

D R A F T
FOR DISCUSSION ONLY

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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January 24, 2020

ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT

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1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **Prefatory Note**

3 This act is designed to cover economic rights and obligations that arise between
4 cohabitants based on their relationship. Its goal is to ensure that a person’s capacity to contract
5 or to obtain an equitable remedy is not affected by that person’s intimate relationship status with
6 any party.

1 **ECONOMIC RIGHTS OF UNMARRIED COHABITANTS ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

4 **SECTION 101. SHORT TITLE.** This [act] may be cited as the [Uniform] Economic
5 Rights of Unmarried Cohabitants Act.

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

7 (1) “Cohabitant” means one of two individuals who live together as a couple, or live apart
8 together, in an intimate, committed relationship and function as an economic, social, and
9 domestic unit. The term:

10 (A) includes an individual who is not married during the period of cohabitation
11 but cohabited with an individual who is married during the period of cohabitation only if the
12 unmarried individual did not know or have reason to know that the other individual was married;
13 and

14 (B) does not include:

15 (i) an individual who is married during the period of cohabitation except
16 for purposes of enforcing rights and remedies under this [act] in favor of an unmarried individual
17 who unknowingly cohabited with a married individual;

18 (ii) an individual whose marriage to the other individual would not be
19 recognized under law of this state other than this [act]; and

20 (iii) an unemancipated minor who otherwise would be a cohabitant under
21 this [act] when the cohabitation began.

22 (2) “Cohabitants’ agreement” means the manifestation of assent between two cohabitants
23 regarding their reciprocal economic interests and rights arising within the context of their

1 relationship.

2 (3) “Court” means a tribunal having jurisdiction under the laws of this state over
3 [divorce, family, or probate matters].

4 (4) “Domestic services” includes cooking; cleaning; shopping; household maintenance;
5 doing errands for the household; caretaking, including caring for a child of a cohabitant or for the
6 other cohabitant or a family member of the cohabitant; or other similar activities. The term does
7 not include sexual conduct.

8 (5) “Economic right” means any express or implied interest, right, responsibility, duty,
9 promise, or obligation of a cohabitant relating to:

10 (A) the value of the benefit conferred by domestic services rendered by one
11 cohabitant for the benefit of the other or both cohabitants; or

12 (B) property or an interest in property.

13 (6) “Individual” means a natural person of any age.

14 (7) “Property” means anything that may be the subject of ownership or any interest in the
15 thing, whether real or personal, tangible or intangible, legal or equitable. The term includes
16 financial obligations and assets.

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

19 (9) “Sign” means, with present intent to authenticate or adopt a record:

20 (A) to execute or adopt a tangible symbol; or

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

23 (10) “State” means a state of the United States, the District of Columbia, Puerto Rico, the

1 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
2 the United States.

3 (11) “Termination of the cohabitants’ relationship” means either:

4 (A) the death of one of the cohabitants; or

5 (B) the time at which a cohabitant knows or has reason to know of the other
6 cohabitant’s intent to end their relationship.

7 **Note:**

8

9 The definition of “cohabitant” specifies to whom the act applies.

10

11 The parties cannot be in a common law or other lawful marriage at any point during their
12 relationship, subject to the exception stated in Subsection 102(1)(A).

13

14 Subsection 102(1)(A) is based on the concept of putative spousehood recognized in the
15 Uniform Marriage and Divorce Act (UMDA). A putative spouse means one who has a good
16 faith belief that the parties could be married to one another. *See* UMDA § 209, below. There
17 may be situations involving a married cohabitant and an “innocent” cohabitant who does not
18 know of the other cohabitant’s marriage. This definition protects the rights of the innocent
19 cohabitant. While this provision may affect the rights of the innocent spouse, its goal is to
20 ensure that equity between the cohabitants is done.

21

22 Section 209 of the Uniform Marriage and Divorce Act provides:

23

[Putative Spouse];

24

*Any person who has cohabited with another to whom he is not legally married in
25 the good faith belief that he was married to that person is a putative spouse until
26 knowledge of the fact that he is not legally married terminates his status and
27 prevents acquisition of further rights. A putative spouse acquires the rights
28 conferred upon a legal spouse, including the right to maintenance following
29 termination of his status, whether or not the marriage is prohibited (Section 207)
30 or declared invalid (Section 208). If there is a legal spouse or other putative
31 spouses, rights acquired by a putative spouse do not supersede the rights of the
32 legal spouse or those acquired by other putative spouses, but the court shall
33 apportion property, maintenance, and support rights among the claimants as
34 appropriate in the circumstances and in the interests of justice.*

35

36 To qualify as a cohabitant, the individuals need not live together but can be part of a
37 “living apart together” (“LAT”) couple. This is an increasingly common relationship. See, e.g.,
38 Cynthia Grant Bowman, *Living Apart Together As A "Family Form" Among Persons of*
39 *Retirement Age: The Appropriate Family Law Response*, 52 Fam. L.Q. 1 (2018)(exploring the
40 phenomenon of LAT couples among Baby Boomers); *How Should the Law Treat Couples Who*

1 *Live Apart Together?*, 29 Child & Family Law Quarterly 335 (2017)(discussing living apart
2 together couples and suggesting that LAT couples should have certain legal rights, focusing on
3 those designed to promote caretaking, not economic interdependence). For example, the
4 cohabitants may be separated because one or both is stationed by the military in different places,
5 or it may be two people live on separate floors in an assisted living facility, or two people who
6 live in separate residences because of employment or imprisonment or a variety of other
7 reasons. These couples nonetheless remain committed to one another and continue to function as
8 a unit for many purposes.
9

10 A “cohabitants’ agreement” requires mutual assent and consideration. Although not
11 expressly stated in the definition, an agreement may specify that the cohabitants will have no
12 reciprocal rights or obligations. *See, e.g.*, Section 403.
13

14 The definition of “court” is drawn from Section 102(6) of the Uniform Child Custody
15 Jurisdiction and Enforcement Act. We recognize that in some states, divorce and probate actions
16 are tried by a jury and, in others, tried by a judge. Also, in some states divorce and other family
17 law matters are heard in different courts. While ultimately states will need to decide on the
18 appropriate tribunals to hear cases brought under this act, this draft includes language intended to
19 provide direction. Because cohabitant claims differ from those in commercial cases, we believe
20 the appropriate court upon dissolution of the cohabitation should generally be the state court that
21 handles family law matters, not contracts. *Cf.*, *Matter of Estate of Cooney*, __ P.3d. __, 2019
22 WL 7161295 *3 (Mont. 2019)(“A probate court has authority to settle claims against the estate,
23 such as creditor claims.[] Enforcement of a contract to devise property is not a claim against the
24 estate. . . The probate court’s limited jurisdiction does not extend to adjudicating a breach of
25 contract claim”).
26

27 Each state should determine which courts will have jurisdiction. The state may want to
28 designate the family law court (if any) to hear claims between cohabitants upon breach or
29 dissolution of their relationship and the probate court, if any, to hear claims concerning
30 cohabitants at death.
31

32 The definition of “domestic services” focuses on the actual provision of these services.
33 Payments made by one cohabitant for these services could be the subject of another claim under
34 this act.
35

36 The definition of “economic right” is broad enough to include the possibility of liability
37 for ongoing payments between cohabitants or former cohabitants. This may include payments
38 after the cohabitation terminates, if an agreement so provides, but in few, if any, other
39 circumstances. It does not cover tort suits. With respect to the value of domestic services,
40 “economic right” means the value of any benefit conferred as a result of the domestic services or
41 the actual replacement value of the domestic services. For example, domestic services may
42 contribute to the other cohabitant’s ability to earn money. *See* Albertina Antognini, *Nonmarital*
43 *Coverture*, 99 B.U. L. Rev. 2139 (2019) (cases routinely deny access to property in the context
44 of a relationship that involved domestic services).
45

1 The definition of “termination of the cohabitants’ relationship” is adapted from Section
2 801 of the Uniform Partnership Act, which states: “A partnership is dissolved, and its business
3 must be wound up, upon the occurrence of any of the following: (1) in a partnership at will, the
4 partnership knows or has notice of a person’s express will to withdraw as a partner . . .”
5

6 Termination refers to both death of a cohabitant and dissolution of the relationship.
7 Termination is an objective standard as to when the cohabitant knows or has reason to know of
8 the other cohabitant’s intent to end their relationship. Serving a prison sentence, for example,
9 does not, in and of itself, terminate the cohabitation. Issues concerning commencement of the
10 statute of limitations upon termination are addressed in Section 104. Most breach of contract
11 suits or similar property recovery causes of action survive death. David Horton, *Indescendibility*,
12 102 Cal. L. Rev. 543, 557 (2014).
13

14 **SECTION 103. SCOPE.**

15 (a) This [act] applies:

16 (1) to the recognition and enforcement of economic rights between two
17 cohabitants that arise by virtue of agreements between two cohabitants regarding their economic
18 rights and remedies;

19 (2) under circumstances where one cohabitant has been unjustly enriched; or

20 (3) under circumstances in which equity and justice otherwise require a remedy.

21 (b) This [act] does not alter, diminish, or enlarge the application of the doctrine of
22 common law marriage as may be recognized or prohibited by this state.

23 (c) Except as specifically provided in this [act], the [act] does not create, affect, enlarge,
24 or diminish a cohabitant’s rights or duties under law of this state other than this [act].

25 (d) Except as specifically provided in this [act], nothing in this [act] may otherwise be
26 construed or applied to create, affect, enlarge, or diminish rights accruing under law of this state
27 other than this act in favor of the spouse of an individual who would be a cohabitant if not
28 married.

29 **Note:** This Section restates the coverage of the Act. It provides an overview of the goals
30 of this act.
31

1 **SECTION 104. LIMITATION OF ACTION.**

2 (a) The statute of limitations applicable to an action asserting a claim for relief is:

3 (1) One year after breach where there has been a breach of the cohabitants’
4 agreement; or

5 (2) One year after termination where there has been a termination of the
6 cohabitants’ relationship other than by death.

7 (b) The statute of limitations applicable to an action asserting a claim for relief based
8 upon termination of the cohabitants’ relationship due to the death of one cohabitant is governed
9 by the [state probate code].

10 (c) If cohabitants marry each other, the marriage terminates the accrual of any additional
11 rights between cohabitants under this [act] and tolls the statute of limitations until either
12 cohabitant files for divorce or dies.

13 **Note:**

14 The act does not preclude either cohabitant from asserting an equitable defense limiting
15 or enlarging the time for enforcement, such as laches or estoppel.

16
17 Courts increasingly take into account premarital cohabitation in distributing property at
18 divorce. *See, e.g., Matter of Munson*, 146 A.3d 153, 157-58 (N.H. 2016)(permitting trial court to
19 consider premarital cohabitation in dividing property at divorce, and listing other states that do
20 so, including Indiana, Montana, Michigan, and Oregon). In light of this trend, the act permits
21 agreements made during premarital cohabitation to be considered at the end of a marriage. The
22 act tolls the statute of limitations on the enforcement of such agreements during a marriage that
23 follows a cohabitation and allows consideration of the agreement in any subsequent divorce or
24 probate proceeding.

25
26 **SECTION 105. RULES OF CONSTRUCTION.**

27 (a) This [act] must be broadly construed to ensure the predictable and just disposition of
28 the economic rights of cohabitants.

29 (b) The common law of this state and principles of equity supplement this [act], except to

1 the extent specifically modified by this [act] or by law of this state other than this [act].

2 **Note:** This act is intended to give the courts broad discretion to "do equity" as between
3 the parties. Subsection (b) permits a court to apply a jurisdiction's law concerning unjust
4 enrichment and other legal and equitable principles and is drawn from Section 106 of the
5 Uniform Trust Code (2018), which provides: "The common law of trusts and principles of equity
6 supplement this [Code], except to the extent modified by this [Code] or another statute of this
7 State."

8 Note, for example, that to the extent the act establishes burdens of proof for unjust
9 enrichment, it may supersede a state's common law.

10
11 **SECTION 106. GOVERNING LAW.**

12 (a) The validity, enforceability, interpretation, and construction of an agreement is
13 determined by:

14 (1) the law of the jurisdiction designated in a cohabitants' agreement, if the
15 jurisdiction has a significant relationship to the agreement or either cohabitant and the designated
16 law is not contrary to a fundamental public policy of this state; or

17 (2) absent an effective designation, the law of this state, including the choice-of-
18 law rules of this state.

19 (b) In all other cases, a claim brought under this [act] is governed by law of this state
20 other than this [act], including the choice-of-law rules of this state.

21 **Note:** This is drawn from UPMAA Section 4:

22
23 *SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation,*
24 *and construction of a premarital agreement or marital agreement are determined:*
25 *(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a*
26 *significant relationship to the agreement or either party and the designated law is not*
27 *contrary to a fundamental public policy of this state; or*
28 *(2) absent an effective designation described in paragraph (1), by the law of this state,*
29 *including the choice-of-law rules of this state.*

30 Subsection (a) relates to agreements, while subsection (b) applies to all other claims.
31

1 **SECTION 203. IMPLIED-IN-FACT AGREEMENT.** A court may find an implied-
2 in-fact cohabitants’ agreement manifested through the cohabitants’ language, conduct, or silence.

3 **Note:** An implied-in-fact agreement differs from an express contract only “in the mode
4 of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes
5 including silence, so intention to make a promise may be manifested in language or by
6 implication from other circumstances.” Restatement (Second) of Contracts § 4 cmt. (1981).

7
8 **SECTION 204. BURDEN OF PROOF.**

9 (a) An express, written cohabitants’ agreement that is signed by the cohabitant against
10 whom enforcement is sought must be shown by a preponderance of the evidence. A cohabitants’
11 agreement that is contained in a record must be shown by a preponderance of the evidence.

12 (b) The existence of the following must be shown by clear and convincing evidence:

13 (1) a written cohabitants’ agreement which is unsigned or signed only by the
14 cohabitant seeking to enforce the agreement, an express oral agreement, or an implied-in-fact
15 agreement; and

16 (2) a term of an agreement under paragraph (b)(1) that is sought to be enforced.

17 (c) The burden of proof is on a cohabitant seeking to enforce the cohabitants’ agreement
18 or the terms of that agreement.

19 **Note:** As the Supreme Court has recognized, “even if the particular standard-of-proof
20 catchwords do not always make a great difference in a particular case, adopting a “standard of
21 proof is more than an empty semantic exercise.” *Addington v. Texas*, 441 U.S. 418, 425
22 (1979)(internal citations omitted). This standard ensures that trial courts carefully consider
23 the existence of any form of contract. “Increasing the burden of proof is one way to impress
24 the factfinder with the importance of the decision.” *Id.* at 427.

25
26 Note that UCC § 2-201 requires only that a writing be “signed by the party against
27 whom enforcement is sought or by his authorized agent or broker.” Consequently, there is a
28 lower burden of proof when the agreement is signed by the party against whom enforcement is
29 sought.

30 An express oral agreement in Section 204(b)(1) is one that is not contained in a record.
31

1 **SECTION 205. COMMENCEMENT OF ACTION.** An action to enforce a
2 cohabitants’ agreement may be commenced on breach of the agreement or after the termination
3 of the cohabitants’ relationship.

4 **Note:** The significance of this section is that the agreement can be enforced upon breach,
5 even if the cohabitation is ongoing. Section 104 sets out the applicable statute of limitations.

6 **SECTION 206. VOIDABLE AGREEMENT.** A cohabitants’ agreement is voidable if
7
8 a cohabitant against whom enforcement is sought proves the cohabitant’s consent to the
9 agreement was involuntary or the result of duress or fraud.

10 **Note:** This section is adapted from UPMAA Section 9(a), which states “A premarital
11 agreement or marital agreement is unenforceable if a party against whom enforcement is sought
12 proves: (1) the party’s consent to the agreement was involuntary or the result of duress.” Note
13 that “[t]ypical instances of voidable contracts are those where one party was an infant, or where
14 the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other
15 promise justifies the aggrieved party in putting an end to the contract. Usually the power to avoid
16 is confined to one party to the contract.” Restatement (Second) of Contracts § 7 cmt. b. (1981).

17
18 **SECTION 207. UNENFORCEABLE TERMS.**

19 (a) A court may refuse to enforce a term of a cohabitants’ agreement if, in the context of
20 the circumstances taken as a whole, any of the following apply:

21 (1) the term was unconscionable at the time the agreement was entered into;

22 (2) the term is illegal in the state where the agreement is sought to be enforced or
23 in the state where the agreement was made; or

24 (3) enforcement of the term would result in substantial hardship for a cohabitant
25 because of a material change in circumstances arising after the agreement was entered into.

26 (b) A term in a cohabitants’ agreement is not enforceable to the extent that it limits or
27 restricts a remedy available for one of the cohabitants who is a victim of [domestic violence,
28 sexual assault, or stalking] under law of this state other than this [act].

29 (c) The court shall decide questions of the enforceability of a term as a matter of law.

1 **Note:** This section is drawn from UPMAA Sections 9 (f), (g), and 10, which provide as
2 follows:

3
4 *[Section 9] (f) A court may refuse to enforce a term of a premarital agreement or marital*
5 *agreement if, in the context of the agreement taken as a whole[:] [(1)] the term was*
6 *unconscionable at the time of signing[; or (2) enforcement of the term would result in*
7 *substantial hardship for a party because of a material change in circumstances arising*
8 *after the agreement was signed].*

9 *(g) The court shall decide a question of unconscionability [or substantial*
10 *hardship] under subsection (f) as a matter of law.*

11 *[Section 10] (b) A term in a premarital agreement or marital agreement is not*
12 *enforceable to the extent that it . . .*

13 *(2) limits or restricts a remedy available to a victim of domestic violence*
14 *under law of this state other than this [act] . . .*

15
16 **SECTION 208. REMEDIES.**

17 (a) The court may award a cohabitant damages and equitable relief, including preliminary
18 and final injunctive relief.

19 (b) The court may allocate attorneys’ fees and costs, including interim fees and costs,
20 according to law of this state other than this [act] governing fees and costs in [a family law [or
21 probate] proceeding], unless the cohabitants’ agreement provides otherwise.

22 **Note:** The Restatement of Contracts recognizes the following types of interests:

- 23 • *(a) his “expectation interest,” which is his interest in having the benefit of his*
24 *bargain by being put in as good a position as he would have been in had the*
25 *contract been performed,*
- 26 • *(b) his “reliance interest,” which is his interest in being reimbursed for loss*
27 *caused by reliance on the contract by being put in as good a position as he would*
28 *have been in had the contract not been made, or*
- 29 • *(c) his “restitution interest,” which is his interest in having restored to him any*
30 *benefit that he has conferred on the other party.*

31
32 Restatement (Second) of Contracts § 344 (1981).

33
34 Injunctive relief, and particularly preliminary injunctive relief, may be critical to
35 preventing dissipation of assets.

36
37 With respect to the enforceability of an agreement concerning provisions to be made at
38 death, an express contract, for example, may be covered by UPC Section 2-514 (iii): that permits
39 “a writing signed by the decedent evidencing the contract.” If there is no writing and a court has
40 found an implied-in-fact agreement term concerning provisions to be made for the surviving

1 partner at death, that term may be enforceable.

2
3 **[ARTICLE] 3**

4 **EQUITABLE CLAIMS AND REMEDIES**

5 **SECTION 301. EQUITABLE CLAIMS.** Unless inconsistent with an enforceable
6 cohabitants' agreement under [Article] 2, a cohabitant may assert a claim for equitable relief
7 against the other cohabitant.

8 **Note:** Equitable relief includes, for example, constructive trust or injunctive relief.

9
10 **SECTION 302. UNJUST ENRICHMENT.** To establish a claim for unjust
11 enrichment, a cohabitant must prove all of the following:

12 (1) the cohabitant has provided the other cohabitant with a benefit, which may include the
13 performance of domestic services;

14 (2) the other cohabitant knew or had reason to know that the benefit had been conferred;
15 and

16 (3) the other cohabitant accepted or retained the benefit under circumstances such that it
17 would be inequitable for that cohabitant to retain the benefit without payment for its value.

18 **Note:** This language is drawn from the Restatement (Third) of Restitution.
19 Courts in some jurisdictions refer to checklists of factors, such as the following, to identify cases
20 in which the receipt of a benefit gives rise to a liability in restitution:

21
22 To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the
23 plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or
24 knowledge of the benefit; and (3) the defendant accepted or retained the benefit under
25 circumstances making it inequitable for the defendant to retain the benefit without payment of its
26 value.

27
28 Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt (2011).

29
30 **SECTION 303. BURDEN OF PROOF.** A cohabitant must prove an equitable claim,
31 including unjust enrichment, and entitlement to relief, by clear and convincing evidence.

1 two individuals who have been cohabitants for:

2 (1) a period of at least [10] years; or

3 (2) a period of at least [2] years if, during that period, the cohabitants shared caretaking
4 responsibility for a child or other family member who lived with them.

5 **Note:** The definition of cohabitant under Section 102(1) includes cohabitants who live
6 apart together.

7
8 **SECTION 402. BURDEN OF PROOF.** A cohabitant must prove the existence of an
9 interdependent economic unit by clear and convincing evidence.

10 **SECTION 403. AGREEMENT THAT THERE WILL BE NO**

11 **INTERDEPENDENT ECONOMIC UNIT.** A cohabitants' agreement may provide that the
12 cohabitants' relationship does not constitute an interdependent economic unit.

13 **Note:** Article 2 addresses the validity of cohabitants' agreements. This section covers all
14 agreements recognized under Article 2.

15
16 **SECTION 404. REMEDIES.**

17 (a) Unless inconsistent with an enforceable cohabitants' agreement under Article 2, if the
18 court finds the cohabitants have established an interdependent economic unit, the court may
19 order a fair and equitable distribution of the assets acquired and liabilities incurred during the
20 cohabitation, without regard to legal title.

21 (b) In ordering a fair and equitable division of the assets and liabilities under subsection
22 (a), the court shall consider the following factors:

23 (1) the duration and continuity of the cohabitation;

24 (2) the cohabitants' allocation of financial responsibility for housing, food,
25 clothing, health care, child support, and other daily living expenses;

26 (3) the cohabitants' allocation of responsibility for the performance of domestic

1 services; and

2 (4) the cohabitants' allocation of responsibility for caretaking responsibilities for a
3 child or family member who resided with them.

4 (c) There is no presumption that any particular percentage of division of assets or
5 liabilities is equitable.

6 **Note:** The remedy contemplated under this Article and in Article 3 is a division of assets
7 and liabilities acquired during the cohabitation.]

8
9

[ARTICLE] 5

10 **MISCELLANEOUS PROVISIONS**

11 **SECTION 501. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
12 applying and construing this uniform act, consideration must be given to the need to promote
13 uniformity of the law with respect to its subject matter among states that enact it.

14 **SECTION 502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
15 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the
16 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
17 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
18 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
19 U.S.C. Section 7003(b).

20 **[SECTION 503. REPEALS; CONFORMING AMENDMENTS.**

21 (a)

22 (b)

23 (c)]

24 **SECTION 504. EFFECTIVE DATE.** This [act] takes effect