

D R A F T

FOR DISCUSSION ONLY

# **UNIFORM AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR  
PITTSBURGH, PENNSYLVANIA  
JULY 22 - 29, 2005

# **UNIFORM AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

*WITH PREFATORY AND REPORTER'S NOTES*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

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# **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

## **PREFATORY NOTE**

### **(1) Introduction and Process**

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

The Committee's scope was originally limited to "Agriculture and Agriculture Related" purposes. The scope is not, however, limited to agricultural marketing cooperatives (and, thus, contemplates supply and service activities of a broad nature with reference to rural economic development). As a later Reporter's Note observes, the demarcation of activities which are "agriculture and agriculture related" is a central issue. Another overarching question raised by this draft, and discussed at the Committee meetings, is what it means to be a cooperative. Older traditional statutes have found meaning and form by finding the definition of a cooperative in other law. A brief illustrative discussion of some of those definitions is contained in the next part of this preliminary note ("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 Saskatchewan enacted an Act for similar purposes that predated the Wyoming law. There has been study or legislative activity in Tennessee, Missouri, Iowa, Wisconsin and Vermont, but the status of that activity is unknown to the Reporter at the time of drafting of this note.

### **(2) 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 Draft

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

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

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

The centers of gravity of this draft are:

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

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

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

1                   **AGRICULTURAL AND AGRICULTURAL RELATED COOPERATIVES ACT**

3                                   **ARTICLE 1**

4                                   **GENERAL PROVISIONS**

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

7                                   **Reporter's Note**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15                   (19) “Patronage” means business, transactions, or services done for or with the  
16 cooperative as defined by the cooperative which entitles the person conducting the business  
17 transactions or services with the cooperative to receive financial rights, distributions, or payment  
18 from the cooperative based on the value of such business, transactions or services and the  
19 financial performance of the cooperative or the value added to the cooperative by such business,  
20 transactions or services. It includes, but is not limited to, any allocation to patronage members  
21 based on a patronage membership as well as participation in nonmember patron pools.

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

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

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

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

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

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

14          (26) “Sign” means:

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

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

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

22          (28) “Transfer” includes an assignment, conveyance, deed, bill of sale, lease,



1 mortgage, security interest, encumbrance, gift, and transfer by operation of law.

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

#### 4 **Reporter’s Note**

5 The April 2005 draft reflects several technical drafting suggestions made at the 2004  
6 Annual Meeting. One suggested change not made concerned the definition of “person.” It was  
7 suggested that the NCCUSL definition of person has changed but this definition appears in  
8 ULPA 2001. Likewise it was suggested that the terms “record” and “sign” are unnecessary  
9 because of UENTA. Nonetheless ULPA (2001) contains these definitions.

10  
11 As discussed in greater detail in the Reporter’s Note to Section 404, the definitions need  
12 tuning. In particular, “patron”, “patron member” and “nonpatron member” are currently under  
13 reconsideration by the Drafting Committee. “Financial Interest” is used extensively in Article 4  
14 but not defined. The term “financial interest”, as noted in the Reporter’s Note, is also being  
15 reconsidered. It performs the same function as “transferable interest” in ULLCA, ULPA (2001),  
16 and UPA (1997). Below are two rough definitional suggestions from the Reporter for discussion  
17 purposes:

- 18  
19 • “Patron membership interest” means the membership interest providing a patron  
20 rights in governance and a transferable interest [financial interest] of the  
21 cooperative as a member as established by the [Act]; and
- 22  
23 • “Transferable interest” means the right to receive distributions to members but  
24 does not include the right to receive payments based on a separate marketing  
25 contract, if any, between the member and the cooperative.

26  
27 Note that distributions are distinct from allocations in organizational statutes.  
28 Distributions are actual payments of money or money’s worthwhile allocations are accounting  
29 concepts, *e.g.*, the capital accounts of partners in a partnership.

30  
31 The most significant changes are the deletion of any reference to cooperative plan and the  
32 definition of Agricultural or Agricultural related in its entirety. The Drafting Committee has  
33 discussed the latter at length. It is a central issue that needs resolution. The balance of this Note  
34 is retained from the prior Draft for discussion purposes. *See* Section 105.

35  
36 “Agricultural and Agricultural Related” is informed by several sources including federal  
37 law. It is intended to be as broad as reasonably practicable and still retain some definitional  
38 meaning. It is intended to include functions served by several industry categories of cooperatives  
39 including service, supply purchasing, marketing, and processing cooperatives. Tough

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

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

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 it.

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 exercised 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.

#### **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 agricultural or  
2 agriculturally related purpose.

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

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

6 This is the leverage point for requiring the cooperative to be engaged in agriculture,  
7 however defined. Does (b) need to be expanded to include production, supply, service, or the  
8 transformation of agricultural goods through manufacturing or other processes?  
9

10 Subsection (b) states "any lawful purpose" which is consistent with the unincorporated  
11 acts promulgated by the Conference. It is also consistent with the general laws of cooperatives  
12 which in some states reference or are included in not-for-profit acts. Finally, it is consistent with  
13 the historical roots of cooperatives as mutual aid societies. Evidence of the ambivalence of the  
14 for-profit, not-for-profit distinction can be seen in the federal tax treatment of cooperatives.  
15

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

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

21 The formulation of powers in this draft is based upon unincorporated law models as  
22 opposed to a more detailed listing of powers contained in corporate law. The Committee has  
23 discussed this approach for powers only briefly and it is consistent with a general direction to  
24 draft as efficiently as possible even though most cooperative acts tend to follow the more detailed  
25 (and older) corporate model. The question of the level of detail in this section is probably one  
26 that should be informed by givers of legal opinion letters. It is intended to be a broad division.  
27

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

1                   **SECTION 108. SUPPLEMENTAL PRINCIPLES OF LAW; RATE OF**  
2 **INTEREST.**

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

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

7                   **SECTION 109. NAME.**

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

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

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

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

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

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

22                         (1) the present user, registrant, or owner of a reserved name consents to

1 the use in a record and submits an undertaking in form satisfactory to the [Secretary of State] to  
2 change the name to a name that is distinguishable upon the records of the [Secretary of State]  
3 from the name applied for; or

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

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

10 (1) merged with the other cooperative;  
11 (2) been formed by reorganization with the other cooperative; or  
12 (3) acquired substantially all of the assets, including the name, of the other  
13 cooperative.

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

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

#### 23 **SECTION 110. RESERVED NAME.**

24 (a) A person may reserve the exclusive use of the name of a cooperative,  
25 including a fictitious name for a foreign cooperative whose name is not available, by delivering

1 an application to the [Secretary of State] for filing. The application must set forth the name and  
2 address of the applicant and the name proposed to be reserved. If the [Secretary of State] finds  
3 that the name applied for is available, it must be reserved for the applicant's exclusive use for a  
4 nonrenewable 60 day period.

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

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

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

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

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

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

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

1 cooperative qualifies or consents to the qualification of another foreign cooperative under the  
2 registered name.

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

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

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

8 **Reporter’s Note**

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

13  
14 The April 2005 draft attempts to coordinate the name restrictions contained in other  
15 cooperative law in the State, if any, with this Act without granting restrictions or rights not found  
16 elsewhere in State law.  
17

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

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

23 (b) The organic rules may not:

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

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



- 1 (3) vary the requirements of Section 208;
- 2 (4) vary the information required under Section 111 or unreasonably
- 3 restrict the right to information under Section \_\_\_\_ or 621, but the organic rules may impose
- 4 reasonable restrictions on the availability and use of information obtained under those sections
- 5 and may define appropriate remedies, including liquidated damages, for a breach of any
- 6 reasonable restriction on use;
- 7 (5) eliminate the duty of loyalty under Section \_\_\_\_, but the organic rules
- 8 may:
- 9 (A) identify specific types or categories of activities that do not
- 10 violate the duty of loyalty, if not manifestly unreasonable; and
- 11 (B) specify the number or percentage of members which may
- 12 authorize or ratify, after full disclosure to all members of all material facts, a specific act or
- 13 transaction that otherwise would violate the duty of loyalty;
- 14 (6) unreasonably reduce the duty of care under Section \_\_\_\_;
- 15 (7) eliminate the obligation of good faith and fair dealing under Section
- 16 \_\_\_\_, and \_\_\_\_, but the partnership agreement may prescribe the standards by which the
- 17 performance of the obligation is to be measured, if the standards are not manifestly unreasonable;
- 18 (8) vary the power of a person to dissociate as a member under Section
- 19 \_\_\_\_ except to require that the notice under Section \_\_\_\_ be in a record;
- 20 (9) vary the power of a court to decree dissolution in the circumstances
- 21 specified in Section \_\_\_\_;
- 22 (10) vary the requirement to wind up the cooperative's business as

specified in Section \_\_\_\_;

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

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

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

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

Source: 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.

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

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

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

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

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

1 bylaws;

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

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

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

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

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

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

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

15 (12) a record stating:

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

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

20 (C) for any person that is both a patronage and nonpatronage member, a  
21 specification of the interest the person owns in each capacity.  
22

1 **Reporter's Note**

2 The Committee has not yet discussed the appropriate required retention time for the  
3 enumerated records.  
4

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

9 **Reporter's Note**

10 This language is consistent with the language used in ULPA (2001). Is it unambiguous in  
11 the cooperative context?  
12

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

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

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

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

23 (2) an agent for service of process.

24 (b) A foreign cooperative shall designate and continuously maintain in this State

1 an agent for service of process

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

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

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

- 10 (1) the name of the cooperative or foreign cooperative;  
11 (2) the street and mailing address of its current designated office;  
12 (3) if the current designated office is to be changed, the street and mailing  
13 address of the new designated office;  
14 (4) the name and street and mailing address of its current agent for service  
15 of process; and  
16 (5) if the current agent for service of process or an address of the agent is  
17 to be changed, the new information.

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

20 **Reporter's Note**

21 The following comment was made at the annual meeting: "Do you need or desire an  
22 electronic mailing address? Some states are moving to electronic filing. Even if not, the email  
23 address would save state money by sending routine notices by electronic mail." This is a good

1 point but probably does not belong in the service of process provision.  
2

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

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

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

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

14 **SECTION 120. SERVICE OF PROCESS.**

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

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

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

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

7 (1) the date the cooperative or foreign cooperative receives the process,  
8 notice, or demand;

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

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

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

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

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

19 Source: ULPA (2001). Is the term "mail" in section 119 (c) ambiguous?

## ARTICLE 2

## FORMATION; ARTICLES OF ORGANIZATION AND OTHER FILINGS

## SECTION 201. ORGANIZATION.

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

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

## Reporter's Note

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

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

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

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



1 required.

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

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

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

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

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

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

of State] for filing a statement of cancellation.

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

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

- (1) the name of the cooperative;
- (2) the date of filing of its initial articles; and
- (3) the changes the amendment makes to the articles as most recently amended or restated.

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

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

- (1) cause the articles to be amended; or
- (2) if appropriate, deliver to the [Secretary of State] for filing an amendment pursuant to Section 203 or a statement of correction pursuant to Section 211.

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

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

1 for filing in the same manner as an amendment.

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

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

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

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

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

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

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

#### 24 **SECTION 205. BYLAWS.**

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

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

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

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

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

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

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

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

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

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

(a) Unless the articles of organization provide otherwise, the board of directors

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

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

5 (2) quorum requirements for the meeting; and

6 (3) designation of additional or substitute directors.

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

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

12 (1) binds the cooperative; and

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

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

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

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

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

24 (a) A dissolved cooperative that has completed winding up may deliver to the

1 [Secretary of State] for filing a statement of dissolution that states:

2 (1) the name of the cooperative;

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

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

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

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

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

16  
17 The statement of dissolution simply indicates that the cooperative has entered winding-up  
18 and this provision could be moved to Article 10. ULPA (2001) does not do so but ULLCA  
19 (1996) does place it there.

20  
21 Termination is a very different creature than dissolution. Upon termination the entity,  
22 and its liability shield, ends.  
23

#### 24 **SECTION 208. 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

1 of a person to wind up the dissolved cooperative's activities must be signed by that person.

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

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

6 **SECTION 209. 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 person that is aggrieved may petition the [appropriate  
9 court] to order:

10 (1) the person to sign the record;

11 (2) 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 the person aggrieved 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. A person aggrieved under subsection (a) may seek the  
16 remedies provided in subsection (a) in the same action in combination or in the alternative.

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

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

21 (a) A record authorized to be delivered to the [Secretary of State] for filing under  
22 this [act] must be captioned to describe the record's purpose, be in a medium permitted by the

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

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

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

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

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

16 (3) 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 (A) the specified date; or

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

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

22 (A) the specified date; or



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

2 **SECTION 211. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

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

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

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

9                   **Reporter's Note**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **Reporter's Note**

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

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

1 **ARTICLE 3**

2 **MEMBERS**

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

5 **Reporter's Note**

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

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

10 (1) as provided in the organic rules;

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

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

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

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

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

18 **Reporter's Note**

19 Source: ULPA (2001).  
20

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

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

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

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

4 Source: ULPA (2001). There has been some discussion about modifying the ULPA  
5 (2001) language to include the word "personal" in an attempt to make the provision clearer but it  
6 is not certain it does so and there is a cost associated with changing the language from one Act to  
7 another if the intent is the same.  
8

## 9 **SECTION 305. RIGHT OF MEMBER AND FORMER MEMBER TO** 10 **INFORMATION.**

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

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

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

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

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

24 (c) Within 10 days after receiving a demand pursuant to subsection (b), the



1 cooperative shall inform the member in a record that made the demand:

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

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

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

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

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

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

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

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

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

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

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

21 (i) Whenever this [act] or the organic rules provide for a member to give or  
22 withhold consent to a matter, before the consent is given or withheld, the cooperative shall,

1 without demand, provide the member with all information material to the member's decision that  
2 the cooperative knows.

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

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

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

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

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

21 \*\*\*

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

31  
32 Since the last drafting meeting an advisor has suggested revisiting subsections (c) and (e)  
33 noting legislative experience on traditional cooperatives in Washington and Oregon. Would

1 including a “statement of interest” obviate the need for many rules on information rights?  
2

3 The interrelationship between this Section of the draft and the rights of dissociated  
4 members and transferees has not yet been fully discussed.  
5

## 6 **SECTION 306. ANNUAL MEMBERS’ MEETINGS.**

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

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

11 (c) Unless otherwise provided by the organic rules, the presiding officer of the  
12 annual members’ meeting shall be designated by the board of directors.

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

### 16 **Reporter’s Note**

17 This section expands the MBCA provision to address issues, *e.g.* meeting chair and  
18 financial reports, typically addressed in general cooperative law. Note that there is no time  
19 period following the close of the fiscal year in which the meeting must necessarily be held.  
20 Annual meetings are not generally required under general partnership law (*e.g.* UPA (1997)),  
21 limited partnership law (*e.g.* ULPA (2001)) or limited liability company law (*e.g.* ULLCA). Best  
22 practice would be to coordinate the dates of the meetings in the organic rules.  
23

24 Although the MBCA, could subsection (a) be deleted without harm?  
25

## 26 **SECTION 307. SPECIAL MEMBER’S MEETINGS.**

27 (a) Special members’ meetings shall be called

28 (1) as provided in the organic rules;

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

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

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

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

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

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

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

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

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

20  
21 The MBCA allows the 10 percent minimum for demand to be varied upward to 25  
22 percent if provided in the articles of incorporation. As drafted, the 10 percent requirement here is  
23 probably mandatory. Should it be?  
24

25 **SECTION 308. EXPRESS AUTHORITY FOR DISTRICT MEETINGS.** The

1 articles of organization of a cooperative may provide that district members may elect delegates at  
2 district member meetings who shall represent the district in annual and special members  
3 meetings.

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

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

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

14  
15 For the notice required of district meetings *see* Section 309(d).  
16

#### 17 **SECTION 309. NOTICE OF MEMBERS MEETINGS.**

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

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

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

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

1 **Reporter's Note**

2 Query whether the members of a district, having elected a delegate, need to be given  
3 notice of the meeting of delegates or whether those members may take part in the meeting. *See*  
4 Reporter's Note, Section 308.  
5

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

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

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

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

15 **Reporter's Note**

16 The interaction of Sections 310 and 311 means that a member objecting to a meeting  
17 under Section 310 is present for purposes of the quorum under 311. The quorum is low. The  
18 quorum requirement could, of course, be bifurcated by the number of the cooperative's members.  
19 Is "voting power" a confusing term? Could it be replaced with "votes"?  
20

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

22 (a) Each patron member has one vote except the organic rules may provide  
23 additional voting power to members on the basis of patronage under Section 314(a) and may  
24 provide for voting by district, group, or class under subsection (b) of this section.

25 (b) The organic rules may provide:

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

3 (2) that districts may elect district delegates to represent and vote for the  
4 district in annual and special meetings of the members.

5 (c) Delegates selected under subsection (b) shall have one vote subject to Section  
6 314(b).

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

8 (1) the aggregate voting power of all patron members shall be not less  
9 than [two-thirds] [three quarters] of the entire voting power entitled to vote [but the organic rules  
10 may reduce the collective voting power of patronage members to not less than a majority of the  
11 entire voting power entitled to vote]; and

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

14 **Reporter's Note**

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

17  
18 The quantum of voting reserved to patron members under Section 312(d) is controversial  
19 because it is a departure from the general law of cooperatives. It has been controversial in  
20 Committee discussion. It is also one of the primary changes that allows for greater flexibility for  
21 capital formation. Other “new generation” cooperative laws are far less restrictive than this draft.  
22 For example, Minnesota substitutes fifteen (15) percent for the two bracketed alternatives and the  
23 “majority” floor.  
24

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

26 (a) Unless otherwise provided by the organic rules, any action that may be taken

1 by the members may be taken without a meeting if each member entitled to vote on such action  
2 consents to the action in a record.

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

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

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

8 What about the possibility of nonvoting members? This Section states the general rule of  
9 unincorporated law and at least some traditional co-op statutes. Under unincorporated law this  
10 provision is a default rule. Should it be mandatory in this organization. *See* Or. Rev. Stat.  
11 §62.305.  
12

## 13 **SECTION 314. DETERMINATION OF VOTING POWER OF PATRONAGE** 14 **MEMBER OR DELEGATE.**

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

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

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

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

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

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



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

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

4                   (b) The collective voting power of nonpatron members is subject to Section  
5 312(c).

6                   **SECTION 316. MANNER OF VOTING.**

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

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

11                                   **Reporter's Note**

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

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

28  
29                   (3) If the bylaws so provide, the board may cause to be submitted  
30 by mail ballot any question to be voted on at any member meeting,  
31 including the election of directors. In such event the secretary shall  
32 mail to each member along with the notice of the meeting, the

1 ballot on each such question and a voting envelope. The ballot  
2 may be cast only in a sealed envelope which is authenticated by the  
3 member's signature. A vote so cast shall be counted as if the  
4 member were present and voting in person.  
5

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

1 **ARTICLE 4**

2 **MEMBERSHIP INTERESTS**

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

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

8 (2) is personal property; and

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

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

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

15 (b) The organic rules may establish nonpatron membership interests and all  
16 nonpatron membership interests shall have equal rights with all other nonpatron membership  
17 interests unless the organic rules:

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

19 (2) authorize the board of directors to establish different classes of  
20 membership interests.

21 **Reporter's Note**

22 The draft of this section is conceptually consistent with the Minnesota Cooperative

1 Associations Act. It differs, however, in that the Minnesota Act contains subsections governing  
2 the form of the board of resolution and a subsection detailing, without limitation, the kinds of  
3 rights and preferences difference classes might possess (*e.g.* cumulative distributions,  
4 distribution preferences, and voting rights).

5  
6 If an agricultural cooperative governed by this draft had not provided for nonpatron  
7 interests, but after formation decided to do so, it would be required to amend either its articles or  
8 bylaws to so provide. This draft requires a two-thirds member vote for bylaw amendments  
9 dealing with members' relative rights and preferences and all article amendments require two-  
10 thirds vote (of those votes present at the members meeting).

11  
12 In order to understand Article 4 it is necessary to reference Article 8 ("Contributions,  
13 Allocations and Distributions"). It may be necessary to add a definition (Section 102) for  
14 financial rights to clarify the intent of Articles 4 and 8. *See*, Section 404, Reporter's Note.  
15

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

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

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

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

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

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

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

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

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

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

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

14 This Section (and article) is based on unincorporated organizational law. For purposes of  
15 the 2005 Annual Meeting it remains unchanged; however, that should not be interpreted as a  
16 Drafting Committee decision to confirm this language. There was much concern expressed  
17 about the intent, operation, and drafting of this Article. As stated in the Reporter's Notes to other  
18 sections the confusion is definitionally rooted. At least to some extent, any ambiguity in the  
19 current draft reflects overlapping use of the terms in industry.

20  
21 Most broadly the solution rests in the following concepts: value given, allocated, or paid  
22 based on:

23  
24 (i) the use of the cooperative (*e.g.*, in a supply co-op the amount paid by a person  
25 for petroleum products during the year) relative to the financial performance of the cooperative;

26  
27 (ii) the delivery of products sold to (*e.g.*, marketing cooperatives) or services  
28 rendered (*e.g.*, worker cooperatives) to or on behalf of the cooperative;

29  
30 (iii) an allocation and/or distribution based on membership or investment in the

1 cooperative.

2  
3 Even under existing traditional law there is a great deal of flexibility given cooperatives  
4 to fashion these payments. For example: entering into a marketing contract (direct payment) with  
5 a producer might require that producer to be a member of the cooperative (and membership may  
6 require an investment – nominal or otherwise) and that any member may receive a year-end  
7 allocation based on the value of product delivered under the contract (and any other additional  
8 product accepted outside the contract) relative to the performance of the cooperative. Further,  
9 under current corporate based statutes, “investors” might purchase preferred stock and, subject to  
10 legal capital constraints, be guaranteed a return.

11  
12 On the other hand, the cooperative may not require membership for entering to a  
13 marketing contract but under its contractual terms promise participation in a defined financial  
14 pool based on the value of the product at time of delivery.

15  
16 Given these two scenarios a reasonable interpretation is that there can be *patron members*  
17 (the producer with the marketing contract requiring membership); *nonpatron members*  
18 (analogous to the preferred shareholder); and, *nonmember patrons* (the producer with the  
19 marketing contract that does not require membership but whom receives a *contractual* payment  
20 based on “business done”).

21  
22 Under the current draft “membership” is not transferable. Thus the member cannot  
23 transfer her voting rights. If a marketing contract *requires* membership as a condition precedent  
24 then, as a practical matter the contract could not be assigned. (Note, however, that payments *on*  
25 *account* of the contract would be subject to other law). If, however, the marketing contract does  
26 *not* require membership; the assignability of the contract or the delegation of its performance  
27 would be governed by contract law outside this draft (personal contract?, anti-assignment  
28 clauses?, *etc.*).

29  
30 Of course, the contract itself could state it is assignable with or without consent of the  
31 cooperative. Likewise, the articles could allow transfer of the membership interest with or  
32 without consent of the cooperative.

33  
34 So the financial interest of the membership is highly contextual on the organic documents  
35 and the “deal”. Nonetheless, there is a dichotomy between the membership interest and the  
36 marketing contract and it seems in the typical the financial interest of the member would *not*  
37 include right to payment under the marketing contract because that would be governed by  
38 contract law.

39  
40 The right *of a member as a member* to receive an allocation based on patronage (or  
41 otherwise) under the default rule, however, would be a financial right.

42  
43 Other uniform unincorporated acts use the term “transferable interest” which might cause

1 less confusion.  
2

3 **SECTION 405. RIGHTS OF CREDITOR OF MEMBER OR TRANSFEEE.**

4 (a) On application to a court of competent jurisdiction by any judgment creditor  
5 of a member or transferee, the court may charge the transferable interest of the judgment debtor  
6 with payment of the unsatisfied amount of the judgment with interest. To the extent so charged,  
7 the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the  
8 share of the distributions due or to become due to the judgment debtor in respect of the  
9 cooperative and make all other orders, directions, accounts, and inquiries the judgment debtor  
10 might have made or which the circumstances of the case may require to give effect to the charged  
11 order.

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

15 (c) At any time before foreclosure, an interest charged may be redeemed:  
16 (1) by the judgment debtor;  
17 (2) with property other than cooperative property, or by one or more of the  
18 other members; or  
19 (3) with members property, by the cooperative with the consent of all  
20 partners whose interests are not so charged.

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

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

### Reporter's Note

This Section is derived with minor modification from ULPA (2001). The charging order provision has been the subject of much discussion in conjunction with the Conference's current LLC drafting project. Because of the significant work being done on this issue in the LLC Committee, this Section is not yet ripe for discussion beyond inclusion of the charging order concept in the context of the agriculture or agricultural cooperative. Minnesota does have an analogue to the charging order provision. *See*, Section 404, Reporter's Note.

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

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

The case where membership is required in order to enter into a marketing contract is probably the most difficult case. If the cooperative chooses to make membership transferable (a derivation from the default rule) it needs to carefully define the "entitlement". For example, it might desire a consent right for the transfer of the membership interest based on proven ability to produce its articles might more clearly delimit that membership is a necessary but not sufficient precondition for actually entering the contract.

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

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

The assumption in the foregoing illustration:



1 (i) will occur only in marketing cooperatives that enter into marketing contracts;  
2 and  
3

4 (ii) will occur only where the cooperative has made a decision to deviate from the  
5 default rule of nontransferability of membership interests (caveat: the bankruptcy courts are  
6 currently struggling with this issue as a matter of LLC law).  
7

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

## ARTICLE 5

## MARKETING CONTRACTS

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

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

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

## Reporter's Note

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

## SECTION 502. MARKETING CONTRACTS.

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

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

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

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

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

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

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

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

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

27 The substance of this section is common to many cooperative statutes.  
28  
29

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 shall not be less than the number of  
8 members in the cooperative as set forth in the organic rules.

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

19  
20 The flexibility afforded to deviate below three directors recognizes the industry practice  
21 of having wholly owned cooperative subsidiaries of a cooperative. In those circumstances the  
22 Committee saw little necessity of having more than one director. Further, if there are two  
23 members the Committee decided that it would be ill-advised to require a minimum of three  
24 directors. Thus, subsection 601(a) provides the members great flexibility, but not unfettered  
25 flexibility, in organizing their own board governance structure.

26  
27 The word "may" in subsection (a) following "the number of directors" replaces the word  
28 "shall" as a matter of style. The Committee may want to discuss this change.  
29

## 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 designate of a member that is not an individual.

(e) The number of nonmember directors elected or appointed 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

1 directors.

2 **Reporter's Note**

3 Subsections (d) and (e) reflect the consensus of the Committee. The word  
4 "representative" in a prior draft has been replaced by the word "designate" in an attempt to cause  
5 less confusion concerning to whom the director owes allegiance under this Act. There was no  
6 prohibition that officers may not serve as directors and subject to discussion at the November  
7 2004 meeting subsection (c) has been added. Note the importance of the word "appointed".  
8 Also note that the number of nonmember directors is severely restricted and reflects a  
9 cooperative policy that is different than corporate policy and at odds with the general thrust of  
10 federal securities laws for publicly traded corporations.  
11

12 **SECTION 604. ELECTION OF DIRECTORS.**

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

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

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

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

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

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

25 **Reporter's Note**

26 Subsection (c) was new in the April 2005 draft and has been revised pursuant to

1 discussion at that meeting. Corporate statutes typically no longer define “cumulative voting”.  
2

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

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

8 (a) Directors’ terms expire at the annual members’ meeting following their  
9 election unless otherwise provided in the articles of organization. In no event may the stated  
10 term of any director exceed three years.

11 (b) Unless otherwise provided in the organic rules, directors may be reelected for  
12 subsequent terms.

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

### 15 **Reporter’s Note**

16  
17 If a successor is not elected the director previously in the position would continue to serve  
18 under the operation of this section. This section coordinates with section 608 (“Board Vacancy”).  
19 Is “may” the correct choice in subsection (a) second sentence (again a matter of style more than  
20 substance).  
21

## 22 **SECTION 606. RESIGNATION OF DIRECTORS.**

23 (a) A director may resign at any time by giving notice in a record to the  
24 cooperative.

25 (b) A resignation is effective when notice is received by the cooperative unless  
26 the notice states a later effective date.  
27



1 **Reporter's Note**

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

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

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

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

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

17 (d) The director against whom a petition has been submitted:  
18 (1) must be informed in a record of the petition before prior to the board  
19 meeting at which the board considered the petition; and  
20 (2) is entitled to an opportunity at the meeting to be heard in person or by  
21 representation and to present witnesses.

22 (e) The person or persons signing the petition are entitled to the same opportunity  
23 to be heard as provided the director in subsection (d)(2).

24 (f) A director may be removed by a majority vote of the directors not subject to

1 removal. If all directors are subject to removal, then removal for cause must be determined:

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

3 (2) if the organic rules do not provide for the appointment of a

4 nonmember director, by appointment of a committee composed of individuals who are not

5 directors under Section 617 or by independent legal counsel retained by the cooperative for that

6 purpose.

7 (g) The director removed for cause under subsection (f) may require a special

8 members' meeting to determine removal by submitting a signed record to the cooperative. The

9 procedure of the special members' meeting must comply with subsections (d) and (e). The

10 director may be removed by the same affirmative vote and in the same manner as the director's

11 election.

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

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

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

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

26 (a) The board of directors may suspend a director if, considering the director's

27 course of conduct and the inadequacy of other available remedies immediate suspension is

1 necessary for the best interests of the cooperative and the director is engaged in:

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

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

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

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

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

7 The Reporter was requested at the November 2004 meeting to draft different judicial  
8 removal of director alternative that would be the equivalent of "changing the locks" on  
9 cooperative management was instructed at the April 2005 meeting to delete judicial removal.  
10 The absence of judicial removal is inconsistent with other cooperative statutes, ULLCA, and  
11 RULPA. The reason for the deletion is to avoid the time and expense of going to court which is  
12 consistent with the *values* of cooperatives but not necessarily the cooperative statutes. Below is  
13 an example of a very short judicial removal proceeding provision.

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

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

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

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

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

21 (b) This section does not limit the equitable powers of the court to order other  
22 relief.  
23  
24

#### 25 **SECTION 609. VACANCY ON BOARD.**

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

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

30 (2) for the unexpired term by members at the next annual members'

meeting or special members' meeting called for that purpose.

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

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

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

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

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

Source: MBCA section 8.11. One question concerns whether the term "remuneration" is the best word choice. It is intended to be a broad term including both director's fees and expenses. Obviously this has become an important topic in publicly traded corporations. The fiduciary duties applicable to other board decisions are generally applicable here, too. Unlike many corporate acts this act does not give express power to make loans to insiders. An example of an alternative provision discussed by the Committee is found in Or. Rev. Stat. Section 62.300 and is set forth below:

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

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

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

1                   **SECTION 611. MEETINGS.**

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

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

8   **Reporter's Note**

9                   The purpose of this section is to provide maximum meeting flexibility.  
10

11                   **SECTION 612. ACTION WITHOUT MEETING.**

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

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

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

18   **Reporter's Note**

19                   The definition of record is in Section 102 and includes electronic medium.  
20  
21

22                   **SECTION 613. MEETINGS AND NOTICE.**

23                   (a) Unless otherwise provided by the organic rules, the board of directors may  
24 establish a time and place for regular board meetings and notice of the time, place, or purpose of

1 those meetings is not required.

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

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

7 Subsection (b) was more closely conformed to RMBCA Section 8.22 (b). At its April  
8 (2005) drafting meeting, however, the Committee decided to require the notice to state the  
9 purpose of the meeting.

10  
11 Best practices might suggest that at least some reminder of the meeting and a proposed  
12 agenda be given directors prior to the meeting. This draft does not require any such notice  
13 because (1) any additional requirements subvert certainty of action taken at meetings; and, (2) if  
14 conforms to the purpose of this act to provide a flexible entity to meet the unique needs of  
15 different groups organized under it.

16  
17 Subsection (a) requires the waiver to be in a record. This is new following the April  
18 (2005) drafting meeting. How well does this work if the meeting is by telephone or other  
19 nontraditional means?

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

24  
25 (d) A director who is present at a meeting of the  
26 board of directors when action is taken shall be  
27 deemed to have assented to the action taken unless:  
28 (1) the director objects at the beginning of  
29 the meeting or promptly upon the directors arrival at  
30 the meeting and does not thereafter vote for or  
31 assent to action taken at the meeting;  
32 (2) the directors assent or abstention from  
33 the action is made in a record  
34 (A) in the minutes of the meeting; or  
35 (B) the director  
36 (i) does not vote for or assent  
37 to the action taken at the meeting; and

1 (ii) delivers notice in a record  
2 to the presiding officer of the meeting before  
3 adjournment or to the cooperative immediately after  
4 adjournment of the meeting.  
5

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

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

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

14 **Reporter's Note**

15 This Section is typical of corporate-like statutes. There has been strong minority dissent  
16 in the Committee concerning "and does not thereafter vote for or...".  
17

18 **SECTION 615. QUORUM.**

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

22 (b) If a quorum is in attendance at the beginning of the meeting, any action taken  
23 by the board of directors present is valid even if the withdrawal of directors originally present  
24 results in the number of directors being less than the number required for a quorum.  
25

1 **Reporter's Note**

2 The Committee is concerned that “attendance” in subsection (b) may not be the correct  
3 word choice. Given the waiver provisions of section 614 the term “presence” seems even less  
4 satisfying. As a point of reference, “attendance” is used in the RMBCA.  
5

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

8 **Reporter's Note**

9 The sense of the drafting committee is that one-director/one-vote as mandatory and  
10 cannot be varied by the organic rules. A prior draft allowed weighted voting and would have  
11 moved a cooperative under this act closer to a manager-managed LLC in form. Such flexibility,  
12 however, creates both drafting and conceptual operational concerns concerning the voting  
13 restrictions protecting patron members. It is also inconsistent with traditional cooperative law  
14 and may be seen as a tool to abuse traditional cooperative values.  
15

16 **SECTION 617. COMMITTEES.**

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

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

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

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

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



1 or

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

3 **Reporter's Note**

4 Special litigation committee, audit committee; Minnesota allows non-directors to be  
5 members of a committee. This draft allows non-members to serve on committees. *See* section  
6 607(f). This is an important policy decision.

7  
8 This draft does not expressly allow executive committees but many cooperative statutes  
9 do so. Nothing herein intentionally prohibits establishing an executive committee. Because this  
10 draft does not expressly contain reference to an executive committee it does not put a prohibition  
11 on nondirectors serving thereon.

12  
13 Subsection (c)(1): The Reporter was directed by the Committee to replace the word  
14 “distribution” with “allocation”. For discussion purposes both terms remain in this draft. It  
15 seems the approval of distributions would be the kind of decision that should be made by the  
16 entire board just as the allocation is such a decision.

17  
18 There was an interesting discussion concerning cooperative practice and tradition as it  
19 relates to nondirector members observing board meetings. The comments to this section will  
20 reference that issue. In part it appears both the historical roots of some cooperatives in the  
21 nonprofit sector and, perhaps, other regulatory law for cooperatives performing regulated  
22 functions might be the source of this tradition. This draft implicitly allows the board to “close”  
23 board meetings and other law (*e.g.* employment law) might, in effect, require the board to do so.  
24 Speculatively, the presence of nondirectors *may* help explain the relatively broad use of executive  
25 committees by cooperatives.

26  
27 **SECTION 618. STANDARDS OF CONDUCT AND LIABILITY.**

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

32 (b) Except as otherwise provided in Sections 620 and 622, the liability of a  
33 director or a member of a committee of the board of directors is governed by [the State

Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General Business Corporation Act of this State] [as amended].

### **Reporter's Note**

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

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

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

1 that it (unintentionally) raises a delegation issue in some states. This change has not yet been  
2 vetted by the Drafting Committee.  
3

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

9 **Reporter's Note**

10 See the Reporter's Note to Section 618.  
11

12 **SECTION 620. LIMITATION OF DIRECTOR'S DUTIES.** The articles of  
13 organization may vary the standards under Sections 618 and 619 except that the articles may not:  
14 (1) eliminate the provisions concerning conflict of interest under Section 619, but  
15 may:

16 (A) identify specific types of categories or activities that are not conflicts  
17 of interest, if not manifestly unreasonable; and

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

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

22 (3) eliminate any obligation of good faith under Section 618, but the articles it  
23 may prescribe the standards by which the performance of the obligation is to be measured, if the

standards are not manifestly unreasonable.

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

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

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

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

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

**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.

1 It may be another, though incomplete, way of communicating the idea of a “cooperative plan”  
2 which is used in state law without definition (the term “cooperative plan” is not used in this  
3 draft).  
4

#### 5 **SECTION 623. APPOINTMENT AND AUTHORITY OF OFFICERS.**

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

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

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

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

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

#### 16 **Reporter’s Note**

17 Almost all current cooperative acts follow pre-1984 business corporation law either  
18 requiring or expressly permitting named offices. This draft does not do so. Rather, it is  
19 consistent with the flexibility of the law of unincorporated organizations and provides the  
20 flexibility present in many cooperative statutes in a more (word) efficient way. Thus it which is  
21 closer to post-1984 business corporation law rather than the existing cooperative statutes based  
22 on pre-1984 corporate law. Thus, it also follows unincorporated law in the flexibility it provides.  
23 Nonetheless, because directors are not agents because of director status, the cooperative (through  
24 its board) will be required to have agents. The language of this draft requires at least one of these  
25 agents to be designated an officer under subsection (b).  
26

#### 27 **SECTION 624. RESIGNATION AND REMOVAL OF OFFICERS.**

28 (a) The board of directors may remove an officer at any time with or with out

1     cause.

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

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

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

9  
10            There is a distinction between the power to remove an officer and the right to do so. This  
11   section is intended to give complete discretion to the board of directors to remove officers (the  
12   power). The exercise of that power; however, may very well lead to a damage claim by the  
13   officer if, for example, the officer has a separate employment contract. The exercise of the power  
14   could also violate other law (*e.g.* Title VII of the Civil Rights Act).

15  
16            The “power” language in Subsection (a) raises a power-right dichotomy similar to the one  
17   raised in Section 606. As a matter of style, it has been urged to delete such language and replace  
18   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 ULPAA (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.



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 or losses between classes or groups of members.

21                   (b) Unless the articles of organization otherwise provide, patron members must  
22                   be allocated not less than 50 percent of the net proceeds, savings, margins, profits, or losses in  
23                   any fiscal year. The articles may not reduce the percentage allocated to patron members to less  
24                   than 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 or 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 in excess of the uses under subsection (a) to patron members annually in  
8 accordance with the ratio of each member's patronage during the period to total patronage of all  
9 members during the period.

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

10 “Allocated” is a term of art in both cooperative and unincorporated law. “Net proceeds”  
11 is a term of art in cooperative law. The comment to this section will need to address those terms.  
12

### 13 **SECTION 805. DISTRIBUTIONS.**

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

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

### 19 **Reporter’s Note**

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

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

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 (f), the effect of a distribution  
23 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 does have the power to dissociate.

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

9 (1) the cooperative's having notice 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 a cooperative and, within 90  
20 days after the cooperative notifies the person that it will be expelled as a member because it has  
21 filed a public document of dissolution, it has been administratively or judicially dissolved, its  
22 charter has been revoked, or its right to conduct business has been suspended by the jurisdiction



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

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

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

6 (6) in the case of a person that is a trust, distribution of the trust's entire  
7 financial interest in the cooperative, but not merely by the substitution of a successor trustee;

8 (7) in the case of a person that is an estate, distribution of the estate's  
9 entire financial interest in the cooperative, but not merely by the substitution of a successor  
10 personal representative;

11 (8) termination of a member that is not an individual, partnership, limited  
12 liability company, cooperative, corporation, trust, or estate;

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

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

16 Source: Closely derived from ULPA (2001) § 601. Subsection (b)(5) follows ULPA in  
17 that it does not state incompetency as an event of dissociation but see Section 903 which can be  
18 read inconsistently. The Comments to this Section need to explain the difference between  
19 subsection (b)(5) and (b)(7). An individual is dissociated upon death under (b)(5) and her estate  
20 has the powers conferred by Section 903. Subsection (b)(7) applies where the (an) estate is  
21 carrying on business and becomes a member by admission. Example: An individual whom was  
22 not a member of the cooperative dies. Her estate anticipates carrying on farming business for  
23 three years before it closes. The estate could become a member of the cooperative pursuant to  
24 the organic rules of the cooperative for admission of members. The issue raised by  
25 incompetency needs yet to be vetted. See section 903 which as currently drafted is inconsistent  
26 with subsection (b)(8). Subsection (b)(4)(C) has been revised and the language is now different  
27 than ULPA (2001).  
28

1 Subsection 901(b)(4)(B) states “subject to Section 405” and it is now corrected to reflect  
2 it is subsection 404 (g) which is the security interest exception for transfers.

3  
4 Section 901(b) contemplates expulsion by the organic rules but there is no default rule for  
5 expulsion. Former subsection (b)(5) read:

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

9 (A) the person engaged in wrongful conduct that adversely and  
10 materially affected the cooperative’s activities;

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

13 (C) the person engaged in conduct relating to the cooperative’s  
14 activities which makes it not reasonably practicable to carry on the  
15 activities with the person as member.  
16

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

18 (a) Upon a person’s dissociation as a member:

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

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

24 (b) A person’s dissociation as a member does not of itself discharge the person  
25 from any obligation to the cooperative which the person incurred while a member.

### 26 **Reporter’s Note**

27 Source: ULPA (2001) § 602. The ULPA (2001) counterpart includes a subsection that  
28 refers only to specifically cross-referenced obligations of good faith and fair dealing and that  
29 subsection has been deleted under this draft. “[O]r other members” was also deleted in (b),  
30 which is consistent, because under this act there is no specific member to member duty (similar  
31 to the basic resolution of duties to limited partners but in ULPA there is a sliding scale where a  
32 limited partner undertakes management obligations). The Comment to this section will include

1 both reference and discussion of the four possible sources of financial return of a member: (1)  
2 under a production (or other) contract; (2) patronage distributions; (3) patronage retains; (4)  
3 return on invested capital. Subsection (b) is important in the context of obligations under a  
4 marketing contract.  
5

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

11 **Reporter's Note**

12 Source: ULP A (2001) § 704. *See* Reporter's Note to section 901 concerning the absence  
13 of incompetency as a cause of dissociation by a member. The Committee suggests that the  
14 guardian of an incompetent will be treated for all purposes the same as an estate through the law  
15 of guardianship but that issue should be left to other law. Other law will also channel obligations  
16 between those that must be personally performed and those that may be "assigned". It might be  
17 advisable for the Comment to suggest this issue (and a related one concerning nonadjudicated  
18 durable powers) be contemplated by the organic rules and the terms of the marketing contract, if  
19 any. Whether incompetency effects the contract will depend, in some instances, on the  
20 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 vote of the organizers, board of directors, or members under Section 1004
- 14 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 which 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 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;

23 (3) in a proceeding by the cooperative to have its voluntary dissolution continued  
24 under court 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 cooperatives 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.  
25



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.  
22

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 1007

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

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

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

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

1 assets; or

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

### 7 **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 1007 and 1008.

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 prepare a declaration of reinstatement that states this determination, sign, and file the  
23 original of the declaration of reinstatement, and serve the cooperative with a copy.

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

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

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

4 Source: ULPA, ULLCA, generally follows the MBCA. At the Committee's direction the  
5 phrase "or continue" was added to subsection (c). The Comments need to explain the effect on  
6 third parties. It is unintended, in that regard, to be completely consistent with corporate and  
7 unincorporated law.  
8

## 9 **SECTION 1012. APPEAL FROM DENIAL OF REINSTATEMENT.**

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

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

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

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

21 Source: ULPA § 811. This article is also conceptually consistent with existing  
22 cooperative law. It is also a point where the "unclaimed and abandoned property" provision  
23 might apply. The Reporter has been directed by the Drafting Committee to determine if it is  
24 appropriate and consistent with other conference products to include the language for a filing and  
25 fees section.

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

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

15 **Reporter's Note**

16 Source: § 1001 ULPA (2001) (modified). 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).  
26

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

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

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

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

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

10 Source: § 1002 ULPA (2001). Is 90 days too long, *but see* the Reporter's Note following  
11 section 1104. Oregon uses 20 days. *See* section 1104. This draft does not contain a futility  
12 exception. Subsection (1) formerly required a writing, the Committee discussed replacing it with  
13 record, this draft goes back to the language in ULPA (2001).  
14

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

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

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

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

21 Source: § 1003 ULPA (2001). Query whether the requirement that the person bringing a  
22 suit be a member at the time of commencement is advisable or necessary. Most corporate  
23 statutes so provide. It is consistent with other conference products. A Comment or Legislative  
24 Note should direct states to determine the placement of derivative actions within their won codes.  
25 South Dakota's derivative procedures, for example, appear in it's code of civil procedure. The  
26 South Dakota provision and, some other corporate codes, require that the plaintiff "fairly  
27 represents" the interest of the corporation. This draft does as well. See § 1002.



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

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

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

7           **SECTION 1105. PROCEEDS AND EXPENSES.**

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

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

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

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

17                                   **Reporter's Note**

18                   Source: § 1005 ULPA (2001).

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

21                   Section 1102 modifies the ULPA (2001) formulation by adding the requirement that the  
22 member adequately represents the interests of the cooperative; by adding a 90 day time period  
23 after demand before suit may be commenced; and by deleting excused demand because of  
24 futility. The 90 day period may be excused if the waiting period would result in irreparable harm

1 to the cooperative under subsection 1102(2). These modifications generally follow the law of the  
2 Model Business Corporations Act. This draft does not include the MBCA provision concerning  
3 litigation committees and the authority of the committee to have the suit dismissed if the  
4 committee exercises good faith. One reason for not providing for such committees is because of  
5 the limited availability of outside or independent directors under this draft. Nonetheless the  
6 addition of the requirement that the member bringing the derivative suit “adequately represent”  
7 the cooperative should provide a framework for the evolution of such concepts under the  
8 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 an agricultural or agricultural related cooperative may not  
13 engage in or exercise in this state.

14 Reporter's Note

15 "Cooperative" is defined in this draft as a cooperative organized under this Act which  
16 Section 105 states is "any lawful agricultural or agricultural related purpose". This is supported  
17 by sections 1204 and 1205. Therefore all references to "agricultural or agricultural related" have  
18 been deleted. Any change in the scope of this act would require conforming language. The  
19 "agricultural or agricultural related" in subsection (c) is ambiguous but it is a matter of definition  
20 broader than its mere use in this subsection. It may, however, set up slight inconsistency with  
21 subsection (b) of this section; though the purposes of the two subsections are clearly different.  
22

23 SECTION 1202. APPLICATION FOR CERTIFICATE OF AUTHORITY.

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

1 application must state:

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

4 (2) the name of the state or other jurisdiction under whose law the foreign  
5 cooperative is organized;

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

10 (4) the name and street and mailing address of the foreign cooperative's  
11 agent for service of process in this state;

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

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

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

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

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

1 (2) holding meetings of its members or carrying on any other activity  
2 concerning its internal affairs;

3 (3) maintaining accounts in financial institutions;

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

7 (5) selling through independent contractors;

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

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

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

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

18 (10) transacting business in interstate commerce.

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

22 (c) This section does not apply in determining the contacts or activities that may

1 subject a foreign cooperative to service of process, taxation, or regulation under any other law of  
2 this state.

3 **Reporter's Note**  
4

5 Source: ULPB (2001) § 903.  
6

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

13 **Reporter's Note**  
14

15 Source: ULPB (2001) § 904.  
16

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

18 (a) A foreign cooperative whose name does not comply with Section 109 may not  
19 obtain a certificate of authority until it adopts, for the purpose of transacting business in this  
20 state, an alternative name that complies with Section 111. A foreign cooperative that adopts an  
21 alternative name under this subsection and then obtains a certificate of authority with the name  
22 need not comply with [fictitious name statute]. After obtaining a certificate of authority with an  
23 alternative name, a foreign cooperative shall transact business in this state under the name unless  
24 the foreign cooperative is authorized under [fictitious name statute] to transact business in this  
25 state under another name.

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

4 **Reporter's Note**

5  
6 Source: ULPA (2001) § 905.  
7

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

9 (a) A certificate of authority of a foreign cooperative to transact business in this  
10 state may be revoked by the [Secretary of State] in the manner provided in subsections (b) and (c)  
11 if the foreign cooperative does not:

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

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

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

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

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

notice must state:

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

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

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

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

Source: ULPB (2001) § 906.

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

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

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

(c) The failure of a foreign cooperative to have a certificate of authority to transact business in this state does not impair the validity of a contract or act of the foreign



1 cooperative or prevent the foreign cooperative from defending an action or proceeding in this  
2 state.

3 (d) A member of a foreign cooperative is not liable for the obligations of the  
4 foreign cooperative solely by reason of the foreign cooperative's having transacted business in  
5 this state without a certificate of authority.

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

9 **Reporter's Note**

10  
11 Source: ULPA (2001) § 907.  
12

13 **SECTION 1208. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]  
14 may maintain an action to restrain a foreign cooperative from transacting business in this state in  
15 violation of this [article].

16 **Reporter's Note**

17  
18 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 BY-LAWS. In order 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 This section is derived from Colorado section 7-55-110.  
11  
12

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

14 (a) No substantive amendment of the proposed amendment of the organic rules  
15 may be made at the members' meeting at which the vote occurs.

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

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

20 **Reporter's Note**

21 At the November 2004 meeting the term "germane" was suggested. This draft uses the  
22 term "substantive".  
23  
24

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 except that a two-thirds  
6 vote of 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, or 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 included 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 shareholder's 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 1308. RESTATED ARTICLES.** A cooperative, by action taken under [this  
17 article] required for amendment of its organic rules, may adopt restated articles that contain the  
18 original articles as currently amended. Restated articles supersede the existing articles and all  
19 amendments upon filing under [Article 2].

1 [ARTICLE] 14

2 CONSOLIDATION AND MERGER

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

5 (1) “Consolidation” means a merger of two or more constituent organizations that  
6 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 that  
14 results in the surviving cooperatives having the name of one of the constituent organizations.

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

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

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

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

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

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

28 (1) the governing statute of each the other organizations authorizes the



1 merger;

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

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

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

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

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

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

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

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

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

## 21 **Reporter's Note**

22 Subsection (6) is derived from section 1406 in the November draft which was based on

1 ULPA (2001).  
2

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

5 (a) Unless otherwise provided in the organic rules, the plan of consolidation or  
6 merger must be approved by a majority vote of the board of directors.

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

9 (1) the plan;

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

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

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

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

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

19 (a) Unless the organic rules provide for a greater quantum and subject to Section  
20 312, a plan of consolidation or merger must be approved by at least a two-thirds vote of members  
21 voting under Section 311 and, if as a result of the merger any member of the cooperative has  
22 personal liability as a result of the merger, consent in a record of that member.

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

(1) as provided in the plan; and

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

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

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

(b) The cooperative owning at least 90 percent of the subsidiary organization before the consolidation or merger shall notify each other owner of the subsidiary, if any, of the consolidation or merger within 10 days after the effective date of the consolidation or merger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 (1) if the surviving organization is a cooperative, upon the later of:
- 2 (A) compliance with subsection (c); or
- 3 (B) subject to Section [210], as specified in the articles of
- 4 consolidation or merger; or
- 5 (2) if the surviving organization is not a cooperative, as provided by the
- 6 governing statute of the surviving organization.

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

- 8 (a) When a merger becomes effective:
- 9 (1) the surviving organization continues or comes into existence;
- 10 (2) each constituent organization that consolidates or merges into the
- 11 surviving organization ceases to exist as a separate entity;
- 12 (3) all property owned by each constituent organization that ceases to
- 13 exist vests in the surviving organization;
- 14 (4) all debts, liabilities, and other obligations of each constituent
- 15 organization that ceases to exist continue as obligations of the surviving organization;
- 16 (5) an action or proceeding pending by or against any constituent
- 17 organization that ceases to exist may be continued as if the merger had not occurred;
- 18 (6) except as prohibited by other law, all of the rights, privileges,
- 19 immunities, powers, and purposes of each constituent organization that ceases to exist vest in the
- 20 surviving organization;
- 21 (7) except as otherwise provided in the plan of consolidation or merger,
- 22 the terms and conditions of the plan take effect; and

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

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

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

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

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

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

**Source:** ULPA (2001). The plan will by necessity address the pre-merger terms of the directors and board officers.

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

**SECTION 1409. [ARTICLE] NOT EXCLUSIVE.** This [article] does not preclude a cooperative from being converted or merged under other law.

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

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

1 of cooperatives to identify any specific concerns caused by META.  
2

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

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

1 **[ARTICLE] 15**

2 **SALE OF SUBSTANTIALLY ALL ASSETS**

3  
4 **[RESERVED]**

5 **Reporter's Note**

6 This Article will closely follow the language and format of the mergers article. Thus, it  
7 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 patter 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 in this state] and are governed by [citation to the applicable  
2 restraint of trade and antitrust provisions].

3 **Reporter's Note**  
4

5 See the Note to Section 1701. Section 1703, and to a lesser extent Section 1702, might  
6 be better placed in Article 5 ("Marketing Contract") but are in Article 17 of this draft for  
7 purposes of discussion.  
8

9 These sections will require a strong legislative note. One of the issues that needs to be  
10 addressed by the legislative note is how to conform the provision to apply to this Act if it is not  
11 completely self-executing. *E.g.*, if it simply states that "cooperatives complying with...".  
12

13 **SECTION 1703. INDUCING BREACH OF MARKETING OR PURCHASE**

14 **CONTRACTS.** The remedies provided by [citation to the applicable statutory provisions] apply  
15 to cooperatives.

16 **Reporter's Note**  
17

18 See the Note to Section 1702.  
19

20 **SECTION 1704. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

21 applying and construing this uniform act, consideration must be given to the need to promote  
22 uniformity of the law with respect to its subject matter among states that enact it.

23 **SECTION 1705. SEVERABILITY.** If any provision of this [act] or its application to  
24 any person or circumstance is held invalid, the invalidity does not affect other provisions or  
25 applications of this [act] which can be given effect without the invalid provision or application,  
26 and to this end the provisions of this [act] are severable.

27 **Reporter's Note**

28 The Committee on Style suggested Section 1705 is unnecessary. It remains in the 2005

1 Annual Meeting Draft only because a similar provision is included in ULPA (2001) and,  
2 therefore, it seems it should be briefed by the Reporter and discussed by the Drafting Committee.  
3 In doing so, the Reporter fully understands the position of the Committee on Style, and the  
4 implicit agreement by the Conference, that a severability clause should be used only where there  
5 is genuine doubt concerning constitutionality and its inclusion here should not be interpreted as  
6 disagreeing with those well-reasoned positions.  
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].