduct business; or

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

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

8 (6) in the case of a person that is a trust, distribution of the trust's entire  
9 financial interest in the cooperative, but not merely by the substitution of a successor trustee;

10 (7) in the case of a person that is an estate, distribution of the estate's  
11 entire financial interest in the cooperative, but not merely by the substitution of a successor  
12 personal representative;

13 (8) termination of a member that is not an individual, partnership, limited  
14 liability company, cooperative, corporation, trust, or estate;

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

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

18 Source: Closely derived from ULPA (2001) § 601. Subsection (b)(5) follows ULPA in  
19 that it does not state incompetency as an event of dissociation but see Section 903 which can be  
20 read inconsistently. The Comments to this Section need to explain the difference between  
21 subsection (b)(5) and (b)(7). An individual is dissociated upon death under (b)(5) and her estate  
22 has the powers conferred by Section 903. Subsection (b)(7) applies where the (an) estate is  
23 carrying on business and becomes a member by admission. Example: An individual whom was  
24 not a member of the cooperative dies. Her estate anticipates carrying on farming business for  
25 three years before it closes. The estate could become a member of the cooperative pursuant to  
26 the organic rules of the cooperative for admission of members. The issue raised by

1 incompetency needs yet to be vetted. See section 903 which as currently drafted is inconsistent  
2 with subsection (b)(8). Subsection (b)(4)(C) has been revised and the language is now different  
3 than ULPA (2001).  
4

5 Subsection 901(b)(4)(B) states “subject to Section 405” and it is now corrected to reflect  
6 it is subsection 404 (g) which is the security interest exception for transfers.  
7

8 Section 901(b) contemplates expulsion by the organic rules but there is no default rule for  
9 expulsion. Former subsection (b)(5) read:  
10

11 (5) on application by the cooperative, the person’s expulsion as a member  
12 by judicial order because:

13 (A) the person engaged in wrongful conduct that adversely and  
14 materially affected the cooperative’s activities;

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

17 (C) the person engaged in conduct relating to the cooperative’s  
18 activities which makes it not reasonably practicable to carry on the  
19 activities with the person as member.  
20

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

22 (a) Upon a person’s dissociation as a member:

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

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

28 (b) A person’s dissociation as a member does not of itself discharge the person  
29 from any obligation to the cooperative which the person incurred while a member.

### 30 **Reporter’s Note**

31 Source: ULPA (2001) § 602. The ULPA (2001) counterpart includes a subsection that  
32 refers only to specifically cross-referenced obligations of good faith and fair dealing and that

1 subsection has been deleted under this draft. “[O]r other members” was also deleted in (b),  
2 which is consistent, because under this act there is no specific member to member duty (similar  
3 to the basic resolution of duties to limited partners but in ULPA there is a sliding scale where a  
4 limited partner undertakes management obligations). The Comment to this section will include  
5 both reference and discussion of the four possible sources of financial return of a member: (1)  
6 under a production (or other) contract; (2) patronage distributions; (3) patronage retains; (4)  
7 return on invested capital. Subsection (b) is important in the context of obligations under a  
8 marketing contract.  
9

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

#### 15 **Reporter’s Note**

16 Source: ULPA (2001) § 704. *See* Reporter’s Note to section 901 concerning the absence  
17 of incompetency as a cause of dissociation by a member. The Committee suggests that the  
18 guardian of an incompetent will be treated for all purposes the same as an estate through the law  
19 of guardianship but that issue should be left to other law. Other law will also channel obligations  
20 between those that must be personally performed and those that may be “assigned”. It might be  
21 advisable for the Comment to suggest this issue (and a related one concerning nonadjudicated  
22 durable powers) be contemplated by the organic rules and the terms of the marketing contract, if  
23 any. Whether incompetency effects the contract will depend, in some instances, on the  
24 classification of the contractual duty as delegable.

1 **[ARTICLE] 10**

2 **DISSOLUTION**

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

- 5 (1) nonjudicially under Section 1002;
- 6 (2) judicially under Section 1003; or
- 7 (3) administratively under Section 1010.

8 **SECTION 1002. NONJUDICIAL DISSOLUTION.** Except as otherwise provided in

9 Section 1003, a cooperative is dissolved and its activities must be wound up only upon the

10 occurrence of any of the following:

- 11 (1) the happening of an event or the coming of a time specified in the articles of
- 12 organization;
- 13 (2) the action of the organizers, board of directors, or members under Section
- 14 1004 and 1005;
- 15 (3) the passage of 90 days after the dissociation of the last member, unless before
- 16 the end of the period the cooperative admits at least one member in accordance with its organic
- 17 rules; or
- 18 (4) the filing of a determination by the [Secretary of State] under Section 1010.

19 **Reporter's Note**

20 Source: ULPA (2001) § 801. It has been modified because cooperatives do not bifurcate

21 membership between general and limited partners. Subsection (3) of this Section again begs the

22 fundamental question of how many members are required for the existence of a cooperative.

23 This Section errs on the side of continuity of life though it is inconsistent with matters of

24 formation. It is anticipated the Committee will revisit the formation issue at its Fall 2005

1 drafting meeting. The “tough nut” scenario seems to be where all the board members are also  
2 members (perhaps the prototypical arrangement contemplated by this act). Who would be in  
3 charge and admit? While a nice technical issue; the same issue arises under unincorporated law  
4 where this provision is regarded as providing both flexibility and key in maintaining perpetuity of  
5 life.  
6

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

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

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

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

12 conferred upon it by law;

13 (2) in a proceeding by a member, if it is established that:

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; or

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

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

24 under judicial supervision.

## Reporter's Note

This section on judicial dissolution is derived from the MBCA but conceptually tracks the current LLC draft being considered by the Conference. Substantively, note: (1) Subsection 2 no longer authorizes transferees to bring an action to dissolve the cooperative (in addition to members) under certain circumstances; (2) Subsection 2(A) does not include the MBCA phrase, “or the business and affairs of the [cooperative] can no longer be conducted to the advantage of the ... [members] generally” (but is consistent with the directors ability to consider other constituencies under Article 6); and, (3) the MBCA provides for an action for dissolution by a creditor of the corporation (here the cooperative) if the claim has been reduced to judgment and the entity is insolvent.

After discussion at the April 2005 Committee meeting “or a transferee of a member” was deleted from Section 1003(2). It was pointed out that it gave transferees greater power than they have under almost all unincorporated law, that there was no similar provision in traditional cooperative law, and that it gave transferees the power to unreasonably interfere with the operation of the cooperative by filing suit.

Thus broadest provision for transferee rights in the entire draft in the former draft subsections 2(B) and 2(D). The Committee discussed these provisions but they need to be discussed further. The language has the same effect as provided by Section 801(6) (ii) of UPA (1997) for at-will partnerships. ULPA Section 802 is much shorter and more restrictive:

On application by a partner the [appropriate court] may order a dissolution of a limited partnership if it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement.

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

Subsection (2)(B) states a different (and lower) standard for judicial dissolution than for the removal of a director under Section 607 which includes “grossly abusive” and “intentionally harmful.”

Finally, though it is included in the MBCA, the committee has not addressed Subsection (2)(C) does not require any showing of damage to the cooperative following corporate law. Finally, most corporate statutes allow creditors to move for dissolution if a corporation is insolvent. This act does not do so.

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

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

**[RESERVED]**

## Reporter's Note

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

## SECTION 1006. WINDING UP.

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

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

(1) shall discharge its liabilities, settle and close its activities, and marshal and distribute its assets; and

(2) file a statement of dissolution indicating it is winding up pursuant to Section 203, preserve the cooperative or its property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer cooperative property, settle disputes by mediation or arbitration, and perform other necessary acts.

(c) On the application of the cooperative, any member, or a transferee, the

1 [appropriate court] may order judicial supervision of the winding up, including the appointment  
2 of a person to wind up the dissolved cooperative's activities, if:

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

5 (2) the applicant establishes other good cause.

6 **Reporter's Note**

7  
8 Subsection (b)(2) is conformed with comments to Section 203.  
9

10 **SECTION 1007. DISTRIBUTION OF ASSETS IN WINDING UP**  
11 **COOPERATIVE.**

12 (a) In winding up a cooperative's business, the assets of the cooperative must be  
13 applied to discharge its obligations to creditors, including members who are creditors. Any  
14 remaining assets must be applied to pay in money the net amount distributable to members in  
15 accordance with their right to distributions under subsection (b).

16 (b) Unless otherwise provided in the organic rules, each member is entitled to a  
17 distribution from the cooperative of any remaining assets in the proportion of the member's  
18 financial interests to the total financial interests of members of the cooperative after all other  
19 obligations are satisfied.

20 **Reporter's Note**

21 Best practice would provide detail in the organic rules. The Reporter was directed by the  
22 Committee at its April 2005 meeting to compare this provision with the Colorado Cooperative  
23 Act (corporate) and the Minnesota Cooperative Association Act and report it at its Fall 2005  
24 meeting.



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

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

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

- 6                               (1) specify the information required to be included in a claim;  
7                               (2) provide a mailing address to which the claim is to be sent;  
8                               (3) state the deadline for receipt of the claim, which may not be less than  
9 120 days after the date the notice is received by the claimant; and  
10                              (4) state that the claim will be barred if not received by the deadline.

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

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

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

19   **Reporter's Note**

20                  The substance of this section and that of the remainder of this article is contained in both  
21 corporate and LLC law. The base model for the drafting of these provisions was ULLCA.

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

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

4                   (b) The notice must:

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

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

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

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

16                         (1) a claimant that did not receive notice in a record under Section 1008;

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 **Reporter's Note**

8 The Committee discussed the possibility of broadening the notice requirements in  
9 subsection (b)(1). The Reporter is to prepare a comparative and substantive preliminary  
10 comment on (b)(3) for the Fall 2005 meeting. This provision is very similar to provisions in  
11 corporate and unincorporated law although there is some variation in the number of years  
12 identified in subsection (b)(3). Corporate law provides an additional step that the Committee  
13 desires to consider. The RMBCA version of the addition follows:

#### 14 § 14.08. Court Proceedings

15 (a) A dissolved corporation that has published a notice under  
16 section 14.07 may file an application with the [name or describe]  
17 court of the county where the dissolved corporation's principal  
18 office (or, if none in this state, its registered office) is located or a  
19 determination of the amount and form of security to be provided  
20 for payment of claims that are contingent or have not been made  
21 known to the dissolved corporation or that are based on an event  
22 occurring after the effective date of dissolution but that, based on  
23 the facts known to the dissolved corporation, are reasonably  
24 estimated to arise after the effective date of dissolution. Provision  
25 need not be made for any claim that is or is reasonably anticipated  
26 to be barred under section 14.07(c).

27 (b) Within 10 days after the filing of the application, notice of the  
28 proceeding shall be given by the dissolved corporation to each  
29 claimant holding a contingent claim whose contingent claim is  
30 shown on the records of the dissolved corporation.

31 (c) The court may appoint a guardian ad litem to represent all  
32 claimants whose identities are unknown in any proceeding brought  
33 under this section. The reasonable fees and expenses of such  
34 guardian, including all reasonable expert witness fees, shall be paid  
35 by the dissolved corporation.  
36

1 (d) Provision by the dissolved corporation for security in the  
2 amount and the form ordered by the court under section 14.08(a)  
3 shall satisfy the dissolved corporation's obligations with respect to  
4 claims that are contingent, have not been made known to the  
5 dissolved corporation or are based on an event occurring after the  
6 effective date of dissolution, and such claims may not be enforced  
7 against a shareholder who received assets in liquidation.  
8

9 **SECTION 1010. ADMINISTRATIVE DISSOLUTION.**

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

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

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

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

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

24 (d) A cooperative administratively dissolved continues its existence but may  
25 carry on only activities necessary to wind up its activities and liquidate its assets under Section

1 1006 and to notify claimants under Sections 1008 and 1009.

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

4 **Reporter's Note**

5 An issue that needs to be discussed by the Committee is whether the number of days are  
6 appropriate. The choice in the April 2005 draft conforms to ULPA (2001) and is not changed  
7 from the 2004 annual meeting draft. The 60 day period also mirrors RMBCA section 14.20.  
8 This section combines ULPA (2001) sections 809 and 810.  
9

10 **SECTION 1011. 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:

23 (1) prepare a declaration of reinstatement that states this determination;

24 (2) sign and file the original of the declaration of reinstatement; and

1 (3) serve the cooperative with a copy.

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

5 **Reporter's Note**

6 Source: ULP, ULLCA, generally follows the MBCA. At the Committee's direction the  
7 phrase "or continue" was added to subsection (c). The Comments need to explain the effect on  
8 third parties. It is unintended, in that regard, to be completely consistent with corporate and  
9 unincorporated law.  
10

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

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

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

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

22 **Reporter's Note**

23 Source: ULP § 811. This article is also conceptually consistent with existing  
24 cooperative law. It is also a point where the "unclaimed and abandoned property" provision  
25 might apply. The Reporter has been directed by the Drafting Committee to determine if it is

1 appropriate and consistent with other conference products to include the language for a filing and  
2 fees section.  
3

#### 4 **SECTION 1013. STATEMENT OF DISSOLUTION.**

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

7 (1) the name of the cooperative;

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

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

10 This Section was formerly numbered Section 207.  
11

12 There was discussion at the 2004 annual meeting suggesting that the statement of  
13 termination was a throwback to older versions of the MBCA and that this Act should follow the  
14 current MBCA provisions for filing the articles of dissolution. Because this is an unincorporated  
15 entity, however, it (now at least) follows ULPA (2001). No filing is required under this  
16 provision nor in Article 10 requiring a filing for dissolution or winding-up. This statement is  
17 simply an elective statement that may be filed. The November 2004 draft more closely followed  
18 ULLCA (1996).  
19

20 The statement of dissolution simply indicates that the cooperative has entered winding-up  
21 and this provision could be moved to Article 10. ULPA (2001) does not do so but ULLCA  
22 (1996) does place it there.  
23

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

1 [ARTICLE] 11

2 ACTIONS BY MEMBERS

3  
4 SECTION 1101. DIRECT ACTION BY MEMBER.

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

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

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

15 Reporter's Note

16 Source: § 1001 ULPA (2001) (modified). A prior draft included a direct right to sue  
17 another member based on unincorporated entity law (in former section 1101). Directors are  
18 included to raise the issue of “primary” shareholder litigation in the corporate context and to  
19 better reflect the operation of the provision under ULPA. Query whether this merely reflects  
20 current law; or causes or alleviates confusion. Finally, query whether the provision on direct  
21 action is necessary. Current corporate and cooperative acts do not make this statutory distinction.  
22 Unincorporated laws, however, include this because, historically, the individual partner could not  
23 sue directly outside an accounting action. The direct-derivative distinction is currently in the  
24 ULLCA draft being discussed by another committee of the Conference. A Comment needs to be  
25 included explaining subsection (c).



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

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

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

10                           **Reporter's Note**

11           Source: § 1002 ULPA (2001). Is 90 days too long, *but see* the Reporter's Note following  
12 section 1104. Oregon uses 20 days. *See* section 1104. This draft does not contain a futility  
13 exception. Subsection (1) formerly required a writing, the Committee discussed replacing it with  
14 record, this draft goes back to the language in ULPA (2001).  
15

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

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

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

21                           **Reporter's Note**

22           Source: § 1003 ULPA (2001). Query whether the requirement that the person bringing a  
23 suit be a member at the time of commencement is advisable or necessary. Most corporate  
24 statutes so provide. It is consistent with other conference products. A Comment or Legislative  
25 Note should direct states to determine the placement of derivative actions within their won codes.  
26 South Dakota's derivative procedures, for example, appear in it's code of civil procedure. The

1 South Dakota provision and, some other corporate codes, require that the plaintiff “fairly  
2 represents” the interest of the corporation. This draft does as well. See § 1002.  
3

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

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

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

10 **SECTION 1105. PROCEEDS AND EXPENSES.**

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

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

15 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff  
16 shall immediately remit them to the cooperative.

17 (b) If a derivative action is successful in whole or in part, the court may award the  
18 plaintiff reasonable expenses, including reasonable attorney’s fees, from the recovery of the  
19 cooperative.

20 **Reporter’s Note**

21 Source: § 1005 ULPA (2001).

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

1           Section 1102 modifies the ULPA (2001) formulation by adding the requirement that the  
2 member adequately represents the interests of the cooperative; by adding a 90 day time period  
3 after demand before suit may be commenced; and by deleting excused demand because of  
4 futility. The 90 day period may be excused if the waiting period would result in irreparable harm  
5 to the cooperative under subsection 1102(2). These modifications generally follow the law of the  
6 Model Business Corporations Act. This draft does not include the MBCA provision concerning  
7 litigation committees and the authority of the committee to have the suit dismissed if the  
8 committee exercises good faith. One reason for not providing for such committees is because of  
9 the limited availability of outside or independent directors under this draft. Nonetheless the  
10 addition of the requirement that the member bringing the derivative suit “adequately represent”  
11 the cooperative should provide a framework for the evolution of such concepts under the  
12 common law.

1 [ARTICLE] 12

2 FOREIGN COOPERATIVES

3  
4 SECTION 1201. GOVERNING LAW.

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

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

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

13 SECTION 1202. APPLICATION FOR CERTIFICATE OF AUTHORITY.

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

17 (1) the name of the foreign cooperative and, if the name does not comply  
18 with Section 109, an alternative name adopted pursuant to Section 1205;

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

21 (3) the street and mailing addresses of the foreign cooperative's  
22 designated office and, if the laws of the jurisdiction under which the foreign cooperative is

1 organized require the foreign cooperative to maintain an office in that jurisdiction, the street and  
2 mailing addresses of the required office;

3 (4) the name and street and mailing addresses of the foreign cooperative's  
4 agent for service of process in this state; and

5 (5) the name and street and mailing addresses of each of the foreign  
6 cooperative's current directors and officers.

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

11 **SECTION 1203. ACTIVITIES NOT CONSTITUTING TRANSACTING**  
12 **BUSINESS.**

13 (a) Activities of a foreign cooperative which do not constitute transacting  
14 business in this state within the meaning of this [Article] include:

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

16 (2) holding meetings of its members or carrying on any other activity  
17 concerning its internal affairs;

18 (3) maintaining accounts in financial institutions;

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

22 (5) selling through independent contractors;

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

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

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

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

11                   (10) transacting business in interstate commerce.

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

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

18                   **Reporter's Note**

19  
20                   Source: ULPA (2001) § 903. The Style Committee has asked whether “of a like manner”  
21 in subsection (a)(9) is surplusage.  
22

23                   **SECTION 1204. FILING OF CERTIFICATE OF AUTHORITY.** Unless the  
24 [Secretary of State] determines that an application for a certificate of authority does not comply

1 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,  
2 shall file the application, prepare, sign, and file a certificate of authority to transact business in  
3 this state, and send a copy of the filed certificate, together with a receipt for the fees, to the  
4 foreign cooperative or its representative.

5 **Reporter's Note**

6  
7 Source: ULPA (2001) § 904.  
8

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

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

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

21 **Reporter's Note**

22  
23 Source: ULPA (2001) § 905. In subsection (a): Would it change the meaning of the first  
24 sentence if “the purpose” were replaced by “purposes”?

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

2                   (a) A certificate of authority of a foreign cooperative to transact business in this  
3 state may be revoked by the [Secretary of State] in the manner provided in subsections (b) and (c)  
4 if the foreign cooperative does not:

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

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

9                               (3) appoint and maintain an agent for service of process as required by  
10 Section 117; or

11                              (4) deliver for filing a statement of a change under Section 118 within 30  
12 days after a change has occurred in the name or address of the agent.

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

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

20                              (2) the foreign cooperative's noncompliance with subsection (a) which is  
21 the reason for the revocation.

22                   (c) The authority of the foreign cooperative to transact business in this state



1 ceases on the effective date of the notice of revocation unless before that date the foreign  
2 cooperative cures each failure to comply with subsection (a) stated in the notice. If the foreign  
3 cooperative cures the failures, the [Secretary of State] shall so indicate on the filed notice.

4 **Reporter's Note**

5  
6 Source: ULPB (2001) § 906.  
7

8 **SECTION 1207. CANCELLATION OF CERTIFICATE OF AUTHORITY;**  
9 **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

10 (a) To cancel its certificate of authority to transact business in this state, a foreign  
11 cooperative must deliver to the [Secretary of State] for filing a notice of cancellation. The  
12 certificate is canceled when the notice becomes effective under Section 210.

13 (b) A foreign cooperative transacting business in this state may not maintain an  
14 action or proceeding in this state unless it has a certificate of authority to transact business in this  
15 state.

16 (c) The failure of a foreign cooperative to have a certificate of authority to  
17 transact business in this state does not impair the validity of a contract or act of the foreign  
18 cooperative or prevent the foreign cooperative from defending an action or proceeding in this  
19 state.

20 (d) A member of a foreign cooperative is not liable for the obligations of the  
21 foreign cooperative solely by reason of the foreign cooperative's having transacted business in  
22 this state without a certificate of authority.

23 (e) If a foreign cooperative transacts business in this state without a certificate of

1 authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent for  
2 service of process for rights of action arising out of the transaction of business in this state.

3 **Reporter's Note**  
4

5 Source: ULPA (2001) § 907.  
6

7 **SECTION 1208. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]  
8 may maintain an action to restrain a foreign cooperative from transacting business in this state in  
9 violation of this [Article].

10 **Reporter's Note**  
11

12 Source: ULPA (2001) § 908.

1 **[ARTICLE] 13**

2 **AMENDMENT OF ORGANIC RULES**

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

5 (a) A cooperative may amend its organic rules under this [Article].

6 (b) A member of a cooperative does not have vested rights in any provision in the  
7 organic rules.

8 **Reporter's Note**

9 This article attempts to consolidate the amendment and restatement procedures for both  
10 the articles of organization and bylaws. This section simply grants a general authority to amend.  
11 Subsection (b) is in the MBCA and is the analogue of the effect of a change or amendment of  
12 underlying law provided in Section 104. The Committee has yet to address whether this is a  
13 default or mandatory provision. This issue is an important one because under the corporate law  
14 of most states the directors alone may amend the by-laws. This draft more closely follows LLC  
15 law. It is also consistent with the Oregon Cooperative Act (§ 62.135).  
16

17 **SECTION 1302. NOTICE AND ACTION ON AMENDMENT OF ARTICLES OF**  
18 **ORGANIZATION OR BYLAWS.** To amend its organic rules:

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

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

23 (A) the proposed amendment:

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

1 make such a recommendation;

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

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

4 and

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

6 members' meeting.

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

9 **Reporter's Note**

10  
11 This section is derived from Colorado section 7-55-110. There is known inconsistency  
12 concerning proxies under 1303 and 1408 and the more general provisions in the first portion of  
13 the draft (§ 316). The Committee needs to reach resolution of this policy issue.  
14

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

16 (a) A substantive amendment of the proposed amendment of the organic rules  
17 may not be made at the members' meeting at which the vote occurs.

18 (b) Subject to subsection (a) any amendment of the amendment need not be  
19 separately voted upon by the board of directors.

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

22 **Reporter's Note**

23 At the November 2004 meeting the term "germane" was suggested instead of  
24 "substantive" in subsection (a). Is subsection (b) clear?

1                   **SECTION 1305. APPROVAL OF AMENDMENT.**

2                   (a) Subject to Sections 312 and 1306, an amendment to the articles of  
3 organization must be approved by at least a two-thirds vote of members voting at the meeting.

4                   (b) Subject to Sections 312 and 1306, an amendment to the bylaws must be  
5 approved by at least a majority vote of members voting at the meeting, but a two-thirds vote of  
6 members is required for any amendment modifying:

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

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

11                              (3) quorum for a meeting and rights of voting and governance;

12                              (4) the transferability of members' interests; or

13                              (5) the manner or method of allocation of net proceeds, savings, margins,  
14 profits, and losses among members.

15   **Reporter's Note**

16                   The Reporter was requested to consider several suggested revisions at the November  
17 2004 meeting included separate voting by patronage and nonpatronage members. There are two  
18 reasons such revisions are not included in this draft which was discussed at the April 2005  
19 Committee meeting: (1) In many instances the desired result would be obtained by operation of  
20 section 1305; (2) The operation of section 312 was not fully considered. SECTION 312  
21 CONFOUNDS THE OPERATION OF THIS SECTION because, in effect, it gives a majority of  
22 patron members absolute control over the ultimate outcome of the vote. THIS MUST BE  
23 DISCUSSED and provides a very strong argument section 312 should be reduced to majority.  
24 On the other hand, providing for separate patronage/non-patronage voting in any meaningful way  
25 gives non-patronage members, who are likely to be few in number, blocking power.  
26

27                   Many cooperative acts allow the board of directors to amend the bylaws, some do not. It  
28 is the tentative general sense of the committee to be protective of members and this draft is

1 consistent with that sense. It would be possible to make (b) a default rule rather than mandatory  
2 (*See* Colorado Rev. Stat. § 7-56-208).  
3

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

## 12 **SECTION 1306. VOTING BY GROUP, CLASS, OR DISTRICT MEMBERS.**

13 (a) If a proposed amendment affects a group, class, or district of members in one  
14 or more of the ways described in Section 1303, those members shall vote as a separate group.

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

19 (c) A group, class, or district of members has the rights provided in this section  
20 even if those members are not otherwise entitled to vote under the organic rules.

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

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

26 This section should not be interpreted to extend voting rights to transferees.  
27

## 28 **SECTION 1307. PROPOSAL OF AMENDMENT BY MEMBERS.**

29 (a) Members may propose amendments to the organic rules to be considered by

1 the board of directors by demand in a record signed by members holding at least 10 percent of all  
2 votes entitled to be cast on the matter.

3 (b) The board of directors shall report its action on the proposed amendment at  
4 the next annual shareholders' meeting or any special meeting for that purpose held under Section  
5 307.

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

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

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

### 16 **SECTION 1307A. EMERGENCY BYLAWS.**

17 (a) Unless the articles of organization provide otherwise, the board of directors  
18 may adopt bylaws to be effective only in an emergency described in subsection (d). The  
19 emergency bylaws may be amended or repealed by the members; and may make all provisions  
20 necessary for managing the corporation during the emergency, including:

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

22 (2) quorum requirements for the meeting; and

23 (3) designation of additional or substitute directors.

24 (b) The regular bylaws consistent with the emergency bylaws remain effective  
25 during the emergency. The emergency bylaws are not effective after the emergency ends.

26 (c) Action taken by the cooperative in good faith in accordance with the

emergency bylaws:

(1) binds the cooperative; and

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

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

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

This Section was formerly numbered Section 206. It will be numbered Section 1308 and the balance of the Article will be renumbered if moving this Section to Article 13 is accepted by the Committee.

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

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

#### **SECTION 1309. AMENDMENT OR RESTATEMENT OF ARTICLES OF ORGANIZATION.**

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

(1) the name of the cooperative;



1 (2) the date of filing of its initial articles of organization; and  
2 (3) the changes the amendment makes to the articles of organization as  
3 most recently amended or restated.

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

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

10 (1) cause the articles to be amended; or  
11 (2) if appropriate, deliver to the [Secretary of State] for filing an  
12 amendment pursuant to Section 203 or a statement of correction pursuant to Section 211.

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

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

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

19 **Reporter's Note**

20 This Section was formerly numbered Section 203.

1 [ARTICLE] 14

2 CONSOLIDATION AND MERGER

3  
4 SECTION 1401. DEFINITIONS. In this [Article]:

5 (1) “Consolidation” means a merger of two or more constituent organizations  
6 which results in the creation of a surviving organization.

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

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

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

13 (5) “Merger” means a combination of two or more constituent organizations  
14 which results in the surviving cooperatives having the name of one of the constituent  
15 organizations.

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

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

1 a member of the organization:

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

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

8 (8) "Surviving organization" means an organization into which one or more other  
9 organizations are merged. A surviving organization may exist before the merger or be created by  
10 the merger.

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

12  
13 For a discussion of the term "consolidation" see the Note following section 1409.  
14 Defining "consolidation" as a merger attempts to avoid complicating drafting. The term is used  
15 only as a matter of labeling in the substantive provisions and in the headings of the balance of  
16 this Article. See generally the Note following 1409.

17  
18 As a preliminary matter this Article allows a cooperative formed under this draft  
19 flexibility to combine with the full panoply of other organizations whether domestic or foreign.  
20 It does not include conversions but META would allow such transactions. Neither does it allow  
21 "share exchanges." A separate Article (15) exists for the sale of assets but its drafting awaits  
22 action on Article 14. This section is based on ULPA (2001) section 1101. The terms "co-owns"  
23 and "co-owning" appear in ULPA.

24 The language, most especially in (7)(A) needs work.  
25

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

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

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

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

5 (3) each of the other organizations complies with its governing statute in  
6 effecting the merger.

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

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

9 (2) the name and form of the surviving organization and, if the surviving  
10 organization is to be created by the merger, a statement to that effect;

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

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

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

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

1 **Reporter's Note**

2 Subsection (6) is derived from section 1406 in the November draft which was based on  
3 ULPA (2001).  
4

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

7 (a) Unless otherwise provided in the organic rules, the plan of consolidation or  
8 merger must be approved by a majority vote of the board of directors.

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

11 (1) the plan of consolidation or merger;

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

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

16 (4) any condition of its submission of the plan of consolidation or merger  
17 to the members; and

18 (5) notice of the meeting in the same manner as an annual or special  
19 members' meeting.

20 **Reporter's Note**

21 The Reporter tentatively inserted the Style Committee's recommendation pending  
22 Committee discussion.  
23  
24

1           **SECTION 1404. APPROVAL AND ABANDONMENT OF CONSOLIDATION OR**  
2           **MERGER BY MEMBERS OF CONSTITUENT COOPERATIVE.**

3           (a) Unless the organic rules provide for a greater quantum and subject to Section  
4           312, a plan of consolidation or merger must be approved by at least a two-thirds vote of members  
5           voting under Section 311 and, if as a result of the merger any member of the cooperative has  
6           personal liability as a result of the merger, consent in a record of that member.

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

10                   (1) as provided in the plan; and

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

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

14           (a) Unless the organic rules of the cooperative or the organic law or organic rules  
15           of the other organization otherwise provide, a cooperative that owns at least 90 percent of each  
16           class of the voting power of a subsidiary organization may consolidate or merge the subsidiary  
17           into itself or into another subsidiary.

18           (b) The cooperative owning at least 90 percent of the subsidiary organization  
19           before the consolidation or merger shall notify each other owner of the subsidiary, if any, of the  
20           consolidation or merger within 10 days after the effective date of the consolidation or merger.

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

22           (a) After each constituent organization has approved a consolidation or merger,

1 articles of consolidation or merger must be signed on behalf of each other preexisting constituent  
2 organization, by an authorized representative.

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

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

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

9 (3) the date the consolidation or merger is effective under the governing  
10 statute of the surviving organization;

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

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

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

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

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

22 (7) if the surviving organization is a foreign organization not authorized to

1 transact business in this state, the street and mailing addresses of an office which the [Secretary  
2 of State] may use for the purposes of Section [service of process]; and

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

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

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

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

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

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

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

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

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

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

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

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

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



1 (5) an action or proceeding pending by or against any constituent  
2 organization that ceases to exist may be continued as if the consolidation or merger had not  
3 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,  
8 the terms and conditions of the plan take effect;

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

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 exists before the consolidation or  
17 merger, any amendments provided for in the articles of merger for the organizational document  
18 that created the organization become effective.

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

20 Source: ULPA (2001). The plan will by necessity address the pre-merger terms of the  
21 directors and board officers.  
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 **Reporter's Note**

3 See Reporter's Note § 1303.  
4

5 **SECTION 1409. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude a  
6 cooperative from being converted or merged under other law.

7 **Reporter's Note**

8 Most of this article is based on the merger provisions found in Article 11, ULPA (2001).  
9 There are two major differences with the ULPA formulation. *First*, this draft does not provide  
10 for conversions although it provides for the same result through merger of a cooperative *into*  
11 another type of entity. *Second*, it allows for short-form merger where cooperative owns at least  
12 90 percent of the voting power of the subsidiary. The first difference is a matter of degree  
13 depending on decisions made in the Model Entity Transactions Act. It may be important to  
14 discuss the advisability of conversion-like processes here, however, squarely within the context  
15 of cooperatives to identify any specific concerns caused by META.  
16

17 One change incorporated in this draft is the use of both the terms “merger” and  
18 “consolidation”. The advisors to this act have urged that the term “consolidation” be used where  
19 the surviving entity is a new organization. The term “new”, unfortunately, is ambiguous and the  
20 term has been deleted from the MBCA but remains in many state cooperative acts. The return of  
21 the term consolidation should not raise substantive concerns beyond being somewhat  
22 inconsistent with the laws of other organization.  
23

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

1  
2  
3  
4  
5  
6  
7

**[ARTICLE] 15**

**SALE OF SUBSTANTIALLY ALL 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 **[DELETED: ARTICLE 16**

2 **DISSENTERS RIGHTS]**

3 **Reporter's Note**

4 Dissenters' appraisal rights are a traditional corporate remedy. Some traditional  
5 cooperative statutes have adopted them (*see* Colo. Rev. Stat. § 7-56-608) others have not (*Cf.*,  
6 Or. Rev. Stat. § 62.613(2)).

7  
8 The April 2005 draft included a fully drafted article on dissenters' rights that has been  
9 deleted at the direction of the Committee. This is consistent with unincorporated law but the  
10 voting quantum defaults in unincorporated law are generally higher and, therefore, unless altered,  
11 default voting may provide back-door protection.

12  
13 The probable effect of the deletion of dissenters rights (sometimes known as "appraisal  
14 rights") is to strengthen governance by majority, particularly in fundamental change transactions  
15 (Consolidations, Mergers, Sale of Assets). It probably also enhances centralized management in  
16 the board of directors because it lessens flight-of-capital concerns in those kinds of decisions that  
17 corporate law would provide such rights. Arguably this result is consistent with the historical  
18 root values of cooperatives.

19  
20 The organic rules, of course, may provide for such rights and in capital intensive  
21 cooperatives with nonpatron members it is probable those members will demand the inclusion of  
22 such rights to avoid capital lock-in. In any event, the directors are subject to duties of care and  
23 loyalty and could be held responsible under those duties.

1 [ARTICLE] 17

2  
3 MISCELLANEOUS PROVISIONS  
4  
5

6 SECTION 1701. EXEMPTION FROM SECURITIES LAWS. Membership interests  
7 issued or sold by a cooperative as an investment in the cooperative are exempt from the securities  
8 laws of this state under [citation to the provision applicable to other existing forms of  
9 cooperatives].

10 Reporter's Note  
11

12 The language of the statutes vary greatly by state. Many state laws contain exemptions  
13 from securities regulation either in the law governing cooperatives or in their securities acts. To  
14 avoid the necessity of each state renegotiating both the policy and nonuniform statutory language  
15 during the adoption of this Act this draft simply applies those existing exemptions by reference.  
16 *See generally*, Reporters' Note to Section 809 of this draft.  
17

18 The Uniform Securities Act (2002) contains a limited exemption at USA § 201(8). It is  
19 limited to "nonprofit membership cooperatives" and, even there, does *not* apply to "a member's  
20 or owner's interest, retention certificate, or like security sold to persons other than bona fide  
21 members of the cooperative." Comment 8 to Section 201 states:  
22

23 "The 1956 Act... had instead provided: 'insert any desired  
24 exemption for cooperatives'. The Reporter for the 1956 Act had  
25 found such sharp variation among the 18 states that then had  
26 adopted a cooperative exemption that 'no common patten can be  
27 found.' Louis Loss, Commentary on the Uniform Securities Act  
28 118 (1976).  
29

30 The Committee suggests it unlikely to achieve further uniformity than that proposed by  
31 the USA (2002) and that states have already made policy decisions that are unlikely to change  
32 based upon anything stated in this limited purpose unincorporated cooperative act. A strong  
33 legislative not should be drafted.  
34

35 SECTION 1702. EXEMPTION FROM RESTRAINT OF TRADE AND  
36 ANTITRUST LAWS. Cooperatives have the same immunities, rights, and privileges provided

1 cooperatives formed under [other law of this state] and are governed by [citation to the applicable  
2 restraint of trade and antitrust provisions].

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

4  
5 It is most certainly *not* the intent of this Section to expand any such exemptions beyond  
6 the purposes provided in those other laws. See the last paragraph of this Note. A question of  
7 both interpretation and policy is raised, however, by a slippery-slope hypothetical. Assume the  
8 referenced statute states “controlled by agricultural producers” versus “exclusively owned and  
9 controlled by agricultural producers.”

10  
11 See the Note to Section 1701. Section 1703, and to a lesser extent Section 1702, might  
12 be better placed in Article 5 (“Marketing Contract”) but are in Article 17 of this draft for  
13 purposes of discussion.

14  
15 In any event, these sections will require a strong legislative note. One of the issues that  
16 needs to be addressed by the legislative note is how to conform the provision to apply to this Act  
17 if it is not completely self-executing. *E.g.*, if it simply states that “cooperatives complying  
18 with...”.

### 19 **SECTION 1703. INDUCING BREACH OF MARKETING OR PURCHASE**

20 **CONTRACTS.** The remedies provided by [citation to the applicable statutory provisions] apply  
21 to cooperatives.

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

23  
24 See the Note to Section 1702.  
25

### 26 **SECTION 1704. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

27 applying and construing this uniform act, consideration must be given to the need to promote  
28 uniformity of the law with respect to its subject matter among states that enact it.

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

30 The Committee on Style suggested Section 1705 is unnecessary. It remained in the 2005  
31 Annual Meeting Draft only because a similar provision is included in ULPA (2001) and,  
32 therefore, it seems it should be briefed by the Reporter and discussed by the Drafting Committee.

1 In doing so, the Reporter fully understands the position of the Committee on Style, and the  
2 implicit agreement by the Conference, that a severability clause should be used only where there  
3 is genuine doubt concerning constitutionality and its inclusion here should not be interpreted as  
4 disagreeing with those well-reasoned positions.

5 The October 2005 draft conforms to a second suggestion by the Style Committee for its  
6 deletion but does not yet renumber subsequent sections pending Committee discussion.  
7

8 **SECTION 1706. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
9 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the federal  
10 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
11 this [act] does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section  
12 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that  
13 act (15 U.S.C. Section 7003(b)).

14 **SECTION 1707. EFFECTIVE DATE.** This [act] takes effect [effective date].

15 **SECTION 1708. SAVINGS CLAUSE.** This [act] does not affect an action or  
16 proceeding commenced, or right accrued before [this [act] takes effect].