

D R A F T

FOR DISCUSSION ONLY

UNIFORM COOPERATIVE ASSOCIATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting, February 3-5, 2006

Changes Shown in Strike and Score

WITH PREFATORY AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM COOPERATIVE ASSOCIATION ACT

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UNIFORM COOPERATIVE ASSOCIATION ACT

PREFATORY NOTE

(1) Introduction and Process

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

It is important to remember that this act does not replace any existing state co-op laws and, therefore, fulfills a different niche in the cooperative economic ecosystem. Thus, some provisions will be different than the more corporate-like framework of existing traditional statutes. It is intended to provide a cooperative structure as an alternative to the LLC; and, in some ways, “investor participants” are similar to limited partners in a limited partnership. It seeks to provide an alternative which accounts cooperative principles to a *greater* extent, with *less* room for design abuse than can be engineered in a combination of entities. Nonetheless, though some features of the cooperative association are very similar to the features of other entities and descriptive analogies to other entities may be helpful, it is imperative to understand that the cooperative association is a unique entity with important distinctions from each of the other entities to which it is often compared.

The Committee’s scope was originally limited to “Agriculture and Agriculture Related” purposes. In effect, neither the Iowa nor Minnesota Acts are limited to agriculture.

An overarching question raised by this project, and discussed at the Drafting Committee meetings, is what it means to be a cooperative. Older traditional statutes have found meaning and form by finding the definition of a cooperative in other law or by stating that the cooperative must be operated pursuant to a “cooperative plan,” a term that is undefined and without fixed meaning even within the industry. As a practical matter, perhaps, the most important definition of “cooperative” appears under the guise of the definition of operating on a “cooperative basis” found in federal income tax law. A brief illustrative discussion of some of those definitions is contained in the next part of this preliminary note (“Cooperatives: Background Information”).

The definitions of these terms do a modicum of “evolvability” over time, at least on the margin (and concerning select issues). For example, the Service threw in the towel on the issue of whether operating on a cooperative basis required more than 50 percent of the cooperatives business be done with members on a patronage basis. (Rev. Rul. 93-21, 1993-1 C.B. 188, stating that the 50 percent threshold is not necessary). Further a frequently quoted passage from a *dissent* written by Justice Brandeis (and joined by Holmes) stated:

That no one plan of organization is to be labeled as truly co-

operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations [citation omitted]. With the expansion of agricultural co-operatives it has been recognized repeatedly.

Frost v. Corporation Comm. (Oklahoma), 2788 U.S. 515 (1929) (Brandeis, J., dissenting, Westlaw p. 14).

Brandeis, as of 1929, also stated:

And experts in the Department of Agriculture, charged with disseminating information to farmers and legislatures, have warned against any crystallization of the co-operative plan, so as to exclude any type of co-operation.

The genesis of the project was the enactment of the “Wyoming Processing Cooperative Law” in 2001 and the “Minnesota Cooperative Associations Act” in 2003. The Province of Saskatchewan enacted an Act for similar purposes that predated the Wyoming law. Tennessee and Iowa have enacted statutes based on the Minnesota Act. Wisconsin has introduced similar legislation the past two years but it has not been passed. Similar legislation was introduced in Vermont and Missouri but not passed.

(2) Cooperatives: General Background Information

Traditionally, cooperatives have been organized as corporations under State laws specifically enacted to authorize the creation of businesses operated on a cooperative basis. The statutes direct organizers to follow so-called cooperative principles of user-control, user-benefit, and user-ownership. Voting rights are only available to patron-users of the cooperative’s services and earnings are allocated to patrons on the basis of use, rather than on the basis of investment. Member-patrons are the primary source of equity, which is accumulated over time in the form of retained earnings allocated to equity accounts of the patrons on the basis of each patron’s pro rata share of business conducted each year with the cooperative. No market exists for this equity and it is usually only redeemable at face value by the cooperative at the discretion of the cooperative’s board of directors.

The new cooperative acts (Wyoming and Minnesota) 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 and one of the primary reasons for this project is to attempt to gain a measure of uniformity between and among cooperative association acts as they are adopted by the states and to provide as well-drafted and considered an act as reasonably possible.

In fact, a new cooperative model gained some popularity, particularly in the Upper Midwest starting in the 1970’s. The features that distinguish *these* “New Generation”

cooperatives from traditional cooperatives include: (1) a new equity accumulation program based on substantial upfront investments by patron-members, (2) a tie-in between equity investment and the right and obligation to deliver a fixed quantity of product to the cooperative each year, and (3) a right of patron-members to transfer their equity to another person eligible to become a patron-member at whatever price is acceptable to both parties. While traditional cooperatives usually seek to maximize membership, New Generation cooperatives are “closed-end” with a limited number of members.

While New Generation cooperatives involve some significant departures from traditional cooperative structure, they have been organized under traditional cooperative statutes. Thus they have limited voting rights to patron-users and allocated earnings to users based on use.

The new cooperative acts on which this project is based are sometimes known as “LLC-Cooperative” laws though that name has not gained a precise technical meaning. They differ in several important ways from traditional cooperative laws. First, the entities created are unincorporated associations. Thus they have the option, under the Internal Revenue Service check-the-box regulations, to be taxed as partnerships rather than as cooperative associations. Second, up to 85 percent of the voting rights can be vested in non-patron investor members. And third, up to 85 percent of the earnings can be directed to non-patron investor members on the basis of investment. The stated purpose of those laws, as well as this project, is to provide a vehicle for economic development (especially, though by for exclusively in rural areas).

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 LLC-Cooperative statutes, on the other hand, follow the general trend in unincorporated statutes by allowing a cooperative to *decide* whether to qualify for the antitrust protection provided by the Capper-Volstead Act. Thus, the 8% dividend limitation is not mandated by the LLC-Cooperative 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 LLC-Cooperative model allows flexibility for the organization to be taxed as a partnership or as a cooperative as the organization itself chooses. The LLC-Cooperative statutes enacted to date are an option to, not a replacement for, existing cooperative laws.

The Drafting Committee was established by the Conference at the 2003 Annual Meeting pursuant to a Study Report and met December 12-14, 2003. It has met each Spring and Fall since then. 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 “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 subsequent Drafting Committee meetings focused on substantive issues within the context of a draft following the Minnesota Cooperative Associations Act which integrated some of the substantive discussion from the first meeting.

The Drafting Committee was originally asked to prepare a “Uniform Agricultural and Agricultural Related Cooperatives Act.” However, at the 2005 NCCUSL Annual Meeting, the charge was amended to draft a “Uniform Cooperative Associations Act.” Thus the scope of the project was arguably expanded from a law targeted at agricultural cooperatives to one available to a wide range of enterprises. The reason for the change in scope sounded in both technical drafting and policy. *First*, the Conference struggled for nearly two years to devise a definition of “Agricultural and Agricultural Related” that was precise yet not both over and under inclusive. From that limited perspective the change in scope can be seen as a change in “inclusive/permissive” to “exclusive/prohibited” or, stated another way, from a positive to a negative definition. The foregoing change in approach was to remove ambiguity from the draft. *Second*, it was difficult to articulate a reasoned policy statement concerning why the act should be limited to “agricultural,” no matter how defined. *Finally*, the leading cooperative association laws as they currently exist are not limited to “agricultural” uses even though some notion of “agricultural” is included in their names. Thus, attempting to limit the application of the project to “agricultural” was inconsistent with existing acts and cast doubt about whether ULC could succeed its overarching organizational mission encouraging uniformity in state laws.

The current draft is the result of efforts by the Committee to move in this direction at a meeting held October 21-23, 2005. The Committee has had only limited opportunity to discuss the specific language of this draft and new issues raised by the change in the scope of this project. Moreover, the style committee has had the opportunity to review only select articles and while its suggestions have been largely incorporated in this articles, some of the “styled” provisions have been redrafted.

(3) Overview of this Draft

This draft draws from other organizational law including the Uniform Limited Partnership Act (2001), limited liability company acts, the Minnesota Cooperative Associations Act, several modern “traditional” cooperative acts, and the Model Business Corporation Act.

Even though the draft relies, in part, on general organizational law outside cooperatives, it makes every reasonable attempt to acknowledge the fact that cooperatives are a different kind of organization legally, historically, and functionally and that cooperative associations, in turn, add a dimension to traditional cooperatives. 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 investor participant ~~nonmember patron~~ participation in this draft are tighter than those found in most, if not all, the “new generation” cooperative statutes clearly distinguishing this cooperative draft from limited liability company statutes in an attempt to maintain the “co-op brand.”

The February 2006 Draft reflects a number of noteworthy Committee directions. For example:

(1) the nomenclature has changed from “member” to “participant”; from “nonpatron member” to “patron participant”;

(2) the term “association” has been inserted behind “cooperative” wherever appropriate both to avoid interpretive confusion and to emphasize this is a different type of cooperative within the umbrella term;

(3) this draft also changes the method of voting for purposes of Committee discussion in response to questions raised on the floor of the 2005 Annual Meeting such that fundamental changes require approval of both “classes” of participants;

(4) “conversions” have been added and another approach to integrate the term “consolidation” has been attempted by the reporters and, for the first time, the article on “sale of assets” has been drafted;

(5) the definitions have been completely reworked in light of the substantive changes made by the Committee in its on-going discussion (though a couple new ones including “business” and a term to replace the laundry list “net income” terms have yet to be discussed/proposed;

(6) the inconsistent treatment of proxy has been remedied (no proxies are allowed);

(7) the “Reporters Notes” on participant actions (derivative actions) and in selected other sections now reflect research conducted by the Reporter as requested by the Committee over the past two meetings; and,

(8) the “filings” were given substantial attention and editing though they need continued attention;

(9) the entire draft has undergone a heavy edit though the Style Committee will not be able to complete its review of this draft until after the February 2006 Committee Meeting.

This is a work still very much in process. 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. For now, the repetition may be helpful to identify nonwaivable provisions for later centralization. The Reporters are cognizant that the repetition is troublesome and started to coalesce those references into a list. That effort was jettisoned, only for now, until the shape of the act continues to evolve. That remains a “thing to do” but beyond discussing the use in each section as the Committee does its work; the overarching task remains unripe. There, too, are probably errors in cross-referencing as the section numbers continue to change.

Although the entire draft has been heavily edited the Reporters concentrated on the substance of Articles 1, 2, 3, 5, and 9. Those articles, together with Article 7, contain the key concepts that define this act. A memorandum containing a suggested agenda will be sent to the Committee under authority of the Chair nearer the meeting date.

Finally please note that James B. Dean is new “Associate Reporter” and, as noted in the Committee memorandum for the October 2005 John Stieff is the Committee’s new liaison to the “Style Committee.”

1 **UNIFORM COOPERATIVE ASSOCIATION ACT**

2

3 **ARTICLE 1**

4 **GENERAL PROVISIONS**

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

7 **Reporter's Note**

8 The addition of “association” mitigates, to some extent, concerns that the Act be confused
9 with corporate based statutes. It did little to mitigate continuing concerns about co-op
10 “branding.”
11

12 ~~There has been informal discussion concerning the title of this project both within and~~
13 ~~outside the Committee. A position needs to be taken by the committee concerning whether to~~
14 ~~request a change. Another name alternative might be the Unincorporated Agricultural~~
15 ~~Cooperative Act. The Reporter continues to receive industry suggestions to drop all references to~~
16 ~~“cooperative” in the name and Act. See also section 109.~~
17

18 ~~The date of promulgation and the determination of whether this is a uniform act will be~~
19 ~~reflected in later drafts.~~
20

21 ~~Is it clear the act is not a “corporate” statute that does not foreclose cooperatives~~
22 ~~organized pursuant to it to be treated as unincorporated entities for purposes of other law?~~
23

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

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

28 (A) have a function similar to articles of organization ~~and articles of~~
29 ~~merger~~; and

(B) are required to be filed in the office of the [Secretary of State] or other official having custody of articles of organization ~~and articles of merger~~ in the state or country under whose law it is organized.

(2) “Bylaws” includes initial, amended and restated bylaws.

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

(4) “Cooperative” means a cooperative association or an entity organized under any cooperative law.

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

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

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

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

(7) “Designated office” means the office designated under Section 117(a)(1).

(85) “Distribution” means a transfer of money or other property from a cooperative association to a participant member in the participant’s member’s capacity as a participant member or to a transferee because of an right interest owned by the transferee.

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

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

(108) “Entity” means an association, business trust, company, corporation,

1 cooperative association, general partnership, limited liability company, limited liability limited
2 partnership, limited liability partnership, limited partnership, domestic or foreign.

3 (11) “Financial rights” means the right to participate in allocation and distribution
4 under [Article 9] but does not include rights or obligations under a marketing contract governed
5 by [Article 6].

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

9 (13+0) “Foreign entity” means an entity that is not a domestic entity.

10 (14) “Governance rights” means the right to participate in governance of the
11 cooperative association under [Article 3].

12 (15) “Investor participant” means a person admitted as investor participant in
13 accordance with the organic rules and who is not permitted or required by the organic rules to
14 conduct patronage business with the cooperative association in order to receive financial rights or
15 distributions.

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

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

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

21 (14) “Nonpatron member” means a member holding a nonpatronage membership
22 interest.

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

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

6 (17) “Organic rules” means the articles of organization and the bylaws of a
7 cooperative association.

8 ~~(18+1) “Participant” “Member” means a person that is a participant in member of~~
9 ~~a cooperative association and includes patron and investor participants. nonpatron members.~~
10 The term does not include a person that has dissociated as a participant member.

11 (19) “Participants interest” means patron and investor interests.

12 (20) “Participants meeting” means a annual or special participants meeting.

13 ~~(21+8)~~ (21) “Patron” means a person or entity that conducts economic activity with a
14 cooperative association on a patronage basis.

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

16 (22) “Patron participant” means a person admitted as a patron participant with the
17 organic rules and who is permitted or required by the organic rules to conduct patronage business
18 with the cooperative association in order to receive financial rights or distributions.

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

21 ~~(23+1)~~ (23) “Patronage” means business transactions between a cooperative
22 association and a person which entitles this person to receive financial rights, distributions or

1 payments from the cooperative association based on the value or quantity of business done with
2 the person relative to the financial performance of the cooperative association.

3 ~~(A) means business, transactions, or services:~~

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

5 ~~(ii) entitling the person conducting the business, transactions, or~~
6 ~~services for or with the cooperative to receive financial rights, distributions, or payment from the~~
7 ~~cooperative based on:~~

8 ~~(i) the value of the business, transactions, or services and~~
9 ~~the financial performance of the cooperative; or~~

10 ~~(ii) the value added to the cooperative by such the~~
11 ~~business, transactions, or services; and~~

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

14 ~~(2422) “Person” means an individual, entity, corporation, business trust, estate,~~
15 ~~trust, partnership, limited partnership, limited liability company, association, joint venture,~~
16 ~~government, governmental subdivision, agency or instrumentality, public corporation, or any~~
17 ~~other legal or commercial entity.~~

18 ~~(2523) “Principal office” means the office, whether or not in this state, where the~~
19 ~~principal executive office of a cooperative association domestic or a foreign cooperative is~~
20 ~~located.~~

21 ~~(2624) “Record”, used as a noun, means information that is inscribed on a~~
22 ~~tangible medium or that is stored in an electronic or other medium and is retrievable in~~

1 perceivable form.

2 (2725) “Required information” means the information a cooperative association
3 is required to maintain under Section 114 ~~this [act]~~.

4 (2826) “Sign” means, with the present intent to authenticate a record,:

5 (A) to execute or adopt a tangible symbol ~~with the present intent to~~
6 ~~authenticate a record~~; or

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

9 (2927) “State” means a state of the United States, the District of Columbia,
10 Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the
11 jurisdiction of the United States.

12 (3028) “Transfer” includes an assignment, conveyance, deed, bill of sale, lease,
13 mortgage, security interest, encumbrance, gift, and transfer by operation of law.

14 (3129) “Voting participant” ~~member~~” means a participant ~~member~~ that under
15 organic law or organic rules has a right to vote on matters subject to vote by participants.
16 ~~members~~.

17 **Reporter’s Note**

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

25
26 The February 2006 draft has undergone extensive changes.

1 As discussed in greater detail in the Reporter's Note to Section 404, the definitions need
2 tuning. In particular, "patron", "patron member" and "nonpatron member" are currently under
3 reconsideration by the Drafting Committee. "Financial Interest" is used extensively in Article 4
4 but not defined. The term "financial interest", as noted in the Reporter's Note, is also being
5 reconsidered. It performs the same function as "transferable interest" in ULLCA, ULPA (2001),
6 and UPA (1997). Below are two rough definitional suggestions from the Reporter for discussion
7 purposes:
8

- 9 • "Patron membership interest" means the membership interest providing a patron
10 rights in governance and a transferable interest [financial interest] of the
11 cooperative as a member as established by the [Act]; and
12
- 13 • "Transferable interest" means the right to receive distributions to members but
14 does not include the right to receive payments based on a separate marketing
15 contract, if any, between the member and the cooperative.
16

17 Note that distributions are distinct from allocations in virtually all organizational statutes.
18 Distributions are actual payments of money or money's worthwhile allocations are accounting
19 concepts, *e.g.*, the capital accounts of partners in a partnership.
20

21 An observer has suggested that the definition of "patronage" (subsection 21) be revised to
22 read as follows:
23

24 "Patronage" means business transactions between a cooperative
25 and a person which entitle the person to receive financial rights,
26 distributions, or payment from the cooperative based on the value
27 or quantity of such business, done with such person under a pre-
28 existing legal obligation to receive the amount paid, which is
29 determined by reference to the net earnings of the cooperative from
30 all business done with or for such persons.
31

32 All Finally, all references to "cooperative plan" have been deleted in this draft consistent
33 with prior and continuing committee discussion.
34

35 The definition of "domestic cooperative" expressly includes cooperatives formed outside
36 this Act. See, e.g., subsection 109(d). Is it necessary to define "designated office" for purposes
37 of the service of process provision?
38

39 The definition of Bylaws must be read in light of section 305.
40

41 "Financial Rights": allocation and distribution includes the rights to distributions in
42 liquidation, rights to receive dividends if dividends are a method used to distribute funds, rights
43 to receive patronage allocations and dividends and per unit retains, redemption of retained

1 patronage allocations or per unit retains; rights to receive partnership allocations and
2 distributions. It does not include amounts to which a patron participant would be entitled under a
3 marketing contract.
4

5 “Governance Rights” include the right to vote, the right to receive notices of participant
6 meetings, the right to participate in meetings of a district or other subdivision of participants, and
7 the right to be represented by delegates from a district or other subdivision of participants.
8

9 **SECTION 103. KNOWLEDGE AND NOTICE.**

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

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

12 (1) knows of it;

13 (2) has received notification of it; or

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

15 at the time in question.

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

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

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

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

23 (e) A person other than an individual knows, has notice, or receives a notification
24 of a fact for purposes of a particular transaction when the individual conducting the transaction
25 for the person knows, has notice, or receives a notification of the fact, or in any event when the

fact would have been brought to the individual's attention if the person had exercised reasonable diligence. A person other than an individual exercises reasonable diligence if the person it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the person and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

Reporter's Note

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

The LLC Act Drafting Committee included the following in a recent draft:

SECTION 103. KNOWLEDGE AND NOTICE.

(a) A person knows a fact when any of the following apply:

(1) the person is an individual who is consciously aware of the fact;

(2) the person is deemed to know the fact under subsection (b) or (e) or other law.

(b) A person that is not a member is deemed to know of a limitation on authority to transfer real property as provided in Section 302(4).

(c) A person has notice of a fact when any of the following apply:

(1) the person has reason to know the fact from all of the facts known to the person at the time in question;

(2) the person is deemed to have notice of it under subsection (d) or (e);

(d) A person not a member has notice of:

1 (1) another person's dissociation as a member of a
2 member-managed limited liability company, 90 days after a
3 Section 604 statement of dissociation pertaining to the other person
4 becomes effective;

5 (2) another person's ceasing to be a manager of a
6 manager-managed limited liability company, 90 days after a
7 Section 412 statement of manager cessation pertaining to the other
8 person becomes effective;

9 (3) a limited liability company's dissolution, 90
10 days after a Section 710(1) statement of dissolution becomes
11 effective;

12 (4) a limited liability company's termination, 90
13 days after a Section 710(2) statement of termination becomes
14 effective; and

15 (5) a limited liability company's merger,
16 conversion, or domestications, 90 days after an [article 10]
17 statement of merger, conversion, or domestication becomes
18 effective.

19 (e) A limited liability company is deemed to know or have
20 notice of a fact relating to the limited liability company both as
21 provided by other law and when either of the following apply:

22 (1) in a member-managed limited liability company,
23 a member knows or has notice of the fact, except in the case of a
24 fraud on the limited liability company committed by or with the
25 consent of the member;

26 (2) in a manager-managed limited liability
27 company, a manager knows or has notice of the fact, except in the
28 case of a fraud on the limited liability company committed by or
29 with the consent of the manager.

30 (f) In a manager-managed limited liability company, a
31 member's knowledge or notice of a fact relating to the limited
32 liability company is not knowledge of or notice to the limited
33 liability company, except as provided:

34 (1) in subsection (e)(2);

35 (2) in Section 302 (statement of authority); and

36 (3) by law other than this [act].
37

38 **SECTION 104. COOPERATIVE ASSOCIATION SUBJECT TO AMENDMENT**

39 **OR REPEAL OF [ACT].** A cooperative association governed by this [act] is subject to any
40 amendment or repeal of this [act].

1 **Reporter's Note**

2 Tenn. Code. Annot. Section 43-38-102 states: "The general assembly has the power to
3 amend or repeal all or part of this chapter at any time and all domestic cooperatives subject to
4 this chapter shall be governed by such amendment in Appeal.

5
6 The revised language is taken from UPA (1997).
7

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

9 (a) A cooperative association is an entity distinct from its participants. ~~members.~~

10 (b) A cooperative association may be organized under this [act] for any lawful
11 purpose, regardless of whether or not for profit except [designate prohibited purposes].

12 (c) A cooperative association has a perpetual duration ~~unless otherwise provided~~
13 ~~by the articles of organization.~~

14 **Reporter's Note**

15 Subsection (b) states "any lawful purpose" which is consistent with the unincorporated
16 acts promulgated by the Conference. It is also consistent with the general laws of cooperatives
17 which in some states reference or are included in not-for-profit acts. Finally, it is consistent with
18 the historical roots of cooperatives as mutual aid societies.
19

20 Subsection (b) reflects the decision by the Uniform Law Commission at the 2005 Annual
21 Meeting to delete any reference to "agricultural or agricultural related" and, instead, list specific
22 purposes for which cooperatives may not be used. The "except" language is similar to the
23 language in Section 3 of RULPA 1976/1985. The Committee may desire to consider inserting
24 "subject to any law of this state governing or regulating business" which is included in ULLCA
25 1996 (after the words "any lawful purpose").
26

27 The Minnesota Act states:

28
29 "[F]or any other purposes that cooperatives are authorized to
30 perform by law," Minn. Stat. Ann. § 308B. 201(3).
31

32 The Tennessee Act states:

33
34 "[A]nd other purposes that are related to the business of the

1 cooperatives; to provide supplies and services to its members and
2 for purposes are authorized by law.” Tenn. Code. Ann. § 43-38-
3 201.

4
5 Minnesota’s general cooperative law has the following purpose:

6
7 “[F]or the purposes of conducting an agricultural, dairy, marketing,
8 transportation, warehousing, commission, mechanical, mercantile,
9 electrical, heat, light, or power business, or for any other lawful
10 purpose. Minn. Stat. Ann. § 308A.101(1).
11

12 Even though it appears the general Minnesota Cooperative Act reflects a modern trend; at
13 least some states, maintain different cooperative statutes for different types of cooperatives.
14

15 South Dakota’s general cooperative statute (which was enacted in 1939 and amended in
16 1968 and 1978 states:
17

18 “Cooperatives may be organized under this chapter for any lawful
19 purpose except banking and insurance.” SDCL § 47-15-2.
20

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

26 **Reporter’s Note**

27 The formulation of powers in this draft is based upon unincorporated law models as
28 opposed to a more detailed listing of powers contained in corporate law. The Committee has
29 discussed this approach for powers only briefly and it is consistent with a general direction to
30 draft as efficiently as possible even though most cooperative acts tend to follow the more detailed
31 (and older) corporate model. ~~The question of the level of detail in this section is probably one~~
32 ~~that should be informed by givers of legal opinion letters. It is intended to be a broad division.~~
33

34 There was discussion at the October 2005 meeting focusing on two specific instances
35 concerning the remedy of specific instances concerning specific performance:
36

- 1 (1) agricultural marketing contracts; and
2 (2) utility co-ops and easements.

3
4 On the other hand, ULP (2001) and the current draft of the ULLCA Revision Project
5 have simply stated, e.g., “A limited liability company has the capacity to sue and be sued in its
6 own name and the power to do all things necessary or convenient to carry on its activities.”
7

8 **SECTION 107. GOVERNING LAW.** The law of this state governs:

9 (a) the internal affairs of a cooperative association, and

10 (b) the relations among the participants ~~members~~ of a cooperative association and
11 between the participants ~~members~~ and the cooperative association.

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

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

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

18 **Reporter’s Note**

19 The Committee on Style, consistent with previous Committee discussion but not
20 Committee resolution, has “suggested” deleting subsection (a) and queries whether subsection
21 (b) is necessary.
22

23 **SECTION 109. NAME.**

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

26 (b) Except as authorized by subsections (c) and (d), the name of a cooperative

1 association must be distinguishable upon the records of the [Secretary of State] from:

2 (1) the name of any entity ~~corporation, limited partnership, limited~~
3 ~~liability company, cooperative, or company incorporated,~~ organized, or authorized to transact
4 business in this state;

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

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

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

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

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

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

22 ~~(1) merged with the other cooperative;~~

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

4 **Reporter's Note**

5 Subsection (d) has been deleted because it is governed by other law. Subsection (b)
6 seems flawed. This is an area where uniformity is unlikely because of variance in name
7 procedures and policies in the Office of the Secretaries of States. The ULLCA draft has the
8 equivalent of (a) and replaces the balance of the language under this draft with the following:

9 SECTION 108. NAME.

10 (a) The name of a limited liability company must contain
11 "limited liability company" or "limited company" or the
12 abbreviation "L.L.C.", "LLC", "L.C.", or "LC". "Limited" may be
13 abbreviated as "Ltd.", and "company" may be abbreviated as
14 "Co.".

15 [(b) Unless authorized by subsection (c), the name of a
16 limited liability company must be distinguishable in the records of
17 the [Secretary of State] from:

18 (1) the name of each person, other than an
19 individual, incorporated, organized, or authorized to transact
20 business in this state; and

21 (2) each name reserved under Section 109 [or other
22 state laws allowing the reservation or registration of business
23 names, including fictitious name statutes].

24 (c) A limited liability company may apply to the [Secretary
25 of State] for authorization to use a name that does not comply with
26 subsection (b). The [Secretary of State] shall authorize use of the
27 name applied for if, as to each conflicting name:

28 (1) the present user, registrant, or owner of the
29 conflicting name consents in a signed record to the use and submits
30 an undertaking in a form satisfactory to the [Secretary of State] to
31 change the conflicting name to a name that complies with
32 subsection (b) and is distinguishable in the records of the
33 [Secretary of State] from the name applied for; or

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

38 (d) Subject to Section 805, this section applies to any
39

1 foreign limited liability company transacting business in this state,
2 having a certificate of authority to transact business in this state, or
3 applying for a certificate of authority.]
4

5 Should this Act create a new abbreviation “CA or C.A.” It does look like the postal
6 abbreviation for California. Is there another short-hand that isn’t an “abbreviation” covered by
7 the existing language?
8

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

17 The Reporters have adopted the Style Committee recommendation to ~~would~~ delete “of
18 competent jurisdiction” in (c)(2) in this draft.
19

20 **SECTION 110. RESERVATION OF RESERVED NAME.**

21 (a) A person may reserve the exclusive use of the name of a cooperative
22 association, including a fictitious name for a foreign cooperative whose name is unavailable, by
23 delivering an application to the [Secretary of State] for filing. The application must set forth the
24 name and address of the applicant and the name proposed to be reserved. If the [Secretary of
25 State] finds that the name applied for is available, it must be reserved for the applicant’s
26 exclusive use for a nonrenewable 60 day period.

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

30 **Reporter’s Note**

31 The Committee should discuss whether address needs to include both street and mailing

1 address.

2
3 The ULLCA Revision brackets this entire section and modifies it from ULPA (2001).

4
5
6 **SECTION 111. REGISTERED NAME OF FOREIGN COOPERATIVE.**

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

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

12 (1) setting forth its name, or its name with any addition required by
13 Section 1305 ~~1205~~, the state or country and date of its organization, and a brief description of
14 the nature of the affairs in which it is engaged; and

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

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

23 **Reporter's Note**

24 The February 2006 draft changes (c) based on a query from the Style Committee
25 suggesting the "name" doesn't terminate but; rather, the registration terminates. From Style:

1 “Isn’t it the registration of the name that terminates?”
2

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 associations and participants ~~members~~ of cooperatives
7 associations under this [act] have the power to enforce the restrictions on the use of the term
8 “cooperative” under this [act] ~~[and under [other laws]~~ of this state].

9 **Reporter’s Note**

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

14
15 This draft attempts to coordinate the name restrictions contained in other cooperative law
16 in the state, if any, with this Act without granting restrictions or rights not found elsewhere in
17 State law.
18

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

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

23 (b) The organic rules may not:

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

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

- 1 (3) vary the requirements of Section 208;
- 2 (4) vary the information required to be kept under Section 114 ~~114~~ or
- 3 unreasonably restrict the right to information under Section ____ or 721 ~~621~~, but the organic rules
- 4 may impose reasonable restrictions on the availability and use of information obtained under
- 5 those Sections and may define appropriate remedies, including liquidated damages, for a breach
- 6 of any 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 participants ~~members~~
- 12 necessary to authorize or ratify, after full disclosure to all participants ~~members~~ of all material
- 13 facts, a specific act or 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 Sections
- 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 participant ~~member~~ under
- 19 Section ____ 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 association

business pursuant to Section ____;

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

11 to;

(12) restrict the right of a participant ~~member~~ under Section ____ to

approve a conversion or merger; or

(13) restrict rights under this [act] of a person other than a participant,

~~member~~, transferee, or board of director participant. ~~member~~.

Reporter's Note

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

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

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

SECTION 114. REQUIRED INFORMATION RECORDS. A cooperative

association shall maintain in a record at its principal ~~designated~~ office the following information:

1 (1) a current list showing the full name and last known street address, mailing
2 address, and term of office of each director and officer; ~~a current list showing the full name and~~
3 ~~last known street and mailing addresses of each member, separately identifying the patronage~~
4 ~~members, in alphabetical order, and the nonpatronage members, in alphabetical order;~~

5 (2) a copy of the initial articles of organization and all amendments to and
6 restatements of the articles, together with signed copies of any powers of attorney under which
7 any articles, amendments, or restatement has been signed; ~~a current list showing the full name~~
8 ~~and last known street address, mailing address, and term of office of each director and officer;~~

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

13 (4) a copy of any filed articles of consolidation or merger; ~~a copy of the initial~~
14 ~~bylaws and all amendments to and restatements of the bylaws;~~

15 (5) a copy of any financial statement of the cooperative association for the six
16 most recent years; ~~a copy of any filed articles of consolidation or merger;~~

17 (6) a copy of the six most recent annual reports delivered by the cooperative
18 association to the [Secretary of State]; ~~a copy of the cooperative's federal, state, and local income~~
19 ~~tax returns and reports for the three most recent years;~~

20 (7) a copy of the minutes of meetings of participants and records of all actions
21 taken by participants without a meeting for the three most recent years; ~~a copy of any financial~~
22 ~~statement of the cooperative for the three most recent years and all other appropriate accounting~~

1 records;

2 (8) a current list showing the full name and last known street and mailing
3 addresses, separately identifying the patron participants, in alphabetical order, and the investor
4 participants, in alphabetical order; ~~a copy of the three most recent annual reports delivered by~~
5 ~~the cooperative to the [Secretary of State];~~

6 (9) a copy of the federal, state, and local income tax returns and reports of the
7 cooperative association, if any, for the six most recent years; ~~a copy of the minutes of members'~~
8 ~~meetings, and records of all actions taken by members without a meeting for the three most~~
9 ~~recent years;~~

10 (10) accounting records maintained by the cooperative association in the ordinary
11 course of its operations for the six most recent years; ~~a copy of the minutes of meetings of the~~
12 ~~board of directors and records of all actions taken by directors without a meeting for the three~~
13 ~~most recent years;~~

14 (11) a copy of the minutes of director's meetings and records of all actions taken
15 by directors without a meeting for the three most recent years; ~~a copy of all communications in a~~
16 ~~record to members as a group or to any class of members as a group for the three most recent~~
17 ~~years;~~

18 (12) a record stating:

19 (A) the amount of cash contributed and agreed to be contributed by each
20 participant member;

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

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

3 (D) for a person that is both a patron participant member and investor
4 participant nonpatron member, a specification of the interest the person owns in each capacity;:-

5 (13) a copy of all communications in a record to participants as a group or to any
6 class of participants as a group for the three most recent years.

7 **Reporter's Note**

8 This section has been completely reorganized in order to make the cause/no cause
9 distinction later in the draft easier to understand. The only substantive change appears as (10)
10 which replaces part of (7) in the prior draft. Prior (7) was bifurcated into (5) and (7). This shall
11 not be subject to restriction by agreement. The Committee also requested the Reporter to
12 compare (13) (in this draft) with the Revised Model Nonprofit Act. It is consistent. Section
13 16.01(e)(b) states: "all written communications to members generally within the last three
14 years...".

15
16 ~~The Committee has not yet discussed the appropriate required retention time for the~~
17 ~~enumerated records.~~

18
19 ~~The October 2005 draft reflects a suggestion by the Style Committee to bifurcate old~~
20 ~~(12)(A) into (A) and (B). The Committee needs to discuss this change because it seems to~~
21 ~~change the format of the information contemplated and because the original language is from~~
22 ~~ULPA (2001) §111(a)(A).~~
23

24 **SECTION 115. BUSINESS TRANSACTIONS OF PARTICIPANT MEMBER**
25 **WITH COOPERATIVE ASSOCIATION.** A participant member may lend money to and
26 transact other business with the cooperative association and has the same rights and obligations
27 with respect to the loan or other transaction as a person that is not a participant member subject
28 to the organic rules or a specific contract relating to the transaction.

29 **Reporter's Note**

1 This language is consistent with the language used in ULPA (2001). ~~Is it unambiguous in~~
2 ~~the cooperative context?~~ The language beginning with “subject to” is added for Committee
3 discussion to the February 2006 draft to make clear that it is not intended to apply to, e.g.,
4 marketing contracts which implicate article and bylaw provisions governing participation
5 (membership).
6

7 **SECTION 116. DUAL CAPACITY.** A person may be both a patron participant
8 ~~member~~ and a investor participant. ~~nonpatron member.~~ A person that is both a patron and
9 investor participant ~~nonpatron member~~ has the rights, powers, duties, and obligations provided
10 by this [act] and the organic law ~~and rules~~ in each of those capacities. When the person acts as a
11 patron participant, ~~member~~, the person is subject to the obligations, duties, and restrictions under
12 this [act] and the organic law governing ~~and rules~~ for patron participants. ~~members.~~ When the
13 person acts as a investor ~~nonpatron~~ participant, ~~member~~, the person is subject to the obligations,
14 duties, and restrictions under this [act] and the organic law governing ~~and rules~~ for investor
15 ~~nonpatron~~ participants. ~~members.~~

16 **Reporter’s Note**

17 The phrase “and rules” that appeared in the second, third and fourth sentences has been
18 deleted because everything can be varied by the rules unless specifically excepted. Is the deletion
19 appropriate in this circumstance?
20

21 ~~Would it be ambiguous to delete the word “member” the first time it appears? Is this~~
22 ~~section ambiguous because there exist patron members, nonpatron members and nonmember~~
23 ~~patrons under the draft act? The same issue exists in Section 114 and elsewhere and revises a~~
24 ~~significant drafting issue that may reverberate as policy.~~
25

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

27 (a) A cooperative association and a foreign cooperative shall designate and
28 continuously maintain in this state:

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

2 (2) an agent for service of process.

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

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

8 **Reporter's Note**

9 There is a question of nomenclature. This draft uses the vetted NCCUSL language
10 “designated” even though traditional cooperative law and corporate formulation is registered.
11 They “mean” the same thing, functionally. Does “designated office” need to be a defined term?
12

13 **SECTION 118. CHANGE OF DESIGNATED ~~REGISTERED~~ OFFICE OR**
14 **DESIGNATED ~~REGISTERED~~ AGENT FOR SERVICE OF PROCESS.**

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

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

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

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

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

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

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

Reporter's Note

Is subsection (b) surplusage, helpful or confusing? It's source is ULPA (2001).

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

SECTION 119. RESIGNATION OF DESIGNATED ~~REGISTERED~~ AGENT FOR SERVICE OF PROCESS.

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

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

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

SECTION 120. SERVICE OF PROCESS.

1 (a) An agent for service of process appointed by a cooperative association or
2 foreign cooperative is an agent of the cooperative association or foreign cooperative for service
3 of any process, notice, or demand required or permitted by law to be served upon the cooperative
4 association or foreign cooperative.

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

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

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

16 (1) the date the cooperative association or foreign cooperative receives the
17 process, notice, or demand;

18 (2) the date shown on the return receipt, if signed on behalf of the
19 cooperative association or foreign cooperative; or

20 (3) five days after the process, notice, or demand is deposited in the mail
21 ~~with the United States Postal Service~~, if mailed postpaid and correctly addressed.

22 (e) The [Secretary of State] shall keep a record of each process, notice, and

1 demand served pursuant to this section and record the time of, and the action taken regarding, the
2 service.

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

5 **Reporter's Note**

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

1 ARTICLE 2

2 FILING AND ANNUAL REPORTS

3 **Reporter's Preliminary Note**

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

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

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

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

23
24 **SECTION 201. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO**
25 **THE [SECRETARY OF STATE].**

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

29 (1) The initial articles of organization must be signed by at least one
30 organizer. The initial articles of organization or statement of cancellation must be signed by the
31 organizers listed in the articles.

32 (2) A statement of cancellation under Section 302(c) must be signed by

1 each organizer that signed the initial articles of organization. ~~An amendment required by Section~~
2 ~~1006 following the appointment of a person to wind up the dissolved cooperative's activities~~
3 ~~must be signed by that person.~~

4 (3) Except as otherwise provided in paragraph (a)(4), a record signed on
5 behalf of an existing cooperative association must be signed by an officer. ~~Any other amendment~~
6 ~~must be signed by the person or officer designated for that purpose by the cooperative.~~

7 (4) A record filed on behalf of a dissolved cooperative association by a
8 person winding up the activities under Section 1105 or a person appointed under Section 1206 to
9 wind up those activities.

10 (5) Any other record must be signed by the person on whose behalf the
11 record is delivered to the [Secretary of State].

12 (b) Any record to be filed under this [act] may be signed by an authorized agent.
13 ~~Any person except an organizer may sign by an attorney in fact any record to be filed pursuant to~~
14 ~~this [act].~~

15 **Reporter's Note**

16 A question was asked at the October 2005 Drafting meeting concerning the certificate of
17 cancellation. The Reporters, in answering that question, have revised the section to make it more
18 comprehensive and more closely track the ULLCA Revision.

19
20 This is renumbered from "old" section 208.
21

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

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

order:

(1) the person to sign the record; and the person to deliver the record to the [Secretary of State] for filing; or

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

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

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

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

Reporter's Note

This section is renumbered from "old" section 209.

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

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

1 the fees to the person on whose behalf the record was filed].

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

4 (c) Except as otherwise provided in Sections 308 ~~118 and 211~~, a record delivered
5 to the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
6 effective date. Except as otherwise provided in this [act], a record filed by the [Secretary of
7 State] is effective:

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

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

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

15 (A) the specified date; or

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

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

19 (A) the specified date; or

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

21 **Reporter's Note**

22 The cross-reference in (c) to Section 118 created a circularity problem. In (a) the

1 “medium” clause was repositioned and slightly expanded. The last clause in (a) is now bracketed
2 to provide flexibility to the myriad filing systems in existence in the states.

3
4 ~~This section is renumbered from “old” section 210.~~
5

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

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

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

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

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

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

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

22 **Reporter’s Note**

23 ~~This section is renumbered from “old” section 211.~~
24

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

2 (a) If a record delivered to the [Secretary of State] for filing under this [act] and
3 filed by the [Secretary of State] contains false information, a person that suffers loss by reliance
4 on the information may recover damages for the loss from: a person that signed the record, or
5 caused another to sign it on the person's behalf, and knew the information to be false at the time
6 the record was signed.

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

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

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

17 **Reporter's Note**

18 The February 2006 draft deletes a significant amount of this section consistent with the
19 Committee's direction.

20 This section is renumbered from "old" section 212.

21 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee
22 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it
23 is appropriate to add director. An addition or an alternative to director might be officer though it
24 may be difficult at times to demarcate between officers and mere agents.
25
26

1
2
3 **SECTION 206. CERTIFICATE OF GOOD STANDING ~~EXISTENCE~~ OR**
4 **AUTHORIZATION.**

5 (a) The [Secretary of State], upon application ~~request~~ and payment of the required
6 fee, shall furnish a certificate of existence for a cooperative association if the records filed in the
7 [office of the Secretary of State] show that the [Secretary of State] has filed articles of
8 organization is in good standing, and has not filed a statement of termination. ~~A certificate of~~
9 ~~existence must state:~~

10 ~~(1) the cooperative's name;~~

11 ~~(2) that the cooperative was formed under the laws of this state and the~~
12 ~~date of formation;~~

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

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

17 ~~(5) whether the [Secretary of State] has administratively dissolved the~~
18 ~~cooperative;~~

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

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

1 ~~(8) other facts of record in the [office of the Secretary of State] which are~~
2 requested by the applicant.

3 (b) The [Secretary of State], upon application ~~request~~ and payment of the required
4 fee, shall furnish a certificate of authorization for a foreign cooperative if the records filed in the
5 [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
6 authority, has not revoked the certificate of authority, and has not filed a notice of cancellation
7 pursuant to 1207. ~~A certificate of authorization must state:~~

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

10 ~~(2) that the foreign cooperative is authorized to transact business in this~~
11 ~~state;~~

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

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

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

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

20 (c) Subject to any qualification stated in the certificate, a certificate of good
21 standing ~~existence~~ or authorization issued by the [Secretary of State] may be relied upon as
22 conclusive evidence that the ~~domestic~~ cooperative association or foreign cooperative is in good

standing ~~existence~~ or is authorized to transact business in this state.

Reporter's Note

At the Committee's direction:

(1) The name of the "certificate of existence" in the prior draft has been changed to "certificate of good standing"; and, Subsections (a)(1) through (a)(8) and (b)(1) through (b)(6) have been deleted. The prior draft tracked the current ULLA Revision Draft and ULPA (2001) to a lesser extent, ULLCA (1995) and the RMBCA. Is this a place for a legislative note? At least one junction box statute confines (c) to the facts stated in the certificate. The Committee adopted this change "subject to future revision". Finally, the Reporters, on their own motion, replaced "request" with "application".

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

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

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

(1) the name of the ~~domestic~~ cooperative association or foreign cooperative;

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

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

(4) in the case of a foreign cooperative, the state or other jurisdiction under whose law the foreign cooperative is formed and any alternative name adopted under Section 1305 ~~1205~~.

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

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

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

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

(f) A cooperative association that fails to file an annual report ~~a registration~~ under this Section must be dissolved by the [Secretary of State] under Section 1110 ~~1009~~.

(g) A foreign cooperative that fails to file an annual report under this Section shall have its certificate of authority revoked under Section 1306.

Reporter's Note

Subsection (a) focuses the “three” address issues and highlights the fact that “designated

1 office” is not a defined term. There was discussion at the October 2005 meeting concerning
2 whether “if different” should be inserted between street and mailing address. If that is done,
3 should it be a global change?
4

5 This section is renumbered from “old” section 214.
6

7 **SECTION 208. FILING FEES; RULES AND REGULATIONS; ANNUAL**
8 **REPORTS AND LICENSE TAXES.** ~~Unless otherwise provided, the~~ The filing fee for records
9 ~~documents~~ filed under this [Article] with the [Secretary of State] are governed by ~~is subject to~~
10 [the general business corporation act] [the limited liability company act] [the general cooperative
11 act] law of this state.]. ~~The [Secretary of State] shall promulgate rules and regulations necessary~~
12 ~~to implement this [Article].~~

13 **Reporter’s Note**

14 Consideration should be given to bracketing this section. Three bracketed references are
15 suggested as a source of fees. There are others, e.g., the limited partnership act, not-for-profit
16 corporation act, etc.
17

18 ~~This section is renumbered from “old” section 215.~~
19

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

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

1 **ARTICLE ~~32~~A**

2 **FORMATION AND ARTICLES OF ORGANIZATION**

3
4 **Reporter's Note**

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

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

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

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

19 **SECTION ~~301~~201A. ORGANIZATION.**

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

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

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

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

25 **Reporter's Note**

26 The issues raised in Section 301 ~~201~~ have been discussed at length by the Committee but
27 consensus has not been reached on resolution of all the issues.

28
29 The Committee directed the Reporter to delete subsection (b) in the prior draft that
30 required the organizers to "intend" in "good faith" to become members (now participants) in the
31 cooperative. The February 2006 draft reflects that direction.

1 The Committee also directed that this draft should provide that only one organizer was
2 necessary for a wholly-owned subsidiary of an existing cooperative. Several unexplored issues
3 arose when the Reporters attempted to draft the language to effectuate that purpose. First: At
4 what point is “wholly-owned” measured? At the moment of formation? Is it an ongoing
5 requirement? Second: Was the Committee direction really intended to address the minimum
6 number of participants rather than the minimum number of organizers? The Reporters thought it
7 necessary to ask the Committee for clarification before further drafting on this Section.
8

9 Another ~~The first~~ issue raised in conjunction with this Section is whether the formation of
10 “shelf” cooperatives *should* be allowed. “Shelf” entities are those entities formed by promoters,
11 or others for possible future use without a specific current need for the entity. The tentative
12 conclusion of the Committee was not to allow for shelf cooperatives because they are
13 inconsistent with the member focus of cooperatives. For the same reason, two multiple
14 organizers are required under this draft.
15

16 The Committee recognizes that the execution of that tentative conclusion is difficult and
17 raises other issues including the number of members necessary to avoid dissolution (which is
18 related to the first two general questions in this Note). This draft requires only a single member
19 for the latter purposes, in part, because of the current use of wholly owned subsidiaries of
20 cooperatives which are themselves cooperatives and because requiring more than a single
21 member increases the risk of inadvertent dissolution. On the other hand, like under partnership
22 law, it is difficult to conceive of a “cooperative” without more than one member.
23

24 ~~The use of “good faith” as a standard raises practical concerns for opinions concerning~~
25 ~~“valid organization.” Some standard, however, is necessary to avoid using straw persons as~~
26 ~~organizers as became the practice under corporate law when more than one incorporator was~~
27 ~~required.~~
28

29 This draft raises those, and no doubt other, fundamental issues. The Minnesota
30 Cooperative Associations Act allows for “one or more organizers... [who] need not be members.”
31 The Colorado Cooperative Act too, allows for one or more “incorporators.”
32

33 **SECTION 302 202A. FORMATION OF COOPERATIVE ASSOCIATION;**
34 **ARTICLES OF ORGANIZATION.**

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

37 (1) the name of the cooperative association;

- 1 (2) the purposes for which the cooperative association was formed;
- 2 (3) the street and mailing addresses of the initial designated office and the
- 3 name; and street and mailing addresses of the agent for service of process;
- 4 (4) the name and the street and mailing addresses of each organizer;
- 5 (5) the term for which the cooperative association is to exist if other than
- 6 perpetual;
- 7 (6) the number and terms of directors or the method in which the number
- 8 and terms shall be determined; and
- 9 (7) any additional information required by [Article] 14.
- 10 (b) Articles of organization may contain any other matters.
- 11 (c) Unless the articles of organization state a delayed effective date, a cooperative
- 12 association is formed when there is substantial compliance with subsection (a) and the [Secretary
- 13 of State] files the articles of organization. If the articles state a delayed effective date, a
- 14 cooperative association is not formed if, before the articles take effect, one or more organizers
- 15 sign and deliver to the [Secretary of State] for filing a statement of cancellation.

16 **Reporter's Note**

17 The language beginning with "or" in subsection (a)(6) was added by the Reporters in the

18 February 2006 draft and need to be discussed by the Committee.

19 ~~The October 2005 draft reorders the first sentence.~~

20

21

22 **SECTION 303 203A. ORGANIZATION OF COOPERATIVE ASSOCIATION.**

23 After the effective date of the articles of organization:

- 24 (1) if initial directors are named in the articles of organization, the initial directors

1 shall hold an organizational meeting to appoint officers, adopt initial bylaws, and carry on any
2 other business brought before the meeting; and

3 (2) if initial directors are not named in the articles of organization, the organizers
4 shall designate the initial directors and call a meeting of them ~~initial members~~ to adopt initial
5 bylaws and carry on any other business necessary or proper to complete the organization of the
6 cooperative association. ~~elect directors.~~

7 **Reporter's Note**

8 ~~Two observers have asked if this act should follow traditional cooperative statutes drafted~~
9 ~~in the corporate style to allow the organizer to appoint the initial board and providing that board~~
10 ~~to adopt the initial bylaws.~~

11
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 ~~The February 2006 draft attempts to avoid the Formation under this draft presents a~~
20 ~~classic circularity problem concerning which comes first: participants ~~members~~ or the~~
21 ~~cooperative association. This same issue has been discussed in the context of limited liability~~
22 ~~companies. There (probably) is no nice theoretical solution to this very practical problem.~~
23

24 **SECTION 304 ~~204A~~. BYLAWS.**

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

27 (1) a statement of the capital structure of the cooperative association,
28 including a statement of the classes and relative rights, preferences, and restrictions granted to or
29 imposed upon each group, class, or other type of participant ~~member~~ interest, the rights to share

1 in profits or distributions of the cooperative association, and the method ~~authority~~ to admit
2 participants; ~~members, which may be designated to be determined by the board of directors;~~

3 (2) a statement designating the voting and governance rights, including
4 which participants ~~members~~ have voting power and any limitations or restrictions on the voting
5 power under Section ~~412~~ 312;

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

9 (4) if investor participants ~~nonpatron members~~ are authorized, a statement
10 concerning how profits and losses are apportioned and how distributions are made as between
11 patron participants and investor participants. ~~members and nonpatron members.~~

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

15 **Reporter's Note**

16 Governance rights is not yet defined. Are they more than voting rights? The Reporters
17 believe the definitions of, conceptual limits on, "financial rights" (e.g. subsection (a)(4)) and
18 "goveranance rights" ((a)(2)) are now ripe and are necessary to complete the drafting of this act.
19

20 ~~In (a)(1): Does "which may be designated to be determined by the board of directors"~~
21 ~~apply only to the authority to admit members, or to all items in this paragraph?~~
22

23 Section 205(a)(1) goes beyond what is typically considered capital structure in the
24 corporate setting. The Drafting Committee considered alternatives but because this Act is
25 membership based; because the articles and bylaws together constitute the agreement in
26 traditional cooperative and in other unincorporated entities; and, on the other hand, because it
27 desired the greater formality typical in cooperatives, this draft includes greater detail. ~~See Article~~
28 ~~13.~~

1
2 **~~SECTION 205A. SIGNING OF RECORDS.~~**

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

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

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

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

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

13 **~~SECTION 206A. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.~~**

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

17 ~~(1) the person to sign the record;~~

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

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

20 ~~(b) If the an aggrieved person aggrieved under subsection (a) is not the~~
21 ~~cooperative or foreign cooperative to which the record pertains, the aggrieved person shall make~~
22 ~~the cooperative or foreign cooperative a party to the action. A An aggrieved person aggrieved~~

1 under subsection (a) may seek any or all of the remedies provided in subsection (a) in the same
2 action in combination or in the alternative.

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

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

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

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

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

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

22 (2) if the record specifies an effective time but not a delayed effective

1 ~~date, on the date the record is filed at the time specified in the record;~~

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

4 ~~(A) the specified date; or~~

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

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

8 ~~(A) the specified date; or~~

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

10 **~~SECTION 208A. CORRECTING FILED RECORD.~~**

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

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

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

18 ~~(2) specify the incorrect information and the reason it is incorrect or the~~
19 ~~manner in which the signing was defective; and~~

20 ~~(3) correct the incorrect information or defective signature.~~

21 ~~(c) When filed by the [Secretary of State], a statement of correction is effective~~
22 ~~retroactively as of the effective date of the record the statement corrects, but the statement is~~

1 effective when filed as to persons relying on the uncorrected record and adversely affected by the
2 correction.

3 **~~SECTION 209A. LIABILITY FOR FALSE INFORMATION IN FILED~~**
4 **~~RECORD.~~**

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

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

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

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

18 **~~Reporter's Note~~**

19
20 The choice of organizer in subsection (a)(2) is undoubtedly appropriate. The Committee
21 has not yet discussed whether it is appropriate. The Committee has not yet discussed whether it
22 is appropriate to add director. An addition or an alternative to director might be officer though it
23 may be difficult at times to demarcate between officers and mere agents.
24

25 **~~SECTION 210A. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.~~**

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

5 (1) ~~the cooperative's name;~~

6 (2) ~~that it the cooperative was duly formed under the laws of this State~~
7 ~~and the date of formation;~~

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

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

12 (5) ~~whether the [Secretary of State] has administratively dissolved the~~
13 ~~cooperative;~~

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

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

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

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

1 ~~authority, has not revoked the certificate of authority, and has not filed a notice of cancellation.~~

2 ~~A certificate of authorization must state:~~

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

5 ~~(2) that it the foreign cooperative is authorized to transact business in this~~
6 ~~State;~~

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

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

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

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

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

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

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

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

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

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

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

21 ~~(e) If a filed annual report contains an address of a designated office or the name~~
22 ~~or address of an agent for service of process which differs from the information shown in the~~

1 records of the [Secretary of State] immediately before the filing, the differing information in the
2 annual report is considered a statement of change under Section 117.

3 (f) ~~A cooperative that has failed fails to file a registration under the requirements~~
4 ~~of this Section must be dissolved by the secretary of state [Secretary of State] under Section~~
5 ~~1009.~~

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

11 **Reporter's Note**

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

14
15 The base source for much of this Article is ULP A (2001) which is the latest
16 pronouncement of the Conference on these matters.

1 **ARTICLE 43**

2 **PARTICIPANTS MEMBERS**

3
4 **SECTION ~~401 301.~~ PARTICIPANTS MEMBERS.** In order to commence business a
5 A cooperative association must have [two one] or more patron participants except a cooperative
6 association may have only one participant if the participant is a cooperative entity whether or not
7 organized under this [act]. ~~members.~~

8 **Reporter's Note**

9 There was Committee discussion as to whether it should be made clear that this section is
10 not intended to preclude common ownership of a patron participant and the Committee requested
11 the Reporter to consider the matter. Because the Act does not preclude common ownership the
12 Reporters recommend this question be left to the organic rules.

13
14 ~~Section 301 is inconsistent with the Section 201 which requires three organizers. See~~
15 ~~Reporter's Note Section 201. This is an important theoretical as well as practical issue.~~
16

17 **SECTION ~~402 302.~~ BECOMING A PARTICIPANT MEMBER.** A person becomes
18 a participant ~~member~~:

- 19 (1) as provided in the organic rules;
- 20 (2) ~~under Section 1002 following the dissociation of the cooperative's last~~
21 ~~member;~~
- 22 (3) as the result of merger or consolidation under [Article] 15 14; or
- 23 (4) with the consent of all the participants ~~members~~.

24 **Reporter's Note**

25 This section has engendered a great deal of discussion. The Reporter was directed to
26 delete the provision admitting participants after the dissociation of the last remaining participant

1 and this draft reflects that direction. The Reporter was also directed either to delete “with the
2 consent of all remaining members” or to add thereto “if the organic rules are silent”. Upon
3 further review the Reporters have done neither pending further direction of the Committee
4 because: (1) this act requires the admission of participants to be in a record and “if silence” raises
5 both circularity issues and sleeping theoretical issues and (2) all the participants almost certainly
6 have the right to amend the organic rules to admit anyone they want. This approach is consistent
7 with unincorporated law and vests ultimate authority in the participants which seems inherently
8 consistent with cooperative principles.

9
10 The Reporter has been informally asked to justify this section:

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

23
24 It is important to remember that this act does not replace any existing state co-op laws
25 and, therefore, fulfills a different niche in the cooperative economic ecosystem. Thus, some
26 provisions will be different than the more corporate-like framework of existing traditional
27 statutes. It is intended to provide a cooperative structure as an alternative to the LLC or to
28 combination entities. It seeks to provide an alternative which protects cooperative principles to a
29 *greater* extent, with *less* room for design abuse than can be engineered in combination entities.
30 Thus rests the justification. This policy decision, however, should be discussed; as should the
31 technical operation of this particular section. The justification just helps inform the discussion.
32

33 **SECTION 403 303. NO RIGHT OR POWER AS PARTICIPANT MEMBER TO**
34 **BIND COOPERATIVE ASSOCIATION.** A participant member does not have the right or
35 power as a participant member to act for or bind the cooperative association.

36 **Reporter’s Note**

37 Source: ULPA (2001).

SECTION ~~404~~ 304. NO LIABILITY AS PARTICIPANT MEMBER FOR COOPERATIVE ASSOCIATION OBLIGATIONS. Unless otherwise provided by the articles of organization, an obligation of a cooperative association whether arising in contract, tort, or otherwise, is not the obligation of a participant member. A participant member is not personally liable, ~~directly or indirectly~~, by way of contribution or otherwise, for an obligation of the cooperative association solely by reason of being a participant member.

Reporter's Note

Source: ULPA (2001). There has been some discussion about modifying the ULPA (2001) language to include the word “personal” in an attempt to make the provision clearer but it is not certain it does so and there is a cost associated with changing the language from one Act to another if the intent is the same. The phrase directly or indirectly has been deleted in accordance with Committee direction.

SECTION ~~405~~ 305. RIGHT OF PARTICIPANT MEMBER AND FORMER PARTICIPANT MEMBER TO INFORMATION.

(a) On 10 days demand, made in a record received by the cooperative association, a participant member may inspect and copy required information under Section 114(a)(1) through (7) during regular business hours in the cooperative's association's principal designated office. A participant member need not have any particular purpose for seeking the information. A participant may demand the same information under Section 114(a)(1) through (7) no more than once during a twelve month period.

(b) On demand, made in a record received by the cooperative association, a
~~participant During regular business hours and at a reasonable location specified by the~~

1 ~~cooperative, a member~~ may obtain from the cooperative association and inspect and copy
2 required information under Section 114(a)(8) through (13) ~~true and full information regarding the~~
3 ~~state of the activities and financial condition of the cooperative and other information regarding~~
4 ~~the activities of the cooperative as is just and reasonable if:~~

5 (1) the participant member seeks the information for a proper purpose
6 reasonably related to the participant's member's interest as a participant member;

7 (2) the demand includes a description ~~member makes a demand in a~~
8 ~~record received by the cooperative, describing~~ with reasonable particularity the information
9 sought and the purpose for seeking the information; and

10 (3) the information sought is directly connected to the participant's
11 member's purpose.

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

14 (1) what information the cooperative association will provide in response
15 to the demand;

16 (2) a reasonable time and place that ~~when and where~~ the cooperative
17 association will provide the information; and

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

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

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

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

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

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

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

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

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

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

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

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

4 **Reporter's Note**

5 (A) This section has been substantially redrafted for the February 2006 draft. It picks up
6 the cause/no cause concept and references the redrafted Section 114. It is generally consistent
7 with the RMBCA and The Model Nonprofit Corporation Act.
8

9 This draft does not, however, include any "right to go to court". Neither, however, does
10 the Minnesota Cooperative Associations Act nor ULPA (2001). Likewise the Reporters have not
11 been able to find such a provision in either ULLCA (1995) or in the current revision for ULLCA.
12 On the other hand, the Tennessee Act, the Model Nonprofit Corporation Act, and the MBCA all
13 contain court-ordered provisions. The Tennessee Act provides as follows:
14

15 43-38-532. Enforcement of right to inspect and copy records.

16 (a) If a cooperative does not allow a member who complies
17 with § 43-38-530(a) to inspect and copy any records required by
18 that subsection to be available for inspection, a court in the county
19 where the cooperative's principal executive office, or, if none in
20 this state, its registered office, is located may summarily order
21 inspection and copying of the records demanded at the
22 cooperative's expense upon application of the member.

23 (b) If the court orders inspection and copying of the records
24 demanded, it shall also order the cooperative to pay the member's
25 costs, including reasonable counsel fees, incurred to obtain the
26 order, if the member proves that the cooperative refused inspection
27 without a reasonable basis for doubt about the right of the member
28 to inspect the records demanded.
29

30 The Nonprofit Corporation Act section states:

31 Section 16.04. Court-Ordered Inspection.

32 (a) If a corporation does not allow a member who complies
33 with section 16.02(a) to inspect and copy any records required by
34 that subsection to be available for inspection, the [name or describe
35 court] in the county where the corporation's principal office (or, if
36 none in this state, its registered office) is located may summarily
37 order inspection and copying of the records demanded at the
38 corporation's expense upon application of the member.
39

1 (b) If a corporation does not within a reasonable time allow
2 a member to inspect and copy any other record, the member who
3 complies with subsections 16.02(b) and (c) may apply to the [name
4 or describe court] in the county where the corporation's principal
5 office (or, if none in this state, its registered office) is located for
6 an order to permit inspection and copying of the records demanded.
7 The court shall dispose of an application under this subsection on
8 an expedited basis.

9 (c) If the court orders inspection and copying of the records
10 demanded, it shall also order the corporation to pay the member's
11 costs (including reasonable counsel fees) incurred to obtain the
12 order unless the corporation proves that it refused inspection in
13 good faith because it had a reasonable basis for doubt about the
14 right of the member to inspect the records demanded.

15 (d) If the court orders inspection and copying of the records
16 demanded, it may impose reasonable restrictions on the use or
17 distribution of the records by the demanding member.

18 Section 16.05. Limitations on Use of Membership List

19 Without consent of the board, a membership list or any part
20 thereof may not be obtained or used by any person for any purpose
21 unrelated to a member's interest as a member. Without limiting
22 the generality of the foregoing, without the consent of the board a
23 membership list or any part thereof may not be:
24 membership list or any part thereof may not be:

25 (1) used to solicit money or property unless such money or
26 property will be used solely to solicit the votes of the members in
27 an election to be held by the corporation;

28 (2) used for any commercial purpose; or

29 (3) sold to or purchased by any person.

30
31 The Comments will include a discussion of reduction and nondisclosure. Finally, this
32 section cannot be reduced or eliminated by the organic rules.

33
34 This Section generally tracks the rights given limited partners under ULP A (2001) and is
35 similar to the formulation under modern cooperative and corporate acts. In addition to the
36 information in the "required records" under this draft, (B) Upon further review the Reporters
37 request the Committee's permission to revisit the issue of a "Statement of Intent" and propose
38 draft language to be added addressing such a statement. The the Minnesota Cooperative
39 Associations Act mandates each member is entitled a "Statement of Membership Interest." This
40 draft does include much of the information mandated by the Minnesota statute. For purposes of
41 this draft it is intended that the information contained in the Minnesota "Statement" is available
42 through the required records. Nonetheless The the relevant portion of the Minnesota Act is set
43 forth below for discussion purposes:

1 308B.611. Nature of a membership interest and statement of
2 interest owned

3 ***

4 Subd. 2. Statement of membership interest. At the request of any
5 member, the cooperative shall state in writing the particular
6 membership interest owned by that member as of the date the
7 cooperative makes the statement. The statement must describe the
8 member's rights to vote, if any, to share in profits and losses, and
9 to share in distributions, restrictions on assignments of financial
10 rights under section 308B.605, subdivision 3, or voting rights
11 under section 308B.555 then in effect, as well as any assignment of
12 member's rights then in effect other than a security interest.

13
14 ~~Since the last drafting meeting an advisor has suggested revisiting subsections (c) and (e)~~
15 ~~noting legislative experience on traditional cooperatives in Washington and Oregon. Would~~
16 ~~including a "statement of interest" obviate the need for many rules on information rights?~~
17

18 The interrelationship between this Section of the draft and the rights of dissociated
19 members and transferees has not yet been fully discussed.
20

21 **SECTION ~~406~~ 306. ANNUAL PARTICIPANT'S ~~MEMBERS'~~ MEETINGS.**

22 (a) The participants ~~members~~ of the cooperative association shall meet annually
23 as provided in the organic rules or at the direction of the board of directors not inconsistent with
24 the organic rules.

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

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

30 ~~(cd)~~ The board of directors shall report, or cause to be reported at the annual
31 participants' meeting, the business and financial condition as of the close of the most recent

1 fiscal year, ~~at the annual members' meeting first preceding the date of the meeting.~~

2 (d) Unless otherwise provided by the organic rules, the board of directors shall
3 designate the presiding officer of the annual participants' meeting.

4 **Reporter's Note**

5 This act follows cooperative law and corporate law in providing an annual meeting. This
6 provision should not be variable by the organic rules.

7
8 This section expands the MBCA provision to address issues, *e.g.* meeting chair and
9 financial reports, typically addressed in general cooperative law. Note that there is no time
10 period following the close of the fiscal year in which the meeting must necessarily be held.
11 Annual meetings are not required under general partnership law (*e.g.* UPA (1997)), limited
12 partnership law (*e.g.* ULPA (2001)) or limited liability company law (*e.g.* ULLCA). Best
13 practice would be to coordinate the dates of the meetings in the organic rules.

14
15 Although in the MBCA, could subsection (a) be deleted without harm?

16
17 Finally, this section mandates annual meetings. Should there be a provision for "regular"
18 non-annual meetings that do not need to comply with the special meeting notice provisions.

19
20 ~~Is (d) awkward? One suggestion received by the Reporter is as follows: "The board of~~
21 ~~directors shall report, or cause to be reported, the financial condition of the cooperative as of the~~
22 ~~close of the most recent fiscal year."~~
23

24 **SECTION ~~407~~ 307. SPECIAL PARTICIPANTS' ~~MEMBERS'~~ MEETINGS.**

25 (a) Special participants' ~~members'~~ meetings shall be called:

26 (1) as provided in the organic rules;

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

28 (3) by demand in a record signed by participants ~~members~~ holding at least
29 10 percent of the votes of any class or group entitled to cast on the matter that is the purpose of
30 the meeting; or

31 (4) by demand in a record signed by participants ~~members~~ holding at least

1 10 percent of all votes entitled to be cast on the matter that is the purpose of the meeting.

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

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

8 (d) Only affairs within the purpose or purposes stated pursuant to Section 409(c)
9 ~~309(c)~~ may be conducted at a special participants' members' meeting.

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

12 **Reporter's Note**

13 To the Reporters' knowledge, the only current question that needs to be addressed is
14 whether subsections (a)(2)-(4) can be varied organically. For what its worth the Reporters would
15 generally suggest "yes" except one Reporter would require (a)(4) be mandatory; (d) "should" (!?)
16 be mandatory.

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

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

25
26 Old section 308 (which followed this section has been deleted as redundant). The matter
27 was discussed by the Committee and it seemed ambivalent. Thus, the Reporters believed they
28 had Committee permission to use their discretion.

29
30 Neither this draft nor the general cooperative statutes consulted provide for any type of
31 "fiduciary duties" for representatives of districts even though agency principles could apply. The

Committee has not yet discussed this issue though it has discussed whether members, generally, have fiduciary duties. There exists strong sentiment on the Committee that members, solely by reason of being members, should not have fiduciary duties. A finer issue is whether members owe (or should owe) the cooperative or other members a duty of good faith or fair dealing.

For the notice required of district meetings *see* Section 408(d).

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

Reporter's Note

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

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

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

SECTION ~~408~~ 309. NOTICE OF PARTICIPANTS' ~~MEMBERS'~~ MEETINGS.

(a) The cooperative association shall notify each participant ~~member~~ of the time, date, and place of any annual or special participants' ~~members'~~ meeting not less than [15 no more than 60] days before the meeting.

(b) Unless ~~this [act]~~ or the articles of organization otherwise provide, notice of an

1 annual participants' ~~members'~~ meeting need not include [a description of] the purpose or
2 purposes of the meeting.

3 (c) Notice of a special participants' ~~members'~~ meeting must include [a description
4 of] the purpose or purposes of the meeting as contained in the demand under Section 407
5 ~~307(a)(3)~~ and (a)(4) or as voted upon by the board of directors under Section 407 ~~307(a)(2)~~.

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

8 **Reporter's Note**

9 This section is mandatory except (b). Is this correct? The "unless provided by this [act]
10 has been removed the only possible place that might be relevant is in mergers and in that context
11 it should be revisited. A question was raised at the 2005 Annual Meeting about the "description"
12 language. The Committee needs to decide whether (or not) to leave it in.
13

14 The Committee has discussed the bracketed 15 day notice and the long-end has been
15 added for discussion purposes. It is tentative.
16

17 ~~Query whether the members of a district, having elected a delegate, need to be given~~
18 ~~notice of the meeting of delegates or whether those members may take part in the meeting. See~~
19 ~~Reporter's Note, Section 308.~~
20

21 Old subsection (d) has been moved.
22

23 **SECTION 409 ~~310~~. WAIVER OF PARTICIPANT'S MEETING NOTICE.**

24 (a) A participant ~~member~~ may waive notice of any meeting of the participants
25 ~~members~~ either before, during, or after the meeting.

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

1 at the meeting.

2 **SECTION ~~410 344~~. QUORUM OF PARTICIPANTS ~~MEMBERS~~.** Unless the
3 articles of organization provide otherwise, the voting power of those participants ~~members~~
4 present at an annual or special participants' ~~members'~~ meeting constitutes a quorum.

5 **Reporter's Note**

6 This section states a default rule. The “unless the articles otherwise provide” will be
7 removed and it would not be listed as mandatory previous in the draft. The Reporters would
8 suggest that this be revisited to state a high quorum rule as a default.
9

10 The interaction of Sections ~~409 340~~ and ~~410 344~~ means that a member objecting to a
11 meeting under Section ~~409 340~~ is present for purposes of the quorum under ~~410 344~~. The
12 quorum is low. The quorum requirement could, of course, be bifurcated by the number of the
13 cooperative's members. Is “voting power” a confusing term? Could it be replaced with “votes”?
14

15 **SECTION ~~411 342~~. VOTING BY PATRON PARTICIPANTS ~~MEMBERS~~.**

16 (a) Each patron participant ~~member~~ has one vote but the organic rules may
17 provide additional voting power to participants ~~members~~ on the basis of patronage under Section
18 314(a) and may provide for voting by district, group, or class under subsection (b).

19 ~~(b) The organic rules may provide:~~

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

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

24 ~~(c) A delegate selected under subsection (b) has one vote subject to Section~~
25 ~~314(b).~~

26 ~~(bd) If a cooperative association has both patron and investor participants:~~

1 ~~nonpatron members:~~

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

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

9 **Reporter's Note**

10 Old subsections (b) and (c) have been moved (consolidated) in another section dealing
11 with delegate voting.

12
13 This section needs to be revisited and discussed within the matrix of rights and powers.
14 As drafted the equity investors have fewer rights and less initial negotiating power than do
15 lenders who regularly require veto authority over a variety of matters. This goes to the heart of
16 the ability of this organization to reduce its cost of capital by seeking such investors. One
17 solution present in current cooperative association is permitting the patrons to have a minority
18 position.

19
20 As drafted, this act is the worst of both worlds for investors and patron members
21 attempting to reduce their cost of capital and formulate a viable economic organization. The
22 Committee needs to return to the idea of (a) reducing the patron majority block (making the
23 organization have the look and feel of an LLC); or, probably more viably, (b) at least providing
24 for true class voting providing the investors the ability to block/veto (like lenders) but not
25 dominate affirmative action. If the voting scheme more closely followed corporate-like class
26 voting it would also, at least conceptually, make the investors and this act look more like limited
27 partners in a limited partnership. The place within the act to place any such provisions would be
28 in subsection (b). It might also be drafted as an alternative though that compromise is probably
29 less than satisfying to the Committee. The class voting was suggested by a Commissioner on the
30 floor of the 2005 Annual Meeting.

31
32 Subsection (b) has been reformulated and redrafted. The general meeting notice
33 provisions should be equally applicable to (b)(2).
34

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

7
8 This section is mandatory.
9

10 **SECTION 412 313. ACTION WITHOUT A MEETING.**

11 (a) Unless otherwise provided by the organic rules, any action that may be taken
12 by the participants ~~members~~ may be taken without a meeting if each participant ~~member~~ entitled
13 to vote on such action consents to the action in a record.

14 (b) Consent under subsection (a) may be withdrawn by a participant ~~member~~ in a
15 record at any time before the cooperative association receives a consent from each participant
16 ~~member~~ entitled to vote.

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

19 **Reporter’s Note**

20 ~~What about the possibility of nonvoting members? This Section states the general rule of~~
21 ~~unincorporated law and at least some traditional co-op statutes and has been discussed by the~~
22 ~~Committee. Under unincorporated law this provision is a default rule. Should it be mandatory in~~
23 ~~this organization. See Or. Rev. Stat. §62.305.~~
24

25 **SECTION 413 314. DETERMINATION OF VOTING POWER OF PATRON**
26 **PARTICIPANT. ~~MEMBER OR DELEGATE~~.**

27 (a) The organic rules may provide additional voting power be allocated for each
28 patron participant ~~member~~ for:

(1) actual, estimated, or potential patronage or any combination thereof;
(2) equity allocated or held by a patron participant member in the cooperative association; [or]

[(3) if the patron participant member is a cooperative association, the number of patron participants members of the participant member cooperative association]; or]

[(3)] [(4)] any combination of paragraphs (1), (2), and (3).

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

Reporter's Note

Old subsection (b) has been consolidated to the new delegate section (412).

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

It is hoped the definition of “patronage” in the February 2006 draft mitigates some of the ambiguity of this question.

SECTION 414 315. VOTING BY INVESTOR PARTICIPANTS. ~~NONPATRON MEMBERS~~.

(a) If the organic rules provide for investor participants, ~~nonpatron members~~, each investor participant ~~nonpatron member~~ has one vote except as otherwise provided by the organic rules.

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

1 **Reporter's Note**

2 Old subsection (b) stated: “(b) The collective voting power of nonpatron members is
3 subject to section 312(c).” The cross-reference is now 411(b). It is deleted here as surplusage.

4
5 **SECTION ~~415~~ 316. MANNER OF VOTING.**

6 (a) Proxy voting by participants ~~members~~ is prohibited.

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

9 (c) The organic rules may provide for participant ~~member~~ voting by secret ballot
10 delivered by mail or other means, ~~the United States Postal Service~~.

11 **Reporter's Note**

12 The Committee changed USPS to “mail”. The Reporters added “or other means”
13 consistent with Committee discussion concerning voting by facsimile, etc.

14
15 The Committee needs to decide whether this is mandatory or default. The Reporters
16 believe it should be default.

17
18 In some states proxy voting is not available and in others it is allowed. Perhaps most
19 traditionally, cooperative law often provides for mail ballots. ~~For example, the Oregon general~~
20 ~~cooperative statute, in part, states:~~

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

33
34 ~~(3) If the bylaws so provide, the board may cause to be submitted~~

1 by mail ballot any question to be voted on at any member meeting,
2 including the election of directors. In such event the secretary shall
3 mail to each member along with the notice of the meeting, the
4 ballot on each such question and a voting envelope. The ballot
5 may be cast only in a sealed envelope which is authenticated by the
6 member's signature. A vote so cast shall be counted as if the
7 member were present and voting in person.

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

14
15 This issue was raised directly on the floor of the 2005 Annual Meeting: (a) a strong
16 opinion was expressed that no proxies be allowed for patron participants but the same
17 Commissioner was ambivalent as to investor participants; (b) the issue was obfuscated by the
18 question of whether an agent exercising the vote of an entity was a "proxy". The Reporter agreed
19 to look at the question and informally report to the Drafting Committee in 2006.
20

21 **SECTION 416.**

22 **Reporter's Note**

23 The Reporters request the Committee consider adding the following new section:

24 ELECTRONIC PARTICIPATION IN MEETING.

25 The organic rules may provide for participants to attend
26 meeting or conduct participant meetings through the use of any
27 means of communication if all participants attending the meeting
28 can simultaneously communicate with each other during the
29 meeting.
30

31 This is drafted as permissive and it is, therefore, already allowed under this draft.
32 Nonetheless, it avoids having a "default gap" in the statute. That is, it provides an answer where
33 a participant requests the electronic attendance but the organic rules are silent.
34

35 **SECTION 417. DISTRICTS AND DELEGATES.**

36 (a) The organic rules may provide:

1 (1) for the formation of districts and the conduct of participant 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 participants.

5 (b) A delegate selected under subsection (a) has one vote subject to subsection (c).

6 (c) The organic rules may provide additional voting power be allocated to each
7 district, group, or class or delegate for the aggregate of the number of patron participants in each
8 district, group, or class as provided under Section 414.

9 **Reporter's Note**

10 As a matter of drafting this draft attempts to pull together “delegate voting” all in one
11 place. The substance of the section is derived from old sections 308(d), 411(b) and (c), and
12 414(b). A more detailed effort is set forth below:

13
14 (a) The organic rules may provide:

15 (1) for the formation of districts, units, groups, or classes of
16 participants;

17 (2) that districts, units, groups, or classes of participants
18 may elect district, unit, group or class delegates to represent and
19 vote for the district, unit, group or class in annual and special
20 meetings of participants and elect directors;

21 (3) that the delegates may vote on matters at the
22 participants meetings in the same manner as a participant.

23 (b) Delegates may only exercise the voting rights on a basis and
24 with the number of votes as prescribed in the organic rules.

25 (c) If the approval of a certain portion of the participants is
26 required for adoption of amendments, dissolution, merger,
27 consolidation, or the sale of assets, the votes of delegates shall be
28 counted as votes by the participants represented by the delegate.

29 (d) Except as provided in this Section or in the organic rules, a
30 delegate selected under subsection (a) has one vote subject to
31 subsection (c).

32 (e) The organic rules may provide additional voting power be
33 allocated to each district, group, or class or delegate for the
34 aggregate of the number of patron participants in each district,

1 group, or class as provided under Section 414.

2 (f) If the cooperative association has formed districts, units, groups,
3 or classes of participants that elect delegates, then all provisions of
4 this [Article] relating to meetings of participants shall be construed
5 to apply to the delegates and not to the participants except those
6 provisions shall remain applicable to participants with respect to
7 participants at meetings of the districts, units, groups, or classes of
8 participants.

1 ARTICLE 54

2 PARTICIPANT MEMBERSHIP INTERESTS

3
4 SECTION 501 401. PARTICIPANT MEMBERSHIP INTEREST. A member's
5 interest in the cooperative is the member's membership interest. A participant's membership
6 interest:

7 (1) consists of ~~participation in~~ (a) governance rights under ~~[Article] 3 and~~
8 ~~participation in~~ allocation and distributions; (b) financial rights; and (c) the right or obligation, if
9 any, to do business with the cooperative association; under [Article 8];

10 (2) is personal property; and

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

12 **Reporter's Note**

13 The first sentence of this Section was deleted at direction of the Committee. The
14 Committee instructed the Reporter to attempt to provide more clarity concerning the bundle of
15 rights a member possessed not only in this Section but throughout this Article. The balance of
16 the changes in this Section are an attempt to provide such clarity.

17
18 The purpose of this Section is to identify the universe of rights of a participant as
19 contemplated under the Act. Note that these rights may not be exclusive to a participant, even
20 though the participant has them. For example, a nonparticipant may have the ability ("right") to
21 pull up to a co-op gas pump and purchase gas (thus, do business with the cooperative
22 association). On the other hand, some cooperative associations contemplated by this act may
23 restrict the use of co-op serves only to participants (e.g. grocery purchasing cooperatives).
24 Further, come cooperative associations may obligate members to deliver a specified volume of
25 production. This Section does not address the rights of non-participants.

26
27 Confusion, if any, results from starting "backwards". Some cooperative associations
28 deem "membership" automatically if you use their services (e.g. telephones). The latter is more
29 appropriately viewed as a membership qualification and admission provision rather than as the
30 rights of a member. That is, once a member (participant), the individual has some combination
31 of the rights delineated in Subsection (a)(b) or (c).

1 Another related issue, that is probably a confounding variable but very important, is the
2 (using normative nomenclature) “non-member patron”. This Section does not govern non-
3 members. At base, non-member patrons are a species of third-party contracts whose contract
4 rights may be delineated in the organic rules. Does there need to be something addressing this
5 species of users in the organic rule article?
6

7 ~~The purpose of the first sentence is meant to state that a member has no rights to the~~
8 ~~underlying property of the cooperative. It seems the proposition is self-evident....~~
9

10 **SECTION 502 402. PATRON AND NON PATRON PARTICIPANT. TERMS OF**
11 **MEMBERSHIP INTERESTS.**

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

16 (b) The organic rules may establish investor participant nonpatron membership
17 ~~interests, and all nonpatron membership interests must have equal rights with all other nonpatron~~
18 ~~membership interests unless the organic rules:~~

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

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

22 **Reporter’s Note**

23 The February 2006 Draft deletes a substantial amount of language from this Section as
24 surplusage given the provisions found elsewhere, including new definitions under Article 1.
25

26 Previous Note:
27

28 Note that the draft give the organic rules broad flexibility to vest power in the board. One
29 of the hallmarks of the act is flexibility but is this “too much”? Suggestions on how to make the

1 language in (a) and (b) more parallel would be appreciated.
2

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

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

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

19 **SECTION 503 ~~403~~. TRANSFERABILITY OF PARTICIPANT MEMBERSHIP**
20 **INTERESTS.**

21 (a) Unless otherwise provided in the organic rules and subject to subsection (b) Section
22 404, participant membership interests are not ~~non~~transferable. The terms of the restriction on
23 transferability must be set forth in the cooperative's association organic rules, ~~and the participant~~
24 ~~interest transfer~~ records of the cooperative association, and must be conspicuously noted on any
25 certificates evidencing a participant's ~~member's~~ interest. ~~if certificates, if any.~~

26 (b) A participant may transfer its financial rights in the cooperative association unless the
27 transfer is restricted or prohibited by the organic rules.

28 (c) The transferee of a participant's financial rights has, to the extent transferred, the
29 right to share in the allocation of surplus, profits, or losses and to receive the distributions to the
30 participant transferring the interest.

1 (d) The transferee does not become a participant upon transfer of a participant's financial
2 rights unless it is admitted as a participant by the cooperative association.

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

5 (f) A transfer of a participant's financial rights in violation of a restriction or prohibition
6 on transfer contained in the organic rules is void.

7
8 ~~**SECTION 404. TRANSFER OF FINANCIAL INTEREST.**~~

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

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

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

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

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

22 ~~(f) A transfer of a member's financial interest in violation of a restriction on~~

1 transfer contained in the organic rules is ineffective as to a person having notice of the restriction
2 at the time of transfer.

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

6 **Reporter's Note**

7 Prior subsection (d) repeated a concept dealt with in another Section in the draft but
8 stated it in different terms. It's deletion avoids interpretive mischief.
9

10 Although the balance of this Note is far more important, the Reporter first notes that as a
11 matter of style he much prefers "shall" in this Section rather than "may" which appears in this
12 "styled" draft.
13

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 the 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
31 cooperative.
32

33 Even under existing traditional law there is a great deal of flexibility given cooperatives
34 to fashion these payments. For example: entering into a marketing contract (direct payment) with
35 a producer might require that producer to be a member of the cooperative (and membership may
36 require an investment – nominal or otherwise) and that any member may receive a year-end
37 allocation based on the value of product delivered under the contract (and any other additional

1 product accepted outside the contract) relative to the performance of the cooperative. Further,
2 under current corporate based statutes, “investors” might purchase preferred stock and, subject to
3 legal capital constraints, be guaranteed a return.

4
5 On the other hand, the cooperative may not require membership for entering to a
6 marketing contract but under its contractual terms promise participation in a defined financial
7 pool based on the value of the product at time of delivery.

8
9 Given these two scenarios a reasonable interpretation is that there can be *patron members*
10 (the producer with the marketing contract requiring membership); *nonpatron members*
11 (analogous to the preferred shareholder); and, *nonmember patrons* (the producer with the
12 marketing contract that does not require membership but whom receives a *contractual* payment
13 based on “business done”).

14
15 Under the current draft “membership” is not transferable. Thus the member cannot
16 transfer her voting rights. If a marketing contract *requires* membership as a condition precedent
17 then, as a practical matter the contract could not be assigned. (Note, however, that payments *on*
18 *account* of the contract would be subject to other law). If, however, the marketing contract does
19 *not* require membership; the assignability of the contract or the delegation of its performance
20 would be governed by contract law outside this draft (personal contract?, anti-assignment
21 clauses?, *etc.*).

22
23 Of course, the contract itself could state it is assignable with or without consent of the
24 cooperative. Likewise, the articles could allow transfer of the membership interest with or
25 without consent of the cooperative.

26
27 So the financial interest of the membership is highly contextual on the organic documents
28 and the “deal”. Nonetheless, there is a dichotomy between the membership interest and the
29 marketing contract and it seems in the typical the financial interest of the member would *not*
30 include right to payment under the marketing contract because that would be governed by
31 contract law.

32
33 The right *of a member as a member* to receive an allocation based on patronage (or
34 otherwise) under the default rule, however, would be a financial right.

35
36 Other uniform unincorporated acts use the term “transferable interest” which might cause
37 less confusion.

38 39 **SECTION 504. SECURITY INTEREST.**

40 (a) A participant or transferee may grant a security interest in financial rights in a

1 cooperative association, but not in the governance rights. The granting of a security interest in
2 financial rights is not considered a transfer for purposes of Section 503. Upon foreclosure of a
3 security interest in financial rights a person obtaining the financial rights shall only obtain
4 financial rights subject to the security interest and shall not obtain any governance rights or other
5 rights with respect to the cooperative association.

6 (b) The limitation of this Section to financial rights shall not apply in the case of a
7 participant interest that is not subject to a restriction or prohibition on transfer under the organic
8 rules.

9 **Reporter's Note**

10 This Section pulls former Section 403(g) (security grant not a transfer) and is an attempt
11 to respond to Committee direction from the October 2005 meeting.

12
13 Two questions: (1) May the organic rules legally limit the effect of granting a security
14 interest under other law; (2) May the organic rules legally limit a participant from granting a
15 security interest under other law.

16
17 The issue of off-set is not addressed by this Section.

18 19 20 **SECTION 505. 405: CHARGING ORDERS FOR A JUDGMENT RIGHTS OF** 21 **CREDITOR OF PARTICIPANT MEMBER OR TRANSFEREE.**

22 (a) On application by a judgment creditor of a participant or transferee, a court
23 may enter a charging order against the financial rights of the judgment debtor for the unsatisfied
24 amount of the judgment. To the extent necessary to effectuate the collection of distributions
25 pursuant to the charging order, the court may: ~~On application to a court by a judgment creditor~~
26 ~~of a member or transferee, the court may charge the transferable interest of the judgment debtor~~
27 ~~with payment of the unsatisfied amount of the judgment with interest. To the extent so charged,~~

1 ~~the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the~~
2 ~~share of the distributions due or to become due to the judgment debtor in respect of the~~
3 ~~cooperative and make all other orders, directions, accounts, and inquiries the judgment debtor~~
4 ~~might have made or which the circumstances of the case require to give effect to the charging~~
5 ~~order.~~

6 (1) appoint a receiver of the share of the distributions due or to become
7 due to the judgment debtor in respect of the financial rights, with the power to make all inquiries
8 the judgment debtor might have made; and

9 (2) make all other orders which the circumstances of the case may require.

10 (b) A charging order constitutes a lien on the judgment debtor's financial rights
11 and requires the cooperative association to pay over to the person issued the charging order any
12 distribution that would otherwise be paid to the participant or transferee whose financial rights
13 are subject to the charging order. Upon a showing that distributions under the charging order
14 will not pay the judgment debt within a reasonable time, the court may foreclose the lien and
15 order the sale of the financial rights that are subject to a charging order. The purchaser at the
16 foreclosure sale: ~~A charging order constitutes a lien on the judgment debtor's financial interest.~~
17 ~~The court may order a foreclosure upon the interest subject to the charging order at any time.~~
18 ~~The purchaser at the foreclosure sale becomes a transferee.~~

19 (1) does not thereby become a participant;

20 (2) obtains only the financial rights; and

21 (3) unless the purchaser is the cooperative association or a person already a
22 participant, acquires the interest merely as a participant.

1 (c) At any time before foreclosure, the judgment debtor may extinguish the
2 charging order by satisfying the judgment and filing a certified copy of the satisfaction with the
3 court that issued the charging order. ~~At any time before foreclosure, an interest charged may be~~
4 ~~redeemed:~~

5 (1) ~~by the judgment debtor;~~
6 (2) ~~with property other than cooperative property, or by one or more of the~~
7 ~~other members; or~~
8 (3) ~~with members' property, by the cooperative with the consent of all~~
9 ~~partners whose interests are not so charged.~~

10 (d) At any time before foreclosure, the cooperative association or one or more
11 participants financial rights not subject to the charging order may succeed to the charging order
12 by satisfying the judgment and filing with the court that issued the charging order a certified copy
13 of the satisfaction of judgment and an affidavit stating the amount paid to satisfy the judgment.
14 The participant may not use the cooperative association to satisfy the judgment under this
15 subsection. The cooperative association may act under this subdivision only with the consent of
16 all participants whose financial rights are not subject to the charging order. ~~This [act] does not~~
17 ~~deprive any member or transferee of the benefit of any exemption laws applicable to the~~
18 ~~member's or transferee's financial interest.~~

19 (e) When a person succeeds to a charging order under this subsection: ~~This~~
20 ~~section provides the exclusive remedy by which a judgment creditor of a member or transferee~~
21 ~~may satisfy a judgment out of the judgment debtor's financial interest.~~

22 (1) the amount of the lien is the amount paid to satisfy the judgment, plus

1 interest from the date of satisfaction at the rate applicable to judgments;

2 (2) the lien's priority with regard to other creditors of the participant or
3 transferee whose financial rights are subject to the charging order remains unchanged; and

4 (3) the successor has the same rights under this Section as the judgment
5 creditor that originally obtained the charging order but the successor's claim against the
6 participant or transferee whose financial right is subject to the charging order is limited to any
7 distributions the successor is entitled to under the charging order and to proceeds of any
8 foreclosure sale.

9 (f) This [act] does not deprive any participant or transferee of the benefit of any
10 exemption laws applicable to the participant or transferees financial rights.

11 (g) This section provides the exclusive remedy by which a person seeking to
12 enforce a judgment against a participant or transferee may, in the capacity of judgment creditor,
13 satisfy the judgment out of the judgment debtor's financial rights.

14 (h) The limitations of this Section to financial rights shall not apply in the case of
15 a participant interest that is not subject to a restriction or prohibition on transfer under the organic
16 rules.

17 **Reporter's Note**

18 This Section, except for subsection (h) is from the ULLCA revision project and is the best
19 treatment of the rights of judgment creditors that has been found by the Reporters.
20

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

1 is an ever growing body of literature (but only a few cases) addressing charging orders of
2 member's interests when the member is in bankruptcy. The Reporter will be happy to discuss
3 those cases ~~at the October 2005 meeting~~ if so requested.

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

11
12 The ~~same~~ distinction between *member's* financial interest and contractual rights under a
13 marketing contract (in those marketing cooperatives which choose to have market contracts) is
14 made in the definition of financial rights. ~~marketing contracts~~) discussed in the Reporter's Note
15 ~~to Section 404 are applicable to this Section and is extended below.~~

16
17 At the risk of being more confusing than helpful: The case where membership is required
18 in order to enter into a marketing contract is probably the most difficult case. If the cooperative
19 chooses to make membership transferable (a derivation from the default rule) it needs to carefully
20 define the "entitlement". For example, it might desire a consent right for the transfer of the
21 membership interest based on proven ability to produce its articles might more clearly delimit
22 that membership is a necessary but not sufficient precondition for actually entering the contract.

23
24 Nonetheless: If the membership interest *entitles* the member to enter into a contract and
25 the membership interest and the underlying contract are freely transferable; THEN those rights
26 and the value of those rights would be subject to sale at foreclosure. Payments made under an
27 existing contract, however, would be contract rights not financial rights not subject to this
28 Section and would be governed by that law.

29
30 Any other amounts allocated to a member *as a member* or any return of contributed
31 capital would also be subject to this Section (when paid in a charging order without foreclosure).

32
33 The assumption in the foregoing illustration:

34
35 (i) will occur only in marketing cooperatives that enter into marketing contracts;
36 and

37
38 (ii) will occur only where the cooperative has made a decision to deviate from the
39 default rule of nontransferability of membership interests (caveat: the bankruptcy courts are
40 currently struggling with this issue as a matter of LLC law).

41
42 In sum, it is highly contextual and most confusion will not be cause by the act under the

- 1 default rules because the cooperative has the ability to formulate the rules that frame the context.

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

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

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

10 (2) reserves for the purposes set forth in Section 905 ~~805~~.

11 **Reporter's Note**

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

19
20 Many of the current statutes stress “title” which in other contexts has been ceded to UCC
21 law so, at least arguably, language in the older statutes may be anachronistic though Committee
22 discussion observed the importance of “insurable title” to the cooperative. The Committee has
23 not vetted this particular language and the reporter has little confidence that this language is yet
24 “dialed-in” appropriately. If the act authorizes contracts for purposes other than marketing,
25 additional provisions or a separate section dealing with the other types of contracts may be
26 required.
27

28 **SECTION 603. ~~503~~. TERM OF CONTRACT.** A single term of a contract may not
29 exceed 10 years but may be renewable for additional periods not exceeding five years each

1 subject to the right of either party not to renew by giving record notice during a period of the
2 current term as specified in the contract.

3 **Reporter's Note**

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

6 **SECTION 604. ~~504.~~ REMEDIES FOR BREACH OF CONTRACT.**

7 (a) The contract or organic rules may establish a specific sum of money as
8 liquidated damages to be paid by a patron participant ~~member~~ to the cooperative association.
9 The damages may be a percentage of the value of a specific amount per unit of the product,
10 goods, or services involved by the breach or a fixed sum of money.

11 (b) If there is a breach or threatened breach of a contract the cooperative
12 association is entitled to an injunction to prevent the breach and continuing breach and to a
13 judgment of specific performance. Pending the adjudication of the action, and upon filing
14 sufficient bond, the cooperative association is entitled to a temporary restraining order and a
15 preliminary injunction.

16 **Reporter's Note**

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

22
23 A number of State statutes provide significantly more detail regarding the possible
24 remedies available for a breach of contract and clearly specify that recovery of attorneys fees is to
25 be obtained if the cooperative is successful in pursuing the breach of contract claim.
26

1 [ARTICLE] 7 6

2 DIRECTORS AND OFFICERS

3
4 SECTION 701. ~~601.~~ EXISTENCE AND POWERS OF BOARD OF DIRECTORS.

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

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

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

13 Reporter's Note

14 The Reporter deleted "as set forth in the organic rules" at the end of (a) as surplusage.
15

16 The language used in subsection 601(a) is modeled on section 62.280(2) of the Oregon
17 Cooperative Corporation Act. Some statutes, for example, the California Nonprofit Association
18 Act require a minimum of three directors. This subsection allows the articles to establish the
19 number of directors at a number greater than three in all cases. The subsection does not limit the
20 number of directors to the number of participants ~~members~~ where there are fewer than three
21 participants ~~members~~.
22

23 The flexibility afforded to deviate below three directors recognizes the industry practice
24 of having wholly owned cooperative subsidiaries of a cooperative. In those circumstances the
25 Committee saw little necessity of having more than one director. Further, if there are two
26 participants ~~members~~ the Committee decided that it would be ill-advised to require a minimum
27 of three directors. Thus, subsection 701(a) ~~601(a)~~ provides the participants ~~members~~ great
28 flexibility, but not unfettered flexibility, in organizing their own board governance structure.
29

30 The word "may" in subsection (a) following "the number of directors" replaces the word

1 “shall” as a matter of style. The Committee may want to discuss this change.
2
3

4 **SECTION 702. ~~602~~. NO LIABILITY AS DIRECTOR FOR COOPERATIVE’S**
5 **ASSOCIATION’S OBLIGATIONS.** An obligation of a cooperative association, whether
6 arising in contract, tort, or otherwise, is not the obligation of a director. A director is not
7 personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of
8 the cooperative association solely by reason of being a director.

9 **Reporter’s Note**

10
11 Source: Derived from ULPA (2001). “New” to the law of cooperatives.
12

13 **SECTION 703. ~~603~~. QUALIFICATIONS OF DIRECTORS AND COMPOSITION**
14 **OF BOARD.**

15 (a) A director must be an individual.

16 (b) The organic rules may provide for qualification of directors subject to this
17 Section.

18 ~~(c) Unless otherwise provided in the organic rules a director may be an officer or~~
19 ~~employee of the cooperative association.~~

20 ~~(cd)~~ Except as otherwise provided in the organic rules and subject to subsections
21 (d) and (e), each director must be a participant member of the cooperative association or a
22 designee of a participant member that is not an individual.

23 (d) Unless otherwise provided in the organic rules, a director may be an officer or
24 employee of the cooperative.

25 (e) If the cooperative association is permitted to have nonparticipant directors by

1 its organic rules, the ~~The~~ number of nonparticipant ~~nonmember~~ directors ~~under subsection (d)~~
2 may not exceed:

3 (1) one director if there are two, three, or four directors; and

4 (2) one-fifth of the total number of directors if there are five or more
5 directors.

7 **Reporter's Note**

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

16
17 An observer has suggested that the Committee should discuss the advisability of being
18 more explicit (perhaps by using separate Sections) about how directors may be elected solely by
19 participants if there are only participants and about how directors are elected if the cooperative
20 has both patron and investor participants utilizing classification of directors and giving similar
21 consideration to removal in section 707. ~~both the election and the removal of classified directors.~~
22

23 **SECTION 704. ~~604.~~ ELECTION OF DIRECTORS.**

24 (a) At least two-thirds of the board of directors of a cooperative association must
25 be elected exclusively by patron participants ~~members~~.

26 (b) The articles of organization may provide for the election of all or a specified
27 number of directors by the holders of one or more groups or classes of participants' ~~member's~~
28 interests.

29 (c) The organic rules may provide for the nomination or election of directors by

1 geographic district directly or by district delegates.

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

4 (e) Except as otherwise provided by the organic rules under subsection (c) or in
5 Section ~~709~~ 609, participant ~~member~~ directors must be elected at an annual participants'
6 ~~members'~~ meeting.

7 (f) Nonparticipant ~~Nonmember~~ directors must be elected in the same manner as
8 participant ~~member~~ directors unless the organic rules provide for a different method ~~manner~~ of
9 selection.

11 **Reporter's Note**

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

14
15 Subsection (e) is new. Some ~~The~~ advisors to the drafting committee suggested that the
16 act specifically acknowledge the use of an appointment process for nonparticipant ~~nonmember~~
17 directors. These directors are used to provide special expertise on cooperative boards.

18
19 Subsection (f) allows the organic rules to provide for the selection of special
20 nonparticipant directors but such selection is not subject to further default rules. Because this
21 section is subject to the other general "participant" "~~member~~" restrictions it may not "work".
22 The Committee should consider this provision. ~~Is Section 617 helpful in this regard?~~
23

24 **SECTION 705. ~~605.~~ TERMS OF DIRECTORS.**

25 (a) A director's term expires at the annual participants ~~members'~~ meeting
26 following the director's election unless otherwise provided in the articles of organization. The
27 term of a director may not exceed three years.

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

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

Reporter's Note

If a successor is not elected the director previously in the position would continue to serve under the operation of this section. This section coordinates with section ~~709 608~~ ("Vacancy on Board ~~Vacancy~~") Is "may" the correct choice in subsection (a) second sentence (again a matter of style more than substance).

SECTION 706. ~~606.~~ RESIGNATION OF DIRECTORS.

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

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

Reporter's Note

A distinction between the "power" to resign and the "right" to resign contained in prior drafts has been removed as causing more substantive confusion than is necessary despite the concept being consistent with ULLCA. "May" consistent with style has been utilized instead. Subsection (a) states a "director has the power to resign". The use of the power language probably implies the director does not necessarily have the right to resign. The language is consistent with ULLCA but the power-right dichotomy may cause more substantive confusion than is necessary. The quoted phrase could, consistent with style be replaced by "may".

SECTION 707. ~~607.~~ REMOVAL OF DIRECTORS BY PARTICIPANTS MEMBERS.

(a) The participants ~~members~~ may remove a director only for cause unless the

1 organic rules provide for removal without cause.

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

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

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

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

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

14 (e) The participant member or participants members signing the petition are
15 entitled to the same opportunity to be heard and present witnesses as provided the director in
16 subsection (d)(2).

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

19 (g) If directors may only be removed for cause and all directors are subject to
20 removal, then removal for cause must be determined:

21 (1) by a nonparticipant nonmember director appointed pursuant to the
22 organic rules; or

(2) if the organic rules do not provide for the appointment of a nonparticipant nonmember director, by appointment of a committee composed of individuals who are not directors under Section 717 ~~617~~ or by independent legal counsel retained by the cooperative association for that purpose.

(hg) A director removed for cause under subsection (gf) may require a special participants members² meeting to determine removal by submitting a signed record to the cooperative association. The procedure of the special participants members² meeting must provide the same opportunities to be heard and present witnesses as are provided in ~~comply with~~ subsections (d) and (e). The director may be removed by the same affirmative vote and in the same manner as the director's election.

Reporter's Note

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

In response to discussion on the floor, subsection (g) has been created from what was the second sentence of subsection (f) in the prior draft. The draft currently does not specify who appoints the committee that would remove the director for "cause" under subsection (g)(2). This should be given attention.

"Cause" is not defined in the act. Should it be? Does Section 608 define "cause" for purposes of Section 607?

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

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

1 of any class but that the vote would be by only those participants ~~members~~ who elected the
2 director. Is that the Committee's intent?

3
4 An observer has raised two questions suggesting this Section and Section 708 need more
5 thought: (I) May the patron participants petition the Board for removal of a director elected by
6 nonpatrons, and vice versa? (ii) If a majority of the Board represents patron participants, should
7 those directors have the authority to remove a nonpatron participant director? These questions
8 may be especially relevant if removal without cause is permitted by the organic rules.
9

10 **SECTION 708. ~~608.~~ SUSPENSION OF DIRECTOR BY BOARD.**

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

14 (1) fraudulent conduct with respect to the cooperative association or its
15 participants ~~members~~;

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

17 (3) intentional infliction of harm on the cooperative association.

18 (b) After suspension, a director may be removed pursuant to Section 707 ~~607~~.

19 **Reporter's Note**

20 The Reporter was requested at the November 2004 meeting to draft different judicial
21 removal of director alternative that would be the equivalent of "changing the locks" on
22 cooperative management was instructed at the April 2005 meeting to delete judicial removal.
23 The absence of judicial removal is inconsistent with other cooperative statutes, ULLCA, and
24 RULPA. The reason for the deletion of judicial removal is to avoid the time and expense of
25 going to court which is consistent with the *values* of cooperatives but not necessarily the
26 cooperative statutes. Below is an example of a very short judicial removal proceeding provision.
27 For purposes of discussion: (I) There is room for "control group" (oligarchy) abuse and
28 majoritarian tyranny if judicial removal is not allowed; but, (ii) because of possible abuse
29 through minority threat if it is allowed in the organic rules (assuming it is not statutorily allowed
30 or required), would a court find a way to nonetheless remove a director. Should the act do
31 something more affirmative?
32

1 REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING.

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

5 (1) fraudulent conduct with respect to the cooperative or its participants
6 ~~members~~;

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

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

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

11
12 **SECTION 709. ~~609~~: VACANCY ON BOARD.**

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

15 (1) by majority vote of the remaining directors until the next annual
16 participants ~~members~~² meeting or special participants ~~members~~² meeting held for that purpose;
17 and

18 (2) for the unexpired term by participants ~~members~~ at the next annual
19 participants' ~~members~~² meeting or special participants ~~members~~² meeting called for that purpose.

20 (b) If the vacating director was elected by a group or class of participants
21 ~~members~~² interest or by group, class, or district:

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

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

25 **Reporter's Note**

26 This Section does not appear to address replacing a nonparticipant director. This subject
27 would need to be addressed in the organic rules that establish the appointment or election of

1 nonparticipant directors under subsection 604(f).

2
3
4 **SECTION 710. ~~610.~~ COMPENSATION OF DIRECTORS.** Unless the organic rules
5 otherwise provide, the board of directors may fix the remuneration of directors and nondirector
6 committee participants ~~members~~ appointed under Section 717(b) ~~617(b)~~.

7 **Reporter's Note**

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

17
18 62.300 Compensation and benefits to directors, officers and
19 employees. (1) Unless the bylaws provide otherwise, only the
20 members of the cooperative may establish compensation or other
21 benefits for a director, not available generally to officers and
22 employees, for services as a director.

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

26 (3) Unless the bylaws provide otherwise, the board may provide,
27 for prior or future services of any officer or employee, reasonable
28 compensation, pension or other benefits to such officer or employee
29 and pension or other benefits to a member of the family of the officer
30 or employee. No officer or employee who is a director may take part
31 in any vote on the compensation of the officer or employee for
32 services rendered or to be rendered the cooperative.
33

34 **SECTION 711. ~~611.~~ MEETINGS.**

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

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

Reporter's Note

The purpose of this section is to provide maximum meeting flexibility. Deletion of simultaneously was to remove the implication that everyone needed to be permitted to speak and hear each other at the same time as opposed to being able to speak and hear one person at a time.

SECTION 712. ~~612.~~ ACTION WITHOUT MEETING.

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

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

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

Reporter's Note

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

SECTION 713. ~~613.~~ MEETINGS AND NOTICE.

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

(b) Unless otherwise provided by the organic rules, special meetings of the board

1 of directors must be preceded by at least three days notice of the time, date, and place of the
2 meeting. The notice must contain a statement of the purpose of the special meeting and the
3 meeting must be limited to the matters contained in the statement.

4 **Reporter's Note**

5 Subsection (b) was more closely conformed to RMBCA Section 8.22 (b). At its April
6 (2005) drafting meeting, however, the Committee decided to require the notice to state the
7 purpose of the meeting.
8

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

15 Section 714(a) ~~614(a)~~ requires a waiver for the notice in 713(b) ~~613(b)~~ to be in a record.
16 This is new following the April (2005) drafting meeting. How well does this work if the meeting
17 is by telephone or other nontraditional means?
18

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

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

1
2 **SECTION 714. ~~614.~~ WAIVER OF NOTICE OF MEETING.**

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

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

10 **Reporter's Note**

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

13 On the floor a question was presented about what happens if a director attends a special
14 meeting, thereby waiving notice, and a matter is brought up that was not included in the notice.
15 Has the director waived the right to object to the consideration of that matter at the meeting? It
16 was represented the Committee would look at the issue. An additional question from the floor
17 was whether the language made it more beneficial for a member to attend and vote against a
18 proposition rather than object to the meeting and remain silent.

19
20 **SECTION 715. ~~615.~~ QUORUM.**

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

24 (b) If a quorum is in attendance at the beginning of the meeting, any action taken
25 by the board of directors present is valid even if the withdrawal of directors originally present

1 results in the number of directors being less than the number required for a quorum.

2 **Reporter's Note**

3 The Committee is concerned that “attendance” in subsection (b) may not be the correct
4 word choice. Given the waiver provisions of section 714 ~~614~~ the term “presence” seems even
5 less satisfying. As a point of reference, “attendance” is used in the RMBCA.
6

7 **SECTION 716. ~~616~~. VOTING.** Each director has one vote for purposes of decisions
8 made by the board of directors.

9 **Reporter's Note**

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

17 **SECTION 717. ~~617~~. COMMITTEES.**

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

20 (b) Unless otherwise provided by the organic rules, an individual appointed to
21 serve on committees need not be a director or participant ~~member~~ of the cooperative association.

22 An individual serving on a committee has the same rights, duties, and obligations as a director
23 serving on a committee.

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

26 (1) approve allocations or distributions except according to a formula or

1 method prescribed by the board of directors;

2 (2) approve or propose to participants ~~members~~ action requiring approval
3 of participants; ~~members~~; or

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

5 **Reporter's Note**

6 Special litigation committee, audit committee; Minnesota allows non-directors to be
7 members of a committee. This draft allows nonparticipants ~~non-members~~ to serve on
8 committees. See section 707(g) ~~607(f)~~. This is an important policy decision.

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

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

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

28 29 **SECTION 718. ~~618.~~ STANDARDS OF CONDUCT AND LIABILITY.**

30 (a) Except as provided in Sections 720 ~~620~~ and 722 ~~622~~, the discharge of the
31 duties of a director or a participant ~~member~~ of a committee of the board of directors is governed
32 by [the State Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General

1 Business Corporation Act of this State] [as amended].

2 (b) Except as otherwise provided in Sections 720 ~~620~~ and 722 ~~622~~, the liability of
3 a director or a participant ~~member~~ of a committee of the board of directors is governed by [the
4 State Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General Business
5 Corporation Act of this State] [as amended].

6 **Reporter's Note**

7 The substance of Sections ~~sections~~ 718 ~~618~~ (“Standards of Conduct and Liability”), 719
8 ~~619~~ (“Conflict of Interest”), 720 ~~620~~ (“Limitations of Directors’ Duties”), and 722 ~~622~~ (“Other
9 Considerations of Directors”) have been discussed extensively by the Committee. Together these
10 sections form the core of fiduciary duties in this entity.

11
12 The approach taken to Sections ~~sections~~ 718 ~~618~~ and 719 ~~619~~ recognizes that (1) states
13 take fundamentally different approaches to fiduciary duties within unincorporated organizations
14 of the same kind; (2) there is variety among the states in their approach within corporate statutes;
15 and (3) there is variety among the states in their approach in cooperative laws. The existing
16 cooperative statutes appear to follow corporate fiduciary duty formulations. The enactment dates
17 of exiting traditional cooperative statutes, however, result in very little uniformity in either detail
18 or language.

19
20 The Minnesota Cooperatives Associations Act (a non-corporate cooperative act) cleaves
21 closely to the corporate model. This draft act, too, establishes an unincorporated cooperative.
22 Although an unincorporated entity, the board of directors function more analogously to the
23 corporate board than the managers in a manager-managed LLC or general partners in a limited
24 partnership (and, indeed, the flexibility of the LLC allows the operating agreement to establish a
25 corporate-like board). Finally, the Committee considered the traditional operation of a
26 cooperative, member expectation, and advice that the insurance industry was comfortable with
27 the standards, liability and indemnification provided by the more corporate formulation.

28
29 Unfortunately, the wide variety among the states makes uniformity difficult to achieve
30 and creates adoption difficulty. For these reasons the Committee has adopted a “junction box”
31 approach similar to META. These sections need a legislative note but that note has not yet been
32 drafted pending further discussion on the approach taken.

33
34 This approach makes the draft significantly shorter than including detailed provisions.
35 Moreover, it allows the fiduciary duty of cooperatives to keep pace with statutory changes made
36 in corporation law.

1 The Minnesota Act's "conduct" section uses the phrase, "ordinarily prudent person in a
2 like position would exercise under similar circumstances" without including the MBCA's
3 modification "would reasonably believe appropriate."
4

5 The phrase "as amended" has been placed in brackets in this Section and throughout the
6 2005 Annual Meeting Draft for the first time because the Style Committee saliently pointed-out
7 that it (unintentionally) raises a delegation issue in some states. This change has not yet been
8 vetted by the Drafting Committee.
9

10 **SECTION 719. ~~619~~. CONFLICT OF INTEREST.** Except as otherwise provided in
11 Section 720 ~~620~~, [the State Cooperative Corporation Act] [the State Nonprofit Corporation Act
12 of this State] [the General Business Corporation Act of this State] [as amended] governs conflicts
13 of interests between a director or participant ~~member~~ of a committee of the board of directors and
14 the cooperative association.

15 **Reporter's Note**

16 See the Reporter's Note to Section 718 ~~618~~.

17
18 A comment was made on the floor that as drafted there is no guidance which could result
19 in mischief in the enactment process especially in states that do not have provisions in other laws
20 to which reference could be made.
21

22 **SECTION 720. ~~620~~. LIMITATION OF DIRECTOR'S DUTIES.** The articles of
23 organization may vary the standards under Sections 718 ~~618~~ and 719 ~~619~~ except that the articles
24 may not:

25 (1) eliminate the provisions concerning conflict of interest under Section 719
26 ~~619~~, but may:

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

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

(2) unreasonably reduce the standard of conduct under Section 718 ~~618~~; or

(3) eliminate any obligation of good faith under Section 718 ~~618~~, but the articles 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 721. ~~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 association and other information regarding the activities of the cooperative association 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 association.

Reporter's Note

Should this "right" be extended to non-board committee members under 717 ~~617~~?

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 722. ~~622~~. OTHER CONSIDERATIONS OF DIRECTORS. Unless otherwise provided in the organic rules, a director, in determining the best interests of the cooperative association, may consider the interests of employees, customers, and suppliers of the cooperative association and of the communities in which the cooperative association operates, and the long-term and short-term interests of the cooperative association and its participants members.

Reporter's Note

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

SECTION 723. ~~623.~~ APPOINTMENT AND AUTHORITY OF OFFICERS.

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

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

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

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

(e) Unless otherwise provided in the organic rules, an individual may

1 simultaneously hold more than one office in the cooperative association.

2 **Reporter's Note**

3 Almost all current cooperative acts follow pre-1984 business corporation law either
4 requiring or expressly permitting named offices. This draft does not do so. Rather, it is
5 consistent with the flexibility of the law of unincorporated organizations and provides the
6 flexibility present in many cooperative statutes in a more (word) efficient way. Thus it is closer
7 to post-1984 business corporation law than the existing cooperative statutes based on pre-1984
8 corporate law. It also follows unincorporated law in the flexibility it provides. Nonetheless,
9 because directors are not agents because of director status, the cooperative (through its board)
10 will be required to have agents. The language of this draft requires at least one of these agents to
11 be designated an officer under subsection (b).
12

13 **SECTION 724. ~~624~~. RESIGNATION AND REMOVAL OF OFFICERS.**

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

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

19 **Reporter's Note**

20 Note that this draft contains no provision directly addressing the standard of conduct of
21 officers. This is, at the least, not unusual in the world of general cooperative statutes. Thus, this
22 draft leaves much of the law governing officers to contract and agency principles.
23

24 There is a distinction between the power to remove an officer and the right to do so. This
25 section is intended to give complete discretion to the board of directors to remove officers (the
26 power). The exercise of that power; however, may very well lead to a damage claim by the
27 officer if, for example, the officer has a separate employment contract. The exercise of the power
28 could also violate other law (e.g. Title VII of the Civil Rights Act).
29

30 The “power” language in Subsection (a) raises a power-right dichotomy similar to the one
31 raised in Section 706 ~~606~~. As a matter of style, it has been urged to delete such language and
32 replace it with the word “may”.

1 [ARTICLE] 8 ~~7~~

2 INDEMNIFICATION

3
4 SECTION 801. ~~701~~. INDEMNIFICATION. Indemnification of any individual who
5 has 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 association is governed by [the State
7 Cooperative Corporation Act] [the State Nonprofit Cooperative Act] [the General Business
8 Corporation of 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. Note, however, the comment from the floor in the Reporter's Note to Section 719.

1 [ARTICLE] 9 8

2 CONTRIBUTIONS, ALLOCATIONS, AND DISTRIBUTIONS

3
4 SECTION 901. 801. PARTICIPANTS MEMBERSHIP CONTRIBUTIONS. The
5 organic rules may establish the amount, manner, or method of determining any participant
6 ~~membership~~ contribution requirements for participants ~~members~~ or may authorize the board of
7 directors to establish the manner and terms of any contributions for participants. ~~members~~.

8 Reporter's Note

9 Source: Derived from the Oregon Cooperative Corporation Act and ULP (2001). The
10 Committee has not discussed a suggested change from "shall" to "may". The NCCUSL "Style"
11 is a "must". This Draft continues the use of "shall" because there are no default rules. The intent
12 of the Reporters is to consider the marginal benefit of aggregating aggregate all these mandatory
13 "shall" requirements in Article 2 after the substance of the provisions is fully discussed.
14 Relatedly, the marginal cost of distributing what is variable within the substantive provisions
15 must be considered. After the information is gathered the issue will be ripe for the Committee.
16

17 A prior draft expressly contained a provision requiring the organic rules to set forth
18 "accounting procedures". The Committee directed it be taken out (and therefore made
19 permissive) because of possible confusion. The comment to this section needs to point out that
20 using a corporate-like structure without "checking-the-box" to be taxed as a corporation under
21 the current tax scheme may cause unintended consequences and is a relatively sophisticated
22 technique that is already bedeviling under LLC law.
23

24 This draft contemplates but does not mandate capital accounts based on decisions made
25 by the Conference and individual estates in other unincorporated acts.
26

27 This draft does not expressly ~~expressly~~ provide for stock or use the corporate capital
28 accounting model which allows the board of directors, for example, to establish par value. This
29 draft follows unincorporated law which is far more general, and less detailed than corporate law.
30 The draft does contemplate that the organic rules may establish a more corporate-like capital
31 structure. See Section 205(a)(1). Although it does not expressly address certificated ownership
32 interests is that enough? In that regard, is capital formation inhibited by "lack of stock like a
33 corporation" and, if so, is there any way around the problem? Thus, this draft more closely
34 follows the unincorporated organizational model and is, therefore, arguably more contractually or
35 agreement based. Paradoxically, the entity contemplated by this draft is more flexible upon

1 formation but gives the board of directors less power to establish new classes or voting interests
2 than in a business corporation. This mix is consistent with stronger member control.

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

7
8 Does a comment to this section need to discuss equity certificates and, if so, suggestions?
9

10 **SECTION 902. ~~802.~~ FORMS OF CONTRIBUTION AND VALUATION.**

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

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

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

21 **Reporter’s Note**

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

29
30 The Comment (or is it more appropriate in a legislative note) needs to note that some

1 state constitutions may place restrictions on the types of property that may be contributed. The
2 Reporters need guidance on whether, and if so, how, a legislative note needs to be prepared on
3 this issue.
4

5 **SECTION 903. ~~803.~~ CONTRIBUTION AGREEMENTS.**

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

8 (1) otherwise provided by the agreement; or

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

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

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

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

16 **Reporter's Note**

17 This Section is taken almost directly from the listed sources.

18 Query: Should the contribution agreement be able to vary the terms of this Section?
19 Would subsection (a)(2) bring in third-party beneficiaries?
20

21 Source: Oregon Cooperative Corporation Act; conceptually similar to the Minnesota
22 Cooperative Associations Act, the MBCA and ULPA (2001).
23

24 **SECTION 904. ~~804.~~ ALLOCATIONS OF NET PROCEEDS, MARGINS,**
25 **SAVINGS, PROFITS, AND LOSSES.**

26 (a) Subject to subsection (b), the organic rules must provide for the allocation of
27
28

1 net proceeds, savings, margins, profits, and losses between classes or groups of participants.
2 ~~members~~.

3 (b) Unless the articles of organization otherwise provide, patron participants
4 ~~members~~ must be allocated all ~~at least 50 percent~~ of the net proceeds, savings, margins, profits,
5 and losses in any fiscal year. The articles may not reduce the percentage allocated to patron
6 participants ~~members~~ to less than 30 percent.

7 (c) Unless otherwise provided in the organic rules, in order to determine the
8 amount of net proceeds, savings, margins and profits, the board of directors may set aside a
9 portion of the revenue, whether or not allocated to participants, after accounting for other
10 expenses ~~the board of directors may retain or set aside a portion of net proceeds, savings,~~
11 ~~margins, and profits~~ for purposes of:

12 (1) creating or accumulating a capital reserve; and

13 (2) creating or accumulating reserves for specific purposes, including
14 expansion and replacement of capital assets.

15 (d) Subject to subsection (e) and the organic rules, the board of directors shall
16 allocate the amount remaining after the allocations under subsections (a) through (c):

17 (1) to patron participants ~~members~~ annually in accordance with the ratio of
18 each participant's ~~member's~~ patronage during the period to total patronage of all patron
19 participants ~~members~~ during the period; and :

20 (2) to investor participants, if any, in accordance with the ratio of each
21 investor participant's limited contribution to the total initial contribution of all investor
22 participants.

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

Reporter's Note

Throughout this Section the following list has been used: "net proceeds, savings, margins, and profits". This raises two issues. The first is whether the list is as good as it can be (e.g., net proceeds). The second is clumsiness in drafting its resulting confusion. Two observers volunteered at the October 2005 meeting to solve both issues by attempting to draft a defined term.

The Reporters were not given direction to change "30 percent" in subsection (b) but it was discussed (again) at the October 2005 drafting meeting. An observer has suggested that this remains a sticking-point in the draft for significant industry interests unless the patron participants are allocated at least "50 percent".

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

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

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

The comment to this section needs to provide examples and illustrations of subsection (b) including a calculation where you might have "agency" cooperative arrangements but no sales. The 100/30 50/30 "solution" has been questioned and subject to much discussion. Legislation

introduced in Wisconsin is consistent. The existing state statute at play in Minnesota is 50/15. Consider a comment noting that, perhaps, debt will be replaced by equity such that the fixed return otherwise going to debt will need to pay for the use of equity money. In the latter regard the general purpose of this act mirrors the original historical purpose of limited partnership law. The language used to express this decision in subsection (b) still seems somewhat inartful.

“Allocated” is a term of art in both cooperative and unincorporated law. “Net proceeds”, “net margins”, and “net savings” are ~~is a~~ terms of art in cooperative law. The comment to this section will need to address those terms.

SECTION 905. ~~805~~. DISTRIBUTIONS.

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

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

Reporter’s Note

A Commissioner, not on this Committee, has very serious reservations about subsection (b). He suggests that the act is certainly flexible enough to allow these items but, if listed in the text, they must be defined.

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

SECTION 906. ~~806~~. REDEMPTION OF EQUITY. Subject to Section 907 ~~807~~ and

1 unless the articles of organization otherwise provide, a cooperative association:

2 (a) may redeem a patron participant's ~~member's~~ equity; and at any time;

3 (b) may not redeem an investor participant's equity.

5 **Reporter's Note**

6 ~~Does the addition of "at any time" give the cooperative the right to call the equity in such~~
7 ~~a manner to capture good will and the value of appreciating assets? As~~ How is the redemption
8 price determined? This draft is silent and does not address the value of good will or appreciating
9 assets; a significant gap. At least two Commissioners raised this and the related "book-up" idea
10 at the 2005 annual meeting. Is a result, is a valuation procedure advisable? Is equity too broad a
11 term? Would it be better to add according "to a plan" and have the comment specifically address
12 revolving equity?

13
14 This Section may be needless repetition of other authority for distributions under this
15 draft but, on the other hand, it may make the draft more user-friendly for those cooperatives
16 which contemplate "stock" or certificated interests. It is important to note that this Section is
17 permissive at the discretion of the cooperative and does not give any member a put right.
18

19 **SECTION 907. ~~807~~. LIMITATIONS ON DISTRIBUTIONS.**

20 (a) A cooperative association may not make a distribution if, after the
21 distribution:

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

24 (2) the cooperative's association's assets would be less than the sum of its
25 total liabilities.

26 (b) A cooperative association may base a determination that a distribution is not
27 prohibited under subsection (a) on financial statements prepared on the basis of accounting
28 practices and principles that are reasonable in the circumstances or on a fair valuation or other

1 method that is reasonable in the circumstances.

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

4 (1) in the case of distribution by purchase, redemption, or other
5 acquisitions of financial rights ~~a transferable interest~~ in the cooperative association, as of the date
6 money or other property is transferred or debt incurred by the cooperative association; and

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

8 (A) the distribution is authorized, if the payment occurs within
9 120 days after that date; or

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

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

15 **Reporter's Note**

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

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

26
27 An accounting question about subsection (a)(2) was raised at the 2005 Annual meeting.
28 The basic premise was: "I thought assets by accounting convention always equaled liabilities;

1 therefore, what does (a)(2) mean?” It was promised an answer would be provided, at least, in the
2 Final Comments.

3
4 A question was also raised at the 2005 Annual meeting about subsection (d). The
5 Reporters’ have discussed the matter and suggest that the Committee determine whether this
6 matter should be revisited.
7

8 **[SECTION 908. 808. ALTERNATIVE DISTRIBUTION OF UNCLAIMED**
9 **PROPERTY, DISTRIBUTIONS, REDEMPTIONS, OR PAYMENTS.** A cooperative
10 association may distribute unclaimed property, distributions, redemptions, or payments under
11 [citation to the applicable provision in the law governing cooperatives associations not formed
12 under this [act] in this state].

13 **Reporter’s Note**
14

15 The Reporter’s Note formerly included the text of the Oregon Statute (§ 62.425). The
16 Committee determined this is an important substantive provision for states which already include
17 it in their cooperative statutes and many of the leading cooperative states have a provision
18 dealing with a cooperative’s unclaimed property. On the other hand it is unique to cooperative
19 law and the provision could be a major adoption stumbling block in those states which do not
20 already have existing cooperative law.}]

1 [ARTICLE] 10 9

2 DISSOCIATION

3
4 SECTION 1001. 901. PARTICIPANT'S MEMBER'S DISSOCIATION.

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

8 (b) Unless otherwise provided by the organic rules, a A participant member is
9 dissociated from a cooperative association upon the occurrence of any of the following events:

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

13 (2) an event provided in the organic rules as causing the person's
14 dissociation as a participant member;

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

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

19 (A) it is unlawful to carry on the cooperative's association's
20 activities with the person as a participant member;

21 (B) subject to Section 503(g) ~~404(g)~~, there has been a transfer of
22 all of the person's financial rights ~~interest~~ in the cooperative association;

1 (C) the person is a corporation or cooperative association whether
2 or not organized under this act and:

3 (i) the cooperative association notifies the person that it
4 will be expelled as a participant member because it has filed a public document of dissolution, it
5 has been administratively or judicially dissolved, its charter has been revoked, or its right to
6 conduct business has been suspended by the jurisdiction of its incorporation; and

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

10 (D) the person is a limited liability company, cooperative
11 association whether or not organized under this act, or partnership that has been dissolved and
12 whose business is being wound up;

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

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

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

20 (8) termination of a participant member that is not an individual,
21 partnership, limited liability company, cooperative association whether or not organized under
22 this act, corporation, trust, or estate;

(9) the cooperative's association's participation in a consolidation or merger, if under the plan of merger as approved under [Article] 15 ~~14~~, the person ceases to be a participant. ~~member~~.

Reporter's Note

Source: Closely derived from ULPA (2001) § 601. Subsection (b)(5) follows ULPA in that it does not state incompetency as an event of dissociation but see Section 1003 ~~903~~ which can be read inconsistently. The Comments to this Section need to explain the difference between subsection (b)(5) and (b)(7). An individual is dissociated upon death under (b)(5) and her estate has the powers conferred by Section 1003 ~~903~~. Subsection (b)(7) applies where the (an) estate is carrying on business and becomes a participant ~~member~~ by admission. Example: An individual who ~~whom~~ was not a participant ~~member~~ of the cooperative association dies. Her estate anticipates carrying on farming business for three years before it closes. The estate could become a member of the cooperative association pursuant to the organic rules of the cooperative association for admission of participants ~~members~~. The issue raised by incompetency needs yet to be vetted. See section 1003 ~~903~~ which as currently drafted is inconsistent with subsection (b)(8). Subsection (b)(4)(C) has been revised and the language is now different than ULPA (2001).

Subsection 1001(b)(4)(B) ~~901(b)(4)(B)~~ has been changed to refer to ~~states~~ "subject to Section 405" and it is now corrected to reflect it is subsection 503(g) ~~404(g)~~ which is the security interest exception for transfers.

Section 1001(b) ~~901(b)~~ contemplates expulsion by the organic rules but there is no default rule for expulsion. Former subsection (b)(5) read:

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

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

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

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

This Article was discussed in detail at the October 2005 Committee meeting. Changes have been made in accordance with decisions made by the Committee. The Committee directed the Reporter to give more examination to whether subsection (b)(4)(B) should be altered or removed depending on the meaning of "financial rights." With more detail having been provided

1 in the definition of “financial rights” in Section 102, the Reporter respectfully requests to revisit
2 this subsection.

3
4 The Reporters also suggest the Committee should revisit this Article in conjunction with
5 further examination of the composition and election of the Board and the division of financial
6 results among participants. The Reporters believe these three areas are what can differentiate a
7 cooperative association under this act from all other types of organizations. Various observers
8 have raised questions and have made suggestions and requests in these three areas. These areas
9 are the ones in which conflicts between traditional cooperative associations with a focus on
10 member service and investor capital with a focus on financial returns from investment need to be
11 balanced. Questions that have been raised regularly for consideration are: (i) Should there be
12 different rules in the act for small versus large cooperative associations in these areas? (ii)
13 Should there be different rules in the act for investor participants and patron participants? (iii) Is
14 it sufficient to leave these areas to the organic rules or should the act provide some guidance by
15 default rules or otherwise?
16
17

18 **SECTION 1002. ~~902.~~ EFFECT OF DISSOCIATION AS PARTICIPANT**

19 **~~MEMBER.~~**

20 (a) Upon a person’s dissociation as a participant member:

21 (1) subject to Section 1003 ~~903~~, the person does not have further rights as
22 a participant member; and

23 (2) subject to Section 1003 ~~903~~ and [Article] 15 ~~14~~, any financial rights
24 ~~interest~~ owned by the person in the person’s capacity as a participant member immediately before
25 dissociation is owned by the person as a transferee who is not admitted as a participant after
26 dissociation.

27 (b) A person’s dissociation as a participant member does not of itself discharge
28 the person from any obligation to the cooperative association which the person incurred while a
29 participant member.

30 **Reporter’s Note**

1 Source: ULPA (2001) § 602. The ULPA (2001) counterpart includes a subsection that
2 refers only to specifically cross-referenced obligations of good faith and fair dealing and that
3 subsection has been deleted under this draft. “[O]r other members” was also deleted in (b),
4 which is consistent, because under this act there is no specific participant member to participant
5 member duty (similar to the basic resolution of duties to limited partners but in ULPA there is a
6 sliding scale where a limited partner undertakes management obligations). The Comment to this
7 section will include both reference and discussion of the four possible sources of financial return
8 of a participant member: (1) under a production (or other) contract; (2) patronage distributions;
9 (3) patronage retains; (4) return on invested capital. Subsection (b) is important in the context of
10 obligations under a marketing contract.

11
12 At the October 2005 Committee meeting it was determined that so long as it is permitted
13 by other state law, a person acting under a durable power of attorney could continue to act for a
14 participant without a change to this act.
15

16 **SECTION 1003. 903. POWER OF ESTATE OF PARTICIPANT. MEMBER.**

17 Unless otherwise provided in the organic rules, if a participant ~~If a member~~ dies or is adjudged
18 incompetent, the participant’s member’s personal representative or other legal representative may
19 exercise the rights of a transferee and the participant’s member’s financial rights interest as
20 provided in Section 503 405 and, for purposes of settling the estate of a deceased participant
21 member, may exercise the informational rights of a current participant member under Section
22 405 305.

23 **Reporter’s Note**

24 Source: ULPA (2001) § 704. *See* Reporter’s Note to section 1001 901 concerning the
25 absence of incompetency as a cause of dissociation by a participant member. The Committee
26 suggests that the guardian of an incompetent will be treated for all purposes the same as an estate
27 through the law of guardianship but that issue should be left to other law. Other law will also
28 channel obligations between those that must be personally performed and those that may be
29 “assigned”. It might be advisable for the Comment to suggest this issue (and a related one
30 concerning nonadjudicated durable powers) be contemplated by the organic rules and the terms
31 of the marketing contract, if any. Whether incompetency effects the contract will depend, in
32 some instances, on the classification of the contractual duty as delegable.

33
34 At the October 2005 Committee meeting, it was suggested that “power” be substituted for

1 rights. Because of the different appropriate implications of the two words, both have been
2 utilized.

1 [ARTICLE] 11 ~~10~~

2 DISSOLUTION

3
4 SECTION 1101, ~~1001~~. DISSOLUTION. A cooperative association may be dissolved:

- 5 (1) nonjudicially under Section 1102 ~~1002~~;
- 6 (2) judicially under Section 1103 ~~1003~~; or
- 7 (3) administratively under Section 1110 ~~1010~~.

8 SECTION 1102, ~~1002~~. NONJUDICIAL DISSOLUTION. Except as otherwise

9 provided in Section 1103 ~~1003~~, a cooperative association is dissolved and its activities must be

10 wound up only upon the occurrence of any of the following:

11 (1) the happening of an event or the coming of a time specified in the articles of

12 organization;

13 (2) the action of the organizers, board of directors, or participants ~~members~~ under

14 Sections 1104 and 1105 ~~1004~~ and ~~1005~~;

15 (3) the passage of 90 days after the dissociation of ~~the last~~ a participant, resulting

16 in the cooperative association having less than two participants, member, unless before the end of

17 the period the cooperative association admits at least one participant ~~member~~ in accordance with

18 its organic rules; or

19 (4) the filing of a determination by the [Secretary of State] under Section 1110

20 ~~1010~~.

21 Reporter's Note

22 Source: ULPA (2001) § 801. It has been modified because cooperatives do not bifurcate

1 membership between general and limited partners even though under this draft patron and
2 nonpatron participants are authorized. Subsection (3) of this Section has been modified pursuant
3 to action taken by the Committee. This is a bit of a trapdoor. Where does the draft state there
4 must be two members? Comments to previous Sections need to make this clear. ~~again begs the~~
5 ~~fundamental question of how many members are required for the existence of a cooperative.~~
6 This Section errs on the side of continuity of life though it is inconsistent with matters of
7 formation. ~~It is anticipated the Committee will revisit the formation issue at its Fall 2005~~
8 ~~drafting meeting. The “tough nut” scenario seems to be where all the board members are also~~
9 ~~members (perhaps the prototypical arrangement contemplated by this act). Who would be in~~
10 ~~charge and admit? While a nice technical issue; the same issue arises under unincorporated law~~
11 ~~where this provision is regarded as providing both flexibility and key in maintaining perpetuity of~~
12 ~~life.~~
13

14 **SECTION 1103. ~~1003.~~ JUDICIAL DISSOLUTION.** The [appropriate court] may
15 dissolve a cooperative association or order any action that under the circumstances is appropriate
16 and equitable:

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

18 (A) the cooperative association obtained its articles of organization
19 through fraud; or

20 (B) the cooperative association has continued to exceed or abuse the
21 authority conferred upon it by law;

22 (2) in a proceeding by a participant member, if it is established that:

23 (A) the directors are deadlocked in the management of the cooperative
24 association affairs, the participants members are unable to break the deadlock, and irreparable
25 injury to the cooperative association is occurring or is threatened because of the deadlock;

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

28 (C) the participants members are deadlocked in voting power and have

1 failed, for a period that includes at least two consecutive annual participants' meetings ~~members'~~
2 ~~meeting dates~~, to elect successors to directors whose terms have expired; or

3 (D) the assets of the cooperative association are being misapplied or
4 wasted; or

5 (3) in a proceeding by the cooperative association to have its voluntary
6 dissolution continued under judicial supervision.

7 **Reporter's Note**

8 As emphasized by the following paragraph, mere holders of financial rights have no
9 standing to attempt to dissolve the entity. That is important under both unincorporated law (see
10 ULPA) and corporate law.

11
12 This section on judicial dissolution is derived from the MBCA but conceptually tracks the
13 current LLC draft being considered by the Conference. Substantively, note: (1) Subsection (2) no
14 longer authorizes transferees to bring an action to dissolve the cooperative (in addition to
15 members) ~~under certain circumstances~~; (2) Subsection 2(A) does not include the MBCA phrase,
16 "or the business and affairs of the [cooperative] can no longer be conducted to the advantage of
17 the ... [members] generally" (but is consistent with the directors ability to consider other
18 constituencies under Article 6); and, (3) the MBCA provides for an action for dissolution by a
19 creditor of the corporation (here the cooperative) if the claim has been reduced to judgment and
20 the entity is insolvent (perhaps that is best left to bankruptcy law).

21
22 After discussion at the April 2005 Committee meeting "or a transferee of a member" was
23 deleted from Section 1003(2). It was pointed out that it gave transferees greater power than they
24 have under almost all unincorporated law, that there was no similar provision in traditional
25 cooperative law, and that it gave transferees the power to unreasonably interfere with the
26 operation of the cooperative by filing suit.

27
28 Arguably the ~~Thus~~ broadest provisions for transferee rights in the entire draft for
29 individual participant rights are in the former draft subsections (2)(B) and (2)(D). The
30 Committee discussed these provisions but they need to be discussed further. The language has
31 the same effect as provided by Section 801(6) (ii) of UPA (1997) for at-will partnerships. ULPA
32 Section 802 is much shorter and more restrictive:

33
34 On application by a partner the [appropriate court] may order a
35 dissolution of a limited partnership if it is not reasonably
36 practicable to carry on the activities of the limited partnership in

1 conformity with the partnership agreement.

2
3 This section also adds the phrase “or order any action which under the circumstances is
4 appropriate and equitable” to the flush language thereby expressly authorizing the court to,
5 illustratively, appoint provisional directors or force a buy-out for ~~of~~ interests. This follows what
6 appears to be a trend in both statutory and case law of corporations.

7
8 Subsection (2)(B) states a different (and lower) standard for judicial dissolution than for
9 the removal of a director under Section 707 ~~607~~ which includes “grossly abusive” and
10 “intentionally harmful.”

11
12 Finally, though it is included in the MBCA, the committee has not addressed Subsection
13 (2)(C). It does not require any showing of damage to the cooperative association and follows
14 following corporate law. Finally, subsection (2)(c) seems to require that the meetings have been
15 held. While salutary because it prohibits a participant from manipulating quorum requirements,
16 if any, is this the result the Committee intends? ~~most corporate statutes allow creditors to move~~
17 for dissolution if a corporation is insolvent. This act does not do so.
18

19 **SECTION 1104. ~~1004.~~ VOLUNTARY DISSOLUTION BEFORE**
20 **COMMENCEMENT OF ACTIVITY.** A majority of the organizers or initial directors of a
21 cooperative association that has not yet begun activity or the conduct of its affairs may dissolve
22 the cooperative association.

23 **Reporter’s Note**

24 This Section subscribes to the initial approach of avoiding the term “business.” Other
25 provisions now use that term and the Committee has discussed the issue elsewhere. As an aside,
26 should “business” be a defined term?
27

28 **SECTION 1105. ~~1005.~~ VOLUNTARY DISSOLUTION BY THE BOARD AND**
29 **PARTICIPANTS. ~~MEMBERS.~~** In order to voluntarily dissolve:

30 (a) a resolution to dissolve must be approved by a majority vote of the board of
31 directors unless a greater vote is required by the organic rules;

32 (b) the board of directors shall mail or otherwise transmit or deliver a record to

1 each participant:

2 (1) the resolution required by subsection (a);

3 (2) a recommendation that the participants vote in favor of the resolution

4 unless the board determines because of conflict of interest or other special circumstances it
5 should not make such a recommendation;

6 (3) if the board makes no recommendation, the basis of that decision; and

7 (4) give notice of the meeting in the same manner as a special participants
8 meeting.

9 (c) Subject to Section 312, the resolution to dissolve must be approved by at least
10 a two-thirds vote of patron participants voting at the meeting and at least two-thirds vote of
11 investor participants voting at the meeting.

12 (d) Unless otherwise provided in the resolution, the cooperative association is
13 dissolved upon approval in subsection (c).

14 ~~**{RESERVED}**~~

15 **Reporter's Note**

16 This Section is new to the February 2006 draft having been formerly reserved. It follows
17 logically from the articles concerning amendments to organic rules and conversion, merger or
18 consolidation.

19
20 ~~This Section is reserved simply because it is anticipated it will mirror the language and~~
21 ~~procedure utilized for both amendment of the articles of organization (Article 13) and, to a lesser~~
22 ~~extent, the consolidation or merger and sale of assets provisions (Article 14 and 15). Thus, its~~
23 ~~drafting awaits further discussion of those articles.~~
24

25 **SECTION 1106. ~~1006.~~ WINDING UP.**

26 (a) A cooperative association continues after dissolution only for purposes of

1 winding up its activities.

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

3 (1) shall discharge its liabilities, settle and close its activities, and marshal
4 and distribute its assets; and

5 (2) file a statement of dissolution indicating it is winding up pursuant to
6 Section 203, preserve the cooperative association or its property as a going concern for a
7 reasonable time, prosecute and defend actions and proceedings, ~~whether civil, criminal, or~~
8 ~~administrative~~, transfer cooperative association property, settle disputes by mediation or
9 arbitration, and perform other necessary acts.

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

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

16 (2) the applicant establishes other good cause.

17 **Reporter's Note**

18 The term "holder of financial rights" replaces "transferee" in the February 2006 draft.
19 Should creditors have standing to seek judicial supervision?
20

21 ~~Subsection (b)(2) is conformed with comments to Section 203.~~
22

23 **SECTION 1107. ~~1007~~. DISTRIBUTION OF ASSETS IN WINDING UP**
24 **COOPERATIVE ASSOCIATION.**

1 (a) In winding up a cooperative's association's business, the assets of the
2 cooperative association must be applied to discharge its obligations to creditors, including
3 participants ~~members~~ who are creditors. Any remaining assets must be applied to pay in money
4 the net amount distributable to participants ~~members~~ in accordance with their right to
5 distributions under subsection (b).

6 (b) ~~Unless otherwise provided in the organic rules, each~~ Each participant member
7 is entitled to a distribution from the cooperative association of any remaining assets in the
8 proportion of the participant's ~~member's~~ financial interests to the total financial interests of
9 participants ~~members~~ of the cooperative association after all other obligations are satisfied.

10 **Reporter's Note**

11 Best practice would provide detail in the organic rules. The Committee tentatively
12 decided to delete the phrase "unless otherwise provided by the organic rules" in subsection (b).
13 The import of that deletion should be revisited. The Reporter was directed by the Committee at
14 its April 2005 meeting to compare this provision with the Colorado Cooperative Act (corporate)
15 and the Minnesota Cooperative Association Act and report it at its Fall 2005 meeting. The
16 Minnesota Cooperative Associations Act is silent as to liquidating distributions in its dissolution
17 provisions. Section 308B.721 of the Minnesota law, however, generally governs distributions
18 and allocations and it states: "The bylaws shall prescribe..."
19

20 The Colorado Cooperative Act (a "traditional" act) provides:

21
22 (2) Unless otherwise stated in the articles or bylaws, the assets
23 shall be used to pay, in the following order:

24 (a) Liquidation expenses, including reasonable payment and
25 reimbursement for the time and expenses of the trustees in
26 liquidation and their consultants;

27 (b) All debts and liabilities according to their respective
28 priorities;

29 (c) Amounts invested in the cooperative that have a specific
30 preference in liquidation over other amounts invested in the
31 cooperative;

32 (d) Without priority and on a pro rata basis amounts
33 invested in the cooperative, whether as membership fees, common

1 stock, or otherwise, which are required by the cooperative to be
2 invested in order for a person to be a member or to be subject to
3 per unit retains or be entitled to participate in the allocation of net
4 margins on terms and conditions established in the cooperative's
5 bylaws or by the cooperative's board;

6 (e) Without priority and on a pro rata basis, retained
7 patronage, per unit retains, other amounts withheld from or
8 allocated to a patron of the cooperative or any direct contributions
9 to the capital of the cooperative not described in paragraph (d)....,
10 all as shown on the books and records of the cooperative;

11 (f) Any remaining assets, including reserves, if any, shall be
12 distributed among such members of the cooperative, without
13 priority and on a pro rata basis, as shall be practicable as
14 determined by the trustees in liquidation. In making heir
15 determination, the trustees in liquidation may limit those persons
16 entitled to share in the distribution to persons entitled to share in
17 the allocation of the cooperative's net margins during a limited
18 specified period of time;

19 (g) With respect to paragraphs (e) and (f), the amounts to be
20 distributed shall be paid to the persons entitled to them as promptly
21 as reasonably possible after the filing of the articles of dissolution
22 by the secretary of state, but in no event shall the distributions be
23 made later than seven years following the filing of the articles of
24 dissolution by the secretary of state, unless distribution is
25 prevented by circumstances beyond the control of the trustees in
26 liquidation.

27
28 By way of comparison, ULPA (2001) § 812 states:
29

30 (a) In winding up a limited partnership's activities, the assets of the
31 limited partnership, including the contributions required by this
32 Section, must be applied to satisfy the limited partnerships
33 obligations to creditors, including, to the extent permitted by law,
34 partners that are creditors.

35 (b) Any surplus remaining after the limited partnership complies
36 with subsection (a) must be paid in cash as a distribution.
37

38 ***

39 In turn, ULPA Section 503 states:
40

41 A distribution by a limited partnership must be shared among
42 partners on the basis of the value, as stated in the required records
43 when the limited partnership decides to make the distribution, of

1 the contributions the limited partnership has received from each
2 partner.

3
4 At the October 2005 Committee meeting it was mentioned that subsection (b) would be limited
5 to a seven year look-back rule in electric cooperative law. The Reporters would like a bit more
6 guidance on how to use this information.

7
8
9 **SECTION 1108. 1008. KNOWN CLAIMS AGAINST DISSOLVED**
10 **COOPERATIVE ASSOCIATION.**

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

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

- 15 (1) specify the information required to be included in a claim;
16 (2) provide a mailing address to which the claim is to be sent;
17 (3) state the deadline for receipt of the claim, which may not be less than
18 120 days after the date the notice is received by the claimant; and
19 (4) state that the claim will be barred if not received by the deadline.

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

- 22 (1) the cooperative association has not been notified in a record of the
23 ~~claim is not received by the~~ specified deadline; or
24 (2) in the case of a claim that is timely received but rejected by the
25 dissolved cooperative association, the claimant does not commence an action to enforce the
26 claim against the cooperative association within 90 days after the receipt of the notice of the

1 rejection.

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

4 **Reporter's Note**

5 The substance of this section and that of the remainder of this article is contained in both
6 corporate and LLC law. The base model for the drafting of these provisions was ULLCA.

7
8 Subsection (c)(1) has been revised pursuant to Committee direction in the October 2005
9 meeting. Does the revision make the use of the word "claim" inconsistent with (b) and (c). A
10 suggestion/question concerning the flush language of (b)b was also made at that meeting but no
11 revision has yet been made because it raises the deletion of the article about notice and
12 notification. The Committee needs to return to that question.
13

14 **SECTION 1109. 1009. OTHER CLAIMS AGAINST DISSOLVED** 15 **COOPERATIVE ASSOCIATION.**

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

19 (b) The notice must:

20 (1) be published at least once in a newspaper of general circulation in the
21 [county] in which the dissolved cooperative's association's principal office is located or, if it has
22 none in this state, in the [county] in which the cooperative's association's designated office is or
23 was last located;

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

26 (3) state that a claim against the cooperative association is barred unless

1 an action to enforce the claim is commenced within three years after publication of the notice.

2 (c) If a dissolved cooperative association publishes a notice in accordance with
3 subsection (b), the claim of each of the following claimants is barred unless the claimant
4 commences an action to enforce the claim against the dissolved cooperative association within
5 three ~~five~~ years after the publication date of the notice:

6 (1) a claimant that did not receive notice in a record under Section 1108;
7 ~~1008~~;

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

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

12 (d) A claim not barred under this Section may be enforced:

13 (1) against the dissolved cooperative association, to the extent of its
14 undistributed assets; or

15 (2) if the assets have been distributed in liquidation, against a participant
16 ~~member~~ or transferee of financial rights to the extent of that person's proportionate share of the
17 claim or the cooperative's association's assets distributed to the participant ~~member~~ or transferee
18 in liquidation, whichever is less, but a person's total liability for all claims under this subsection
19 ~~paragraph~~ does not exceed the total amount of assets distributed to the person as part of the
20 winding up of the dissolved cooperative association.

21 **Reporter's Note**

22 ~~The Committee discussed the possibility of broadening the notice requirements in~~

1 subsection (b)(1). The Reporter is to prepare a comparative and substantive preliminary
2 comment on (b)(3) for the Fall 2005 meeting. This provision is very similar to provisions in
3 corporate and unincorporated law although there is some variation in the number of years
4 identified in subsection (b)(3). Corporate law provides an additional step that the Committee
5 desires to consider. The RMBCA version of the addition follows:

6
7 § 14.08. Court Proceedings

8 (a) A dissolved corporation that has published a notice under
9 section 14.07 may file an application with the [name or describe]
10 court of the county where the dissolved corporation's principal
11 office (or, if none in this state, its registered office) is located or a
12 determination of the amount and form of security to be provided
13 for payment of claims that are contingent or have not been made
14 known to the dissolved corporation or that are based on an event
15 occurring after the effective date of dissolution but that, based on
16 the facts known to the dissolved corporation, are reasonably
17 estimated to arise after the effective date of dissolution. Provision
18 need not be made for any claim that is or is reasonably anticipated
19 to be barred under section 14.07(c).

20 (b) Within 10 days after the filing of the application, notice of the
21 proceeding shall be given by the dissolved corporation to each
22 claimant holding a contingent claim whose contingent claim is
23 shown on the records of the dissolved corporation.

24 (c) The court may appoint a guardian ad litem to represent all
25 claimants whose identities are unknown in any proceeding brought
26 under this section. The reasonable fees and expenses of such
27 guardian, including all reasonable expert witness fees, shall be paid
28 by the dissolved corporation.

29 (d) Provision by the dissolved corporation for security in the
30 amount and the form ordered by the court under section 14.08(a)
31 shall satisfy the dissolved corporation's obligations with respect to
32 claims that are contingent, have not been made known to the
33 dissolved corporation or are based on an event occurring after the
34 effective date of dissolution, and such claims may not be enforced
35 against a shareholder who received assets in liquidation.
36

37 **SECTION 1110. COURT PROCEEDING.**

38 (a) A dissolved cooperative association that has published a notice under
39 subsection 1109(c) may file an application with the court where the dissolved cooperative

1 association's principal office is located or a determination of the amount and form of security to
2 be provided for payment of claims that are contingent or have not been made known to the
3 dissolved cooperative association or that are based on an event occurring after the effective date
4 of dissolution but that, based on the facts known to the dissolved cooperative association, are
5 reasonably estimated to arise after the effective date of dissolution.

6 (b) Notice of the proceeding shall be given by the dissolved cooperative
7 association to each known claimant holding a contingent claim within 10 days after the filing of
8 the application of the cooperative association.

9 (c) The court may appoint a guardian ad litem to represent all claimants whose
10 identities are unknown in any proceeding brought under this section. The reasonable fees and
11 expenses of such guardian, including all reasonable expert witness fees, shall be paid by the
12 dissolved cooperative association.

13 (d) Provision by the dissolved cooperative association for security in the amount
14 and the form ordered by the court under section 1109(c) shall satisfy the dissolved cooperative
15 association's obligations with respect to claims that are contingent, have not been made known to
16 the dissolved cooperative association or are based on an event occurring after the effective date
17 of dissolution, and such claims may not be enforced against a participant who received a
18 distribution.

19 **Reporter's Note**

20 This Section is new to the February 2006 draft. It was discussed at the October 2005
21 meeting. Is "guardian ad litem" the correct word choice in subsection (c)? A comparative memo
22 on this provision has been completed and will be available at the February 2006 meeting.
23
24

SECTION 1111.1010. ADMINISTRATIVE DISSOLUTION.

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

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

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

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

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

(d) A cooperative association administratively dissolved continues its existence but may carry on only activities necessary to wind up its activities and liquidate its assets under Section 1106 ~~1006~~ and to notify claimants under Sections 1108 and 1109 ~~1008 and 1009~~.

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

Reporter's Note

1 An issue that needs to be discussed by the Committee is whether the number of days are
2 appropriate. The choice in the April 2005 draft conforms to ULPA (2001) and is not changed
3 from the 2004 annual meeting draft. The 60 day period also mirrors RMBCA section 14.20.
4 This section combines ULPA (2001) sections 809 and 810.
5

6 **SECTION 1112, ~~1011~~. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
7 **DISSOLUTION.**

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

11 (1) the name of the cooperative association and the effective date of its
12 administrative dissolution;

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

15 (3) that the cooperative's association's name satisfies the requirements of
16 Section 109.

17 (b) If the [Secretary of State] determines that an application contains the
18 information required by subsection (a) and that the information is correct, the [Secretary of State]
19 shall:

20 (1) prepare a declaration of reinstatement that states this determination;

21 (2) sign and file the original of the declaration of reinstatement; and

22 (3) serve the cooperative association with a copy.

23 (c) When reinstatement becomes effective, it relates back to and takes effect as of
24 the effective date of the administrative dissolution, and the cooperative association may resume

1 or continue its activities as if the administrative dissolution had never occurred.

2 **Reporter's Note**

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

4
5 This Section needs to be discussed regarding the rather detailed instructions it contains
6 for the secretary to state. Consideration should be given to conforming it with the provision
7 governing the articles of organization. At the Committee's direction the phrase "or continue"
8 was added to subsection (c). The Comments need to explain the effect on third parties. It is
9 unintended, in that regard, to be completely consistent with corporate and unincorporated law.
10

11 **SECTION 1113. ~~1012.~~ APPEAL FROM DENIAL OF REINSTATEMENT.**

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

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

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

23 **Reporter's Note**

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

1 fees section.
2

3 **SECTION 1114. STATEMENT OF DISSOLUTION.**

4 (a) A cooperative association that has dissolved or is about to dissolve may
5 deliver to the [Secretary of State] for filing a Statement of Dissolution that states:

6 (1) the name of the cooperative association;

7 (2) the date that the cooperative association dissolved or when it will
8 dissolve;

9 (3) any other information it deems relevant;

10 (b) A person has notice of a cooperative association's dissolution the later of 90
11 days after the filing of the statement or the effective date under subsection (a)(2).

12 **Reporter's Note**

13 This Section is new and it, and this Note, should be read in conjunction with Section
14 1115 and its Note. The Reporters added this Section on their own motion for discussion at the
15 February 2006 meeting because the prior draft and note was inconsistent and, worse,
16 affirmatively confusing. Both this Section and Section 1115 are elective filings. ULP (2001)
17 has an elective statement of termination but not of dissolution.

18
19 Under modern corporate law (e.g., MBCA) the articles of dissolution are mandatory in
20 that the articles are "the only filing required for voluntary dissolution." Official Comment,
21 MBCA §14.03. "Required," however, is misleading because if a corporation were voluntarily
22 dissolved but articles were not filed the secretary of state would (eventually) administratively
23 dissolve the corporation.

24
25 Further, the comments to that Section state:

26
27 The act of filing the articles of dissolution makes the decision to
28 dissolve the corporation a matter of public record and establishes
29 the time when the corporation must begin the process of winding
30 up and cease carrying on its business except to the extent necessary
31 to wind up.
32

1 The limited partnership scheme is different because the certificate of limited partnership
2 is not a governing document but purely a notice one (like the articles of organization in most
3 LLC Acts). As such, the appropriate way to give notice is in an amendment to the certificate
4 itself. Such an amendment is required under ULPA when a third-party is appointed to wind-up
5 the partnership. Where a third party is not appointed, a fair reading of Section 202, at least
6 allows an amendment upon dissolution. Section 202 states:

7
8 (c) A general partner that knows that any information in a filed
9 certificate of limited partnership was false when the certificate was
10 filed or has become false due to changed circumstances shall
11 promptly:

12 (1) cause the certificate to be amended; or

13 (2) if appropriate, deliver to the [Secretary of State] for
14 filing a statement of change pursuant to Section 115 or a statement
15 of correction pursuant to Section 207.

16
17 The problem is this: the certificate is not required to state that it is “not dissolved.” Thus, it is
18 not required to file a notice document upon dissolution under ULPA though a certificate “may
19 also contain any other matters...”.

20
21 **SECTION 1115. ~~1013~~. STATEMENT OF TERMINATION ~~DISSOLUTION~~.**

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

24 (1) the name of the cooperative association;

25 (2) the date of filing of its initial articles of organization, ~~and~~

26 (b) The filing of the statement of termination does not terminate the cooperative
27 association.

28 **Reporter’s Note**

29 This Section was formerly numbered Section 207. Subsection (b) is new to the February
30 2006 draft.

31
32 There was discussion at the 2004 annual meeting suggesting that the statement of
33 termination was a throwback to older versions of the MBCA and that this Act should follow the
34 current MBCA provisions for filing the articles of dissolution. Because this is an unincorporated
35 entity, however, it (now at least) follows ULPA (2001). No filing is required under this

1 provision nor in this article ~~Article 10~~ requiring a filing for dissolution or winding-up. This
2 statement is simply an elective statement that may be filed. The November 2004 draft more
3 closely followed ULLCA (1996).

4
5 ~~The statement of dissolution simply indicates that the cooperative has entered winding-up~~
6 ~~and this provision could be moved to Article 10. ULPA (2001) does not do so but ULLCA~~
7 ~~(1996) does place it there.~~

8
9 Termination is a very different creature than dissolution. Upon termination the entity,
10 and its liability shield, ends.

11
12 Several questions should be addressed by the Committee:

13
14 (1) a prior draft included a third item in the list providing for the addition of any
15 other information;

16
17 (2) the placement of this Section (and Section 1114) here rather than in Article 2;
18 and, most importantly

19
20 (3) the effect of filing such a statement. For example, ULPA (2001) expressly
21 provides (Section 103) for the effect of its filing (e.g., constructive notice? ULPA says it is after
22 it has been filed for 90 days). See Section 1114. The latter is an issue in at least two practical
23 contexts. The first is opinion letter drafting and the experience with statements of authority
24 under RUPA. The second is whether its filing would have any bearing on the “certificate of good
25 standing” and require the secretary of state to search its records.

1 [ARTICLE] 12 11

2 ACTIONS BY PARTICIPANTS MEMBERS

3
4 Reporter's Preliminary Note to Article 12

5 (1) Placement of Derivative Sections. The Reporter was requested to conduct preliminary
6 research regarding the comparative placement of derivative action within state statutory schemes.
7 According to a secondary source approximately eleven states place rules on derivative
8 proceedings in their rules of civil procedure. In corporate law about 30 states place their
9 derivative "rules" in the corporate statute (16 of those states adopted the MBCA provisions).
10 Maryland does not, apparently, deal with derivative actions by statute. The balance, according to
11 the source, have some combination or expressly cross-reference the civil procedure rules.
12

13 (2) Additional Background-Direct v. Derivative. Case law about the distinction is almost
14 entirely from corporate law through some law is now developing under LLC statutes. Professor
15 Kleinberger gave a CLE presentation about derivative actions in the context of LLCs at the
16 Spring 2005 meeting of the ABA Business Section. Therein he provided several observations
17 that apply to this project:
18

19 (a) Analysis of the operation of the rules must take into account the closely-held
20 versus public ownership distinction;

21 (b) Courts follow three general approaches ("direct harm," "special injury," "duty
22 owed/rights infringed"); and,

23 (c) The ALI Principles of Corporate governance suggest there be no distinction
24 between direct and derivative actions in closely-held corporations.
25

26 In the LLC context he suggested that courts follow the "direct harm" approach
27 supplemental by a "purpose and effect" exception in closely-held LLCs where the majority is
28 using the entity to abuse a particular minority owner. Both ULPA (2001) and "Re-ULLCA"
29 adopt the "direct harm" approach.
30

31 (3) Court Approval for Discontinuance. The Reporter was also requested to conduct
32 preliminary research concerning court approval of discontinuance or settlement of derivative
33 proceedings. The MBCA and the Federal Rules of Civil Procedure require such approval. The
34 Section 7.45 of the RMBCA reads as follows:
35

36 A derivative proceeding may not be discontinued or settled without
37 the court's approval. If the court determines that a proposed
38 discontinuance or settlement will substantially affect the interests
39 of the corporation's shareholders or a class of shareholders, the

1 court shall direct that notice be given to the shareholders affected.

2
3 The Conference products do not address court supervision of settlement (ULLCA, Re-
4 ULLCA current draft, ULPA, UPA).

5
6 **SECTION 1201. 1101. DIRECT ACTION BY PARTICIPANT. MEMBER.**

7 (a) Subject to subsection (b), a participant ~~member~~ may maintain a direct action
8 against the cooperative association, an officer, or a director ~~for legal or equitable relief~~, to
9 enforce the rights and otherwise protect the interests of the participant, ~~member~~, including rights
10 and interests under the organic rules or organic law.

11 (b) A participant ~~member~~ maintaining a direct action under this Section is
12 required to plead and prove an actual or threatened injury that is not solely the result of an injury
13 suffered or threatened to be suffered by the cooperative association.

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

17 **Reporter's Note**

18 Source: § 1001 ULPA (2001) (modified) and “Re-ULLCA” (May 15, 2005, Draft). The
19 February 2006 Draft deleted a subsection (c) that dealt with an accounting action. The deletion
20 more closely follows LLC and traditional cooperative law than partnership law. The reference to
21 accounting was ripe for deletion because no Committee discussion suggested an accounting
22 action should be expressly statuted as a statutory matter. Does this Draft's Supplemental
23 Principles” (Section 108) adequately cover this? A prior draft included a direct right to sue
24 another member based on unincorporated entity law (in former section 1101). Directors are
25 included to raise the issue of “primary” shareholder litigation in the corporate context and to
26 better reflect the operation of the provision under ULPA. Query whether this merely reflects
27 current law; or causes or alleviates confusion. Finally, query whether the provision on direct
28 action is necessary. Current corporate and cooperative acts do not make this statutory distinction.
29 Unincorporated laws, however, include this because, historically, the individual partner could not
30 sue directly outside an accounting action. The direct-derivative distinction is currently in the

1 ULLCA draft being discussed by another committee of the Conference. A Comment needs to be
2 included explaining subsection (c).
3

4 **SECTION 1202. 1102. DERIVATIVE ACTION.** A participant member may maintain
5 a derivative action to enforce a right of a cooperative association if the participant member
6 adequately represents the interests of the cooperative association and if:

7 (1) the participant member first makes a demand on the cooperative association,
8 requesting that it bring an action to enforce the right, and the cooperative association does not
9 bring the action within a reasonable time; and

10 (2) 90 days have expired from the date the demand was made unless the
11 participant member has earlier been notified that the demand has been rejected by the cooperative
12 association or unless irreparable injury to the cooperative association would result by waiting for
13 the expiration of the time.

14 **Reporter's Note**

15 Source: § 1002 ULPA (2001). Section 1102 modifies the ULPA (2001) formulation by
16 adding the requirement that the member adequately represents the interests of the cooperative; by
17 adding a 90 day time period after demand before suit may be commenced; and by deleting
18 excused demand because of futility. The 90 day period may be excused if the waiting period
19 would result in irreparable harm to the cooperative under subsection 1102(2). These
20 modifications generally follow the law of the Model Business Corporations Act.
21

22 Is 90 days too long, *but see* the Reporter's Note following section 1104. Oregon uses 20
23 days. *See* section 1104. This draft does not contain a futility exception. Subsection (1) formerly
24 required a writing, the Committee discussed replacing it with record, this draft goes back to the
25 language in ULPA (2001). For purposes of comparison, a recent draft in the "Re-ULLCA"
26 project includes "futility" (as does ULPA) and is silent as to the time limit. Neither does it
27 include "adequately represents the interests" in the flush language.
28

29 The Committee has discussed (briefly) the inclusion of a provision about special litigation
30 committees. To date the Committee is satisfied that the flexibility for Committees and other
31 appointments elsewhere in the draft adequately address the issue. The Minnesota Cooperative

1 Association Act has a specific provision on the topic as does the RMBCA. A recent draft of
2 “Re-ULLCA” included such a provision for discussion purposes only. The discussion draft
3 follows the corporate formulation but note that it specifically addresses the standard to be used
4 for the Committee’s business judgment:

5
6 Section 905. SPECIAL LITIGATION COMMITTEE.

7 (a) When a limited liability company is named as a party in
8 a derivative proceeding, the limited liability company may appoint
9 a special litigation committee to investigate claims asserted in the
10 proceeding and determine whether pursuing the proceeding is in
11 the best interests of the limited liability company. If the limited
12 liability company appoints a special litigation committee, on
13 motion by the committee, made in the name of the limited liability
14 company, the court shall stay discovery for the amount of time
15 reasonably necessary to permit the committee to make its
16 investigation.

17 (b) A special litigation committee may be composed of one
18 or more persons, who may, but need not be, members. A special
19 litigation committee may be appointed:

20 (1) in a member-managed limited liability company,
21 by the consent of a majority of those members who are not named
22 as defendants in the proceeding and, if there are none, by a
23 majority of members; and

24 (2) in a manager-managed limited liability
25 company, by:

26 (A) a majority of those managers that are not
27 named as defendants in the proceeding; and

28 (B) if there are none, by a majority of
29 members that are not named as defendants in the proceeding; and

30 (C) if there are none, by a majority of the
31 managers.

32 (c) After appropriate investigation, a special litigation
33 committee may determine that it is in the best interests of the
34 limited liability company that the proceeding:

35 (1) continue under the control of the plaintiff;

36 (2) continue under the control of the special
37 litigation committee;

38 (3) be settled on terms determined by the special
39 litigation committee; or

40 (4) be dismissed.

41 (d) After making a determination under subsection (c), the
42 special litigation shall file with the court a statement of its
43 determination and its report supporting its determination, giving

1 Source: § 1003 ULPA (2001). Query whether the requirement that the person bringing a
2 suit be a member at the time of commencement is advisable or necessary. Most corporate
3 statutes so provide. It is consistent with other conference products. A Comment or Legislative
4 Note should direct states to determine the placement of derivative actions within their own ~~own~~
5 codes. South Dakota's derivative procedures, for example, appear in its code of civil procedure.
6 The South Dakota provision and, some other corporate codes, require that the plaintiff "fairly
7 represents" the interest of the corporation. This draft does as well. ~~See § 1002.~~
8

9 **SECTION 1204. ~~H04.~~ PLEADING.** In a derivative action, the complaint must state
10 with particularity:

- 11 (1) the date and content of the plaintiff's demand and the cooperative's
12 association's response to the demand; and
13 (2) if 90 days have not expired under Section 1202(2), ~~H02(2)~~; that irreparable
14 injury to the cooperative association would result by waiting for the expiration of the time.

15 **SECTION 1205. ~~H05.~~ PROCEEDS AND EXPENSES.**

- 16 (a) Except as otherwise provided in subsection (b):
17 (1) any proceeds or other benefits of a derivative action, whether by
18 judgment, compromise, or settlement, belong to the cooperative association and not to the
19 derivative plaintiff; and
20 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff
21 shall immediately remit them to the cooperative association.
22 (b) If a derivative action is successful in whole or in part, the court may award the
23 plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the
24 cooperative association.

25 **Reporter's Note**

1 Source: § 1005 ULPA (2001).

2 Most cooperative statutes do not expressly provide for derivative actions. This draft
3 closely follows ULPA (2001) in providing for such actions.
4

5 Section 1102 modifies the ULPA (2001) formulation by adding the requirement that the
6 member adequately represents the interests of the cooperative; by adding a 90 day time period
7 after demand before suit may be commenced; and by deleting excused demand because of
8 futility. The 90 day period may be excused if the waiting period would result in irreparable harm
9 to the cooperative under subsection 1102(2). These modifications generally follow the law of the
10 Model Business Corporations Act. This draft does not include the MBCA provision concerning
11 litigation committees and the authority of the committee to have the suit dismissed if the
12 committee exercises good faith. One reason for not providing for such committees is because of
13 the limited availability of outside or independent directors under this draft. Nonetheless the
14 addition of the requirement that the member bringing the derivative suit “adequately represent”
15 the cooperative should provide a framework for the evolution of such concepts under the
16 common law.

1 [ARTICLE] ~~13~~ 12

2 FOREIGN COOPERATIVES

3
4 SECTION ~~1301. 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 participants ~~members~~ of the foreign cooperative and
7 between the participants ~~members~~ and the foreign cooperative.

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

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

13 Reporter's Note

14 This article needs examination by the Committee with respect to whether any type of
15 cooperative organization organized in another state should be permitted to obtain a certificate of
16 authority under this act. "Foreign cooperative" is defined in this draft as a "foreign entity [not a
17 domestic entity] organized under a law *similar* to this [act] in another jurisdiction" [emphasis
18 supplied]. How "similar" is "similar"? A number of states have specialized cooperative statutes,
19 e.g., cooperatives for agriculture, cooperatives for rural power, cooperatives for housing, but do
20 not have a general cooperative statute. If a traditional cooperative formed in a state that permits
21 cooperatives to be organized for many purposes seeks to qualify in a state with only specialized
22 statutes, the cooperative will need to qualify as a for profit or non-profit corporation that does not
23 fit the cooperative "mold." Should this act offer an alternative? A traditional cooperative could
24 be organized under this act for any purpose except that will be specifically excluded. In this
25 draft, the Reporters have assumed "similar" means a cooperative association of a type formed
26 under a statute that would clearly be seen as "similar" to this act meaning the same kind of
27 statute. This article would clearly be seen as "similar" to this act meaning the same kind of
28 statute. This article would currently have limited use by cooperative organizations organized in
29 other states unless organized under an act which is essentially the same as this one, currently
30 Wyoming, Minnesota, Iowa and Tennessee.

1 In keeping with the change of terminology from “member” to “participant” throughout
2 this draft, the terminology has been changed in this article. Is that appropriate in this article? If
3 another state uses “member” could it have an adverse effect on attempting to qualify under this
4 act?
5
6

7 **SECTION 1302. ~~1202.~~ APPLICATION FOR CERTIFICATE OF AUTHORITY.**

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

11 (1) the name of the foreign cooperative and, if the name does not comply
12 with Section 109, an alternative name adopted pursuant to Section 1305 ~~1205~~;

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

15 (3) the street and mailing addresses of the foreign cooperative’s
16 designated office and, if the laws of the jurisdiction under which the foreign cooperative is
17 organized require the foreign cooperative to maintain an office in that jurisdiction, the street and
18 mailing addresses of the required office;

19 (4) the name and street and mailing addresses of the foreign cooperative’s
20 agent for service of process in this state; and

21 (5) the name and street and mailing addresses of each of the foreign
22 cooperative’s current directors and officers.

23 (b) A foreign cooperative shall deliver with the completed application a
24 certificate of good standing or existence or a similar record signed by the [Secretary of State] or
25 other official having custody of the foreign cooperative’s publicly filed records in the state or

1 other jurisdiction under whose law the foreign cooperative is organized.

2
3 **SECTION 1303. 1203. ACTIVITIES NOT CONSTITUTING TRANSACTING**
4 **BUSINESS.**

5 (a) Activities of a foreign cooperative which do not constitute transacting
6 business in this state within the meaning of this [Article] include:

- 7 (1) maintaining, defending, and settling an action or proceeding;
- 8 (2) holding meetings of its participants ~~members~~ or carrying on any other
9 activity concerning its internal affairs;
- 10 (3) maintaining accounts in financial institutions;
- 11 (4) maintaining offices or agencies for the transfer, exchange, and
12 registration of the foreign cooperative's own securities or maintaining trustees or depositories
13 with respect to those securities;
- 14 (5) selling through independent contractors;
- 15 (6) soliciting or obtaining orders, whether by mail or electronic means or
16 through employees or agents or otherwise, if the orders require acceptance outside this state
17 before they become contracts;
- 18 (7) creating or acquiring indebtedness, mortgages, or security interests in
19 real or personal property;
- 20 (8) securing or collecting debts or enforcing mortgages or other security
21 interests in property securing the debts, and holding, protecting, and maintaining property so
22 acquired;

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

3 (10) transacting business in interstate commerce.

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

7 (c) This Section does not apply in determining the contacts or activities that may
8 subject a foreign cooperative to service of process, taxation, or regulation under any other law of
9 this state.

10 **Reporter's Note**

11 Source: ULPA (2001) § 903. The Style Committee has asked whether “of a like manner”
12 in subsection (a)(9) is surplusage.

13
14 The Committee requested alternative suggestions for the occurrence and concurrent
15 ownership requirements. The ALI Principles of Corporate Governance provide more specific
16 guidelines. Section § 7.02(a) (particularly subsection (1)) states:

17
18 (a) A holder [§ 1.22] of an equity security [§ 1.20] has standing to
19 commence and maintain a derivative action if the holder:

20 (1) Acquired the entity security either (A) before the
21 material facts relating to the alleged wrong were publicly disclosed
22 or were known by, or specifically communicated to, the holder, or
23 (B) by devolution of law, directly or indirectly, from a prior holder
24 who acquired the security as described in the preceding Clause (A);

25 (2) Continues to hold the equity security until the time of
26 judgment, unless the failure to do so is the result of corporate
27 action in which the holder did not acquiesce, and either (A) the
28 derivative action was commenced prior to the corporate action
29 terminating the holder's status, or (B) the court finds that the
30 holder is better able to represent the interests of the shareholders
31 than any other holder who has brought suit;

32 (3) Has complied with the demand requirement of § 7.03
33 (Exhaustion of Intracorporate Remedies: The Demand Rule) or

1 was excused by its terms; and

2 (4) Is able to represent fairly and adequately the interests of
3 the shareholders.

4
5 The California Corporate Code is somewhat similar but adds more “procedure.” Section
6 800(b)(1) specifically addresses the issue as follows:

7
8 (b) No action may be instituted or maintained in right of any
9 domestic or foreign corporation by any holder of shares of voting
10 trust certificates of the corporation unless both of the following
11 conditions exist:

12 (1) The plaintiff alleges in the complaint that plaintiff was a
13 shareholder, of record or beneficially, or the holder of voting trust
14 certificates at the time of the transaction or any part thereof of
15 which plaintiff complains or that plaintiff’s shares or voting trust
16 certificates thereafter devolved upon plaintiff by operation of law
17 from a holder who was a holder at the time of the transaction or
18 any part thereof complained of; provided, that any shareholder who
19 does not meet these requirements may nevertheless be allowed in
20 the discretion of the court to maintain the action on a preliminary
21 showing to and determination by the court, by motion and after a
22 hearing, at which the court shall consider such evidence, by
23 affidavit or testimony, as it deems material, that (I) there is a strong
24 prima facie case in favor of the claim asserted on behalf of the
25 corporation, (ii) no other similar action has been or is likely to be
26 instituted, (iii) the plaintiff acquired the shares before there was
27 disclosure to the public or to the plaintiff of the wrongdoing of
28 which plaintiff complains, (iv) unless the action can be maintained
29 the defendant may retain a gain derived from defendant’s willful
30 breach of a fiduciary duty, and (v) the requested relief will not
31 result in unjust enrichment of the corporation or any shareholder of
32 the corporation; and...

33
34
35 **SECTION 1304. ~~1204.~~ FILING OF CERTIFICATE OF AUTHORITY.** Unless the
36 [Secretary of State] determines that an application for a certificate of authority does not comply
37 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,
38 shall file the application, prepare, sign, and file a certificate of authority to transact business in

1 this state, and send a copy of the filed certificate, together with a receipt for the fees, to the
2 foreign cooperative or its representative.

3 **Reporter's Note**

4 Source: ULPA (2001) § 904.
5

6 **SECTION 1305. ~~1205~~. NONCOMPLYING NAME OF FOREIGN**
7 **COOPERATIVE.**

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

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

19 **Reporter's Note**

20 Source: ULPA (2001) § 905. In subsection (a): Would it change the meaning of the first
21 sentence if “the purpose” were replaced by “purposes”?
22

23 **SECTION 1306. ~~1206~~. REVOCATION OF CERTIFICATE OF AUTHORITY.**

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

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

6 (2) deliver, within 60 days after the due date, its annual report required
7 under Section 207 ~~214~~;

8 (3) appoint and maintain an agent for service of process as required by
9 Section 117; or

10 (4) deliver for filing a statement of a change under Section 118 within 30
11 days after a change has occurred in the name or address of the agent.

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

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

19 (2) the foreign cooperative's noncompliance with subsection (a) which is
20 the reason for the revocation.

21 (c) The authority of the foreign cooperative to transact business in this state
22 ceases on the effective date of the notice of revocation unless before that date the foreign

1 cooperative cures each failure to comply with subsection (a) stated in the notice. If the foreign
2 cooperative cures the failures, the [Secretary of State] shall so indicate on the filed notice.

3 **Reporter's Note**

4 Source: ULPA (2001) § 906.

5
6 **SECTION 1307. ~~1207~~. CANCELLATION OF CERTIFICATE OF AUTHORITY;
7 **EFFECT OF FAILURE TO HAVE CERTIFICATE.****

8 (a) To cancel its certificate of authority to transact business in this state, a foreign
9 cooperative must deliver to the [Secretary of State] for filing a notice of cancellation. The
10 certificate is canceled when the notice becomes effective under Section 203 ~~210~~.

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

14 (c) The failure of a foreign cooperative to have a certificate of authority to
15 transact business in this state does not impair the validity of a contract or act of the foreign
16 cooperative or prevent the foreign cooperative from defending an action or proceeding in this
17 state.

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

21 (e) If a foreign cooperative transacts business in this state without a certificate of
22 authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent for

1 service of process for rights of action arising out of the transaction of business in this state.

2 **Reporter's Note**

3 Source: ULPA (2001) § 907.

4
5 **SECTION 1308. ~~1208~~. ACTION BY [ATTORNEY GENERAL].** The [Attorney

6 General] may maintain an action to restrain a foreign cooperative from transacting business in
7 this state in violation of this [Article].

8 **Reporter's Note**

9 Source: ULPA (2001) § 908.

1 [ARTICLE] ~~14~~ 13

2 AMENDMENT OF ORGANIC RULES

3
4 Preliminary Reporters' Note to Article 14

5 As in other articles, this draft now attempts "class voting." See e.g. Section 1405.

6
7 SECTION ~~1401. 1301.~~ AUTHORITY TO AMEND ORGANIC RULES.

8 (a) A cooperative association may amend its organic rules under this [Article].

9 (b) A participant member of a cooperative association does not have vested rights
10 in any provision in the organic rules.

11 **Reporter's Note**

12 This article attempts to consolidate the amendment and restatement procedures for both
13 the articles of organization and bylaws. This section simply grants a general authority to amend.
14 Subsection (b) is in the MBCA and is the analogue of the effect of a change or amendment of
15 underlying law provided in Section 104. Concerning subsection (b): Do cooperatives sometimes
16 have marketing contract provisions in by-laws? If so, is subsection (b) a problem? It doesn't
17 seem to cause a problem in corporate law even though there may be financial contract rights set
18 forth therein (e.g., preferred dividends). The Committee has yet to address whether this is a
19 default or mandatory provision. This issue is an important one because under the corporate law
20 of most states the directors alone may amend the by-laws. This draft more closely follows LLC
21 law. It is also consistent with the Oregon Cooperative Act (§ 62.135).
22

23 SECTION ~~1402. 1302.~~ NOTICE AND ACTION ON AMENDMENT OF
24 ARTICLES OF ORGANIZATION OR BYLAWS. To amend its organic rules:

25 (a+) a proposed amendment must be approved by a majority vote of the board of
26 directors unless a greater vote is required by the organic rules;

27 (b2) the board of directors shall mail or otherwise transmit or deliver in a record

1 to each participant ~~member~~:

2 (1A) the proposed amendment:

3 (2B) a recommendation that the participants ~~members~~ approve the
4 amendment unless the board determines because of conflict of interest or other special
5 circumstances it should not make such a recommendation;

6 (3C) if the board makes no recommendation, the basis of that decision;

7 (4D) any condition of its submission of the amendment to the participants
8 ~~members~~; and

9 (5E) give notice of the meeting in the same manner as ~~a~~ an annual or
10 special participants' ~~members'~~ meeting.

11 **Reporter's Note**

12 This Section is consistent with the article on conversion, merger or consolidation.
13 Subsection (b)(5) has been revised to remove annual meeting for notice because, for practical
14 purposes, it does not require detailed notice of agenda (etc.).
15

16 **SECTION 1403. 1303. METHOD OF VOTING.** Participants ~~Members~~ may vote in
17 the same manner as provided in Section 415. ~~person, by mail, by proxy, or as provided in the~~
18 ~~organic rules.~~

19 **Reporter's Note**

20 This section is derived from Colorado section 7-55-110. ~~There is known inconsistency~~
21 ~~concerning proxies in this draft, the Reporters believe, have been fixed in the February 2006~~
22 draft. Under this draft proxies are not allowed. That is a major policy decision that the
23 Committee has only tentatively made. under 1303 and 1408 and the more general provisions in
24 the first portion of the draft (§ 316). The Committee needs to reach resolution of this policy
25 issue.
26

1 **SECTION ~~1404. 1304.~~ CHANGE AMENDMENT TO AMENDMENT AT**
2 **MEETING.**

3 (a) ~~No~~ A substantive change to amendment of the proposed amendment of the
4 organic rules may not be made at the participants' members' meeting at which the vote occurs.

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

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

9 **Reporter's Note**

10 At the November 2004 meeting the term “germane” was suggested instead of
11 “substantive” in subsection (a). Is subsection (b) clear? This Section received comment from the
12 floor at the 2005 Annual Meeting. A commissioner stated that Robert's Rules of Order should
13 take care of this and queried about “substitute amendments.” In response to the latter comment
14 the February 2006 draft broadens the language slightly from “amendment to amendment” to
15 “change.”

16
17 **SECTION ~~1405. 1305.~~ APPROVAL OF AMENDMENT.**

18 (a) Subject to Sections 411 312 and 1406, 1306, an amendment to the articles of
19 organization must be approved by at least a two-thirds vote of participants members voting at the
20 meeting.

21 (b) Subject to Sections 411 312 and 1406, 1306, an amendment to the bylaws
22 must be approved by at least a majority vote of participants members voting at the meeting and
23 by at least a majority of investor participants voting at the meeting, but a two-thirds vote of
24 patron participants and a two-thirds vote of investor participants members is required for any

1 amendment modifying:

- 2 (1) the capital structure of the cooperative association, including the
3 relative rights, preferences, and restrictions granted or imposed upon any group or class of
4 participants, members, and the rights of the cooperative association's participants members to
5 share in profits, surplus, or distributions;
- 6 (2) the terms for admission of new participants; members;
- 7 (3) quorum for a meeting and rights of voting and governance;
- 8 (4) the transferability of participants' members' interests; or
- 9 (5) the manner or method of allocation of net proceeds, savings, margins,
10 profits, and losses among participants. members.

11 **Reporter's Note**

12 The Reporter was requested to consider several suggested revisions at the November
13 2004 meeting included separate voting by patronage and nonpatronage members. There are two
14 reasons such revisions are not included in this draft which was discussed at the April 2005
15 Committee meeting: ~~(1) In many instances the desired result would be obtained by operation of~~
16 ~~section 1305; (2) The operation of section 312 was not fully considered. SECTION 312~~
17 ~~CONFOUNDS THE OPERATION OF THIS SECTION because, in effect, it gives a majority of~~
18 ~~patron members absolute control over the ultimate outcome of the vote. THIS MUST BE~~
19 ~~DISCUSSED and provides a very strong argument section 312 should be reduced to majority.~~
20 ~~On the other hand, providing for separate patronage/non-patronage voting in any meaningful way~~
21 ~~gives non-patronage members, who are likely to be few in number, blocking power. This draft~~
22 presents "class" voting provisions for Committee discussion based loosely on discussion at the
23 April 2005 Committee meeting and a comment on the floor at the 2005 Annual meeting. An
24 important discussion, that is now ripe, is how to "tune" governance rights. "Class" voting is
25 either a part of the solution or a part of the problem. Previous to the February 2006 draft the
26 investor participants were,

27
28 Many cooperative acts allow the board of directors to amend the bylaws, some do not. It
29 is the tentative general sense of the committee to be protective of members and this draft is
30 consistent with that sense. It would be possible to make (b) a default rule rather than mandatory
31 (See Colorado Rev. Stat. § 7-56-208).
32

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

10 SECTION 1406. ~~1306~~. VOTING BY GROUP, CLASS, OR DISTRICT

11 PARTICIPANTS. ~~MEMBERS.~~

12 (a) If a proposed amendment affects a group, class, or district of participants
13 ~~members~~ in one or more of the ways described in Section 1403, ~~1303~~, those participants
14 ~~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 participants ~~members~~ in the same or a
17 substantially similar way, the participants ~~members~~ of those groups, classes, or districts shall
18 vote on the proposed amendment as a single group.

19 (c) A group, class, or district of participants ~~members~~ has the rights provided in
20 this section even if those participants ~~members~~ are not otherwise entitled to vote under the
21 organic rules.

22 Reporter's Note

23 Query whether (b) is/should be limited to patron participants. This is part of the
24 balancing issue discussed in the previous note and elsewhere and needs Committee direction.
25

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

1 This section should not be interpreted to extend voting rights to transferees (now:
2 “holders of financial rights”).
3

4 **SECTION 1407. 1307: PROPOSAL OF AMENDMENT BY PARTICIPANTS.**

5 **MEMBERS:**

6 (a) Participants ~~Members~~ may propose amendments to the organic rules to be
7 considered by the board of directors by demand in a record signed by participants ~~members~~
8 holding at least 10 percent of all votes entitled to be cast on the matter.

9 (b) The board of directors shall report its action on the proposed amendment at
10 the next annual participant ~~shareholders'~~ meeting or any special meeting for that purpose held
11 under Section 407. 307.

12 **Reporter's Note**

13 Previous provisions allow ~~Section 307 allows~~ 10 percent of the votes of any class or
14 group to call a special meeting so the board can be forced to report through the special meeting
15 process. Note that the proposal under this section requires 10 percent of all votes (not of a class).
16 Inconsistency in detail is a trap unless there is a substantive reason for doing so.
17

18 This section, like corporate law and limited partnership law, provides a central role for
19 the board of directors and does not allow a pure referendum. The relationship between this
20 Section ~~section~~ and the board of directors removal provision needs to be discussed.
21

22 **SECTION 1408. 1307A: EMERGENCY BYLAWS.**

23 (a) Unless the articles of organization provide otherwise, the board of directors
24 may adopt bylaws to be effective only in an emergency described in subsection (d). The
25 emergency bylaws may be amended or repealed by the participants ~~members~~ and may make all
26 provisions necessary for managing the cooperative association ~~corporation~~ during the emergency,
27 including:

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

2 (2) quorum requirements for the meeting; and

3 (3) designation of additional or substitute directors.

4 (b) The regular bylaws consistent with the emergency bylaws remain effective
5 during the emergency. The emergency bylaws are not effective after the emergency ends.

6 (c) Action taken by the cooperative association in good faith in accordance with
7 the emergency bylaws:

8 (1) binds the cooperative association; and

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

11 (d) An emergency exists for purposes of this section if a quorum of the board of
12 directors cannot readily be assembled because of a catastrophic event.

13 **Reporter's Note**

14 This Section was formerly numbered Section 206. ~~It will be numbered Section 1308 and~~
15 ~~the balance of the Article will be renumbered if moving this Section to Article 13 is accepted by~~
16 ~~the Committee.~~

17
18 Emergency bylaw provisions are common in cooperative law. Similar provisions are not
19 typically found in unincorporated entity law. Corporate law, however, frequently contains such
20 provisions. Indeed, according to the annotated version of the MBCA the corporation law of
21 approximately 40 states contains some provision for emergency bylaws.

22
23 The Committee thought it important, therefore, to mirror existing cooperative law.
24 Subsection (d) Section 206(d) needs to be revisited by the Committee as there is some variety in
25 its expression in corporate law. This provision might be better placed in Article 13-
26 "Amendment to Organic Rules".
27

28 **SECTION 1409. 1308. RESTATED ARTICLES.** A cooperative association, by action

1 taken under this [article] required for amendment of its organic rules, may adopt restated articles
2 that contain the original articles as currently amended. Restated articles supersede the existing
3 articles and all amendments upon filing under [Article] 2.

4 **Reporter's Note**

5 There needs to be a cross-reference in the Comments to Section 1310(e).

6
7 **SECTION 1410. 1309: AMENDMENT OR RESTATEMENT OF ARTICLES OF**
8 **ORGANIZATION.**

9 (a) To amend its articles of organization, a cooperative association must deliver
10 to the [Secretary of State] for filing an amendment or, ~~pursuant to [Article] 14~~, articles of
11 conversion, merger or consolidation pursuant to [Article 15], stating:

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

16 (b) A cooperative association shall promptly deliver to the [Secretary of State] for
17 filing an amendment to the articles of organization to reflect the appointment of a person to wind
18 up the cooperative's association's activities under Section 1106. 1006.

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

- 22 (1) cause the articles to be amended; or

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

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

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

7 (f) Subject to Section 203 ~~210~~, an amendment or restated article is effective when
8 filed by the [Secretary of State].

9 **Reporter's Note**

10 This Section was formerly numbered Section 203. Is subsection (c) too broad? There
11 needs to be a cross-reference in the Comments for subsection (e) back to Section 1309.

1 [ARTICLE] ~~15~~ 14

2 CONVERSION, ~~CONSOLIDATION~~ AND MERGER OR CONSOLIDATION

3
4 SECTION 1501, ~~1401~~. DEFINITIONS. In this [Article]:

5 (1) ~~“Consolidation” means a merger of two or more constituent organizations~~
6 ~~which results in the creation of a surviving organization.~~

7 (12) “Constituent cooperative association” means a cooperative association that is
8 a party to a consolidation or merger.

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

11 (3) “Converted organization” means the organization into which a converting
12 organization converts pursuant to Sections 1502 through 1505.

13 (4) “Converting cooperative association” means a converting organization that is a
14 cooperative association.

15 (5) “Converting organization” means an organization that converts another
16 organization pursuant to Section 1502.

17 (64) “Governing statute” of an organization means the statute that governs the
18 organization’s internal affairs.

19 (5) ~~“Merger” means a combination of two or more constituent organizations~~
20 ~~which results in the surviving cooperatives associations having the name of one of the constituent~~
21 ~~organizations.~~

22 (76) “Organization” means a cooperative association, cooperative governed by

1 law other than this [act], general partnership, limited liability partnership, limited partnership,
2 limited liability limited partnership, limited liability company, business trust, corporation, or any
3 other person having a governing statute. The term includes domestic and foreign organizations
4 whether or not organized for profit.

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

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

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

15 (98) “Surviving organization” means an organization into which one or more
16 other
17 organizations are merged. A surviving organization may exist before the merger or be created by
18 the merger.

19 **Reporter’s Note**

20 Perhaps the best way to deal with the Model Entity Transactions Act (META) would be
21 to provide a legislative note to accompany this act setting forth the necessary revisions to this act
22 if META is in place. Such a note would also provide rough guidance for states that have a non-
23 model “junction box” type of statutes. In the latter regard the final section in this article
24 (“nonexclusivity”) may also be helpful.

1 Legislative notes accompany META for suggested amendments to plug into other acts
2 (a.k.a. “trailing amendments”) when META is adopted in a state. The basic idea of META is
3 that it will replace the existing transactions dispersed throughout the entities as they relate to
4 trans-entity transactions and provide default rules for those entities that do not contemplate a
5 transaction allowed by META (e.g. divisions) in their own governing law. Nonetheless, the
6 individual laws (e.g. this act) will govern the cooperative association side of any transaction to
7 the extent it addresses it (e.g., the vote quantum for merging a cooperative association will trump
8 any META default rules for the voting provision in META).

9
10 After Committee discussion of this article, perhaps it would want to direct the Reporters
11 to draft the “META” legislative note for review at the next Committee meeting.

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.” or divisions but “conversions” are added to the February 2006 draft. A
22 separate article ~~Article (15)~~ exists for the sale of assets, ~~but its drafting awaits action on Article~~
23 ~~14.~~ This section is based largely on ULPA (2001) section 1101. The terms “co-owns” and “co-
24 owning” appear in ULPA.

25 Does this article need a definition for “organizational documents”? The language, most
26 especially in (7)(A) needs work.
27

28 **SECTION 1502. CONVERSION.**

29 (a) An organization other than a cooperative association may convert to a
30 cooperative association and a cooperative association may convert to another organization
31 pursuant to this Section and Sections 1503 through 1505 and a plan of conversion, if:

32 (1) the other organization’s governing statute authorizes the conversion;

33 (2) the conversion is not prohibited by the law of the jurisdiction that
34 enacted the governing statute; and

35 (3) the other organization complies with its governing statute in effecting

1 the conversion.

2 (b) A plan of conversion must be in a record and must include:

3 (1) the name and form of the organization before conversion;

4 (2) the name and form of the organization after conversion; and

5 (3) the terms and conditions of the conversion, including the manner and
6 basis for converting interests in the converting organization into any combination of money,
7 interests in the converted organization, and other consideration; and

8 (4) the organizational documents of the converted organization.

9 **Reporter's Note**

10 Source: ULPB (2001) § 1102.
11

12 **SECTION 1503. ACTION ON PLAN OF CONVERSION BY CONVERTING**
13 **COOPERATIVE ASSOCIATION.**

14 (a) A plan of conversion must be consented to by at least two-thirds vote of patron
15 participants voting under Section 410 and by at least two-thirds vote of investor participants, if
16 any, voting under Section 414. If as a result of the conversion any participant of the cooperative
17 association has personal liability as a result of the conversion, consent in a record of that
18 participant.

19 (b) Subject to Section _____ any contractual rights, after a conversion is
20 approved, and at any time before a filing is made under Section 1504, a converting cooperative
21 association may amend the plan or abandon the planned conversion:
22

1 (1) as provided in the plan; and
2 (2) except as prohibited by the plan, by the same consent as required to
3 approve the plan.

4 **Reporter's Note**

5 The special "consent" by those being burdened by personal liability is drafted differently
6 in ULPA (2001). It is pulled out into a separate section (§1110) and that section makes clear tht
7 the special consent provisions trump any general provisions in the organic rules regarding their
8 amendment. The Committee should discuss this matter.

11 **SECTION 1504. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE**

12 **DATE.**

13 (a) After a plan of conversion is approved:

14 (1) a converting cooperative association shall deliver to the [Secretary of
15 Sate] for filing articles of conversion, which must include:

16 (A) a statement that the cooperative association has been converted
17 into another organization;

18 (B) the name and form of the organization and the jurisdiction of
19 its governing statute;

20 (C) the date the conversion is effective under the governing statute
21 of the converted organization;

22 (D) a statement that the conversion was approved as required by
23 this [Act];

24 (E) a statement that the conversion was approved as required by the
25 governing statute of the converted organization; and

1 (F) if the converted organization is a foreign organization not
2 authorized to transact business in this State, the street and mailing address of an office which the
3 [Secretary of State] may use for the purposes of Section 1505(c); and

4 (2) if the converting organization is not a converting cooperative
5 association, the converting organization shall deliver to the [Secretary of State] for filing articles
6 of organization, which must include, in addition to the information required by Section _____ :

7 (A) a statement that the cooperative association was converted
8 from another organization;

9 (B) the name and form of the organization and the jurisdiction of
10 its governing statute; and

11 (C) a statement that the conversion was approved in a manner that
12 complied with the organization's governing statute.

13 (b) A conversion becomes effective:

14 (1) if the converted organization is a cooperative association, when the
15 certificate of limited partnership takes effect; and

16 (2) if the converted organization is not a cooperative association, as
17 provided by the governing statute of the converted organization.

18 **Reporter's Note**

19 Source: ULP A (2001) §1104.

20
21
22 **SECTION 1505. EFFECT OF CONVERSION.**

23 (a) An organization that has been converted pursuant to this [article] is for all

1 purposes the same entity that existed before the conversion.

2 (b) When a conversion takes effect:

3 (1) all property owned by the converting organization remains vested in
4 the converted organization;

5 (2) all debts, liabilities, and other obligations of the converting
6 organization continue as obligations of the converted organization;

7 (3) an action or proceeding pending by or against the converting
8 organization may be continued as if the conversion had not occurred;

9 (4) except as prohibited by other law, all of the rights, privileges,
10 immunities, powers, and purposes of the converting organization remain vested in the converted
11 organization;

12 (5) except as otherwise provided in the plan of conversion, the terms and
13 conditions of the plan of conversion take effect; and

14 (6) except as otherwise agreed, the conversion does not dissolve a
15 converting cooperative association for the purposes of [Article 11].

16 (c) A converted organization that is a foreign organization consents to the
17 jurisdiction of the courts of this State to enforce any obligation owed by the converting
18 cooperative association if before the conversion the converting cooperative association was
19 subject to suit in this State on the obligation. A converted organization that is a foreign
20 organization and not authorized to transact business in this State appoints the [Secretary of State]
21 as its agent for service of process for purposes of enforcing an obligation under this subsection.
22 Service on the [Secretary of State] under this subsection is made in the same manner and with the

1 same consequences as in Section 117(c) and (d).

2 **Reporter's Note**

3 Source: ULPB (2001) § 1105.

5 **SECTION 1506. 1402. ~~CONSOLIDATION OR MERGER OR CONSOLIDATION.~~**

6 (a) A cooperative association may merge with one or more other constituent
7 organizations pursuant to this [Article] and a plan of ~~consolidation or~~ merger if:

8 (1) the governing statute of each the other organizations authorizes the
9 merger;

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

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

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

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

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

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

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

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

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

Reporter's Note

Subsection (6) is derived from section 1406 in the November draft which was based on
ULPA (2001).

SECTION 1507. 1403. NOTICE AND ACTION ON PLAN OF ~~CONSOLIDATION~~ ~~OR~~ MERGER BY CONSTITUENT COOPERATIVE ASSOCIATION.

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

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

(1) the plan of ~~consolidation or~~ merger;

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

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

(4) any condition of its submission of the plan of ~~consolidation or~~ merger
to the participants members; and

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

Reporter's Note

The Reporter tentatively inserted the Style Committee's recommendation pending Committee discussion.

SECTION 1508. 1404. APPROVAL AND ABANDONMENT OF ~~CONSOLIDATION OR~~ MERGER BY PARTICIPANTS MEMBERS OF CONSTITUENT COOPERATIVE ASSOCIATION.

(a) Unless the organic rules provide for a greater quantum and subject to Section ~~411, 312,~~ a plan of ~~consolidation or~~ merger must be approved by at least a two-thirds vote of patron participants ~~members~~ voting under Section 410 by at least two-thirds vote of investor participants, if any, voting under Section 414. ~~311 and,~~ If if as a result of the merger any participant ~~member~~ of the cooperative association has personal liability as a result of the merger, consent in a record of that participant. ~~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 1506, 1407, a constituent cooperative association may amend the plan of ~~consolidation or~~ merger or abandon the planned ~~consolidation or~~ 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.

Reporter's Note

1 Is “filing” the appropriate measuring date in subsection (b)?

2
3 **SECTION 1509. 1405. ~~CONSOLIDATION OR~~ MERGER OF SUBSIDIARY.**

4 (a) Unless the organic rules of the cooperative association or the organic law or
5 organic rules of the other organization otherwise provide, a cooperative association that owns at
6 least 90 percent of each class of the voting power of a subsidiary organization may ~~consolidate or~~
7 merge the subsidiary into itself or into another subsidiary.

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

12 **SECTION 1510. 1406. FILINGS REQUIRED FOR MERGER; EFFECTIVE**
13 **DATE.**

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

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

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

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

1 (3) the date the ~~consolidation or~~ merger is effective under the governing
2 statute of the surviving organization;

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

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

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

9 (5) if the surviving organization preexists the ~~consolidation or~~ merger, any
10 amendments provided for in the plan of ~~consolidation or~~ merger for the organizational document
11 that created the organization;

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

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

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

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

21 (d) A ~~consolidation or~~ merger becomes effective under this [Article]:

22 (1) if the surviving organization is a cooperative association, upon the

1 later of:

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

3 (B) subject to Section [203(c)], as specified in the articles of
4 consolidation or merger; or

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

7 **SECTION 1511. 1407. EFFECT OF ~~CONSOLIDATION OR MERGER~~.**

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

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

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

12 (3) all property owned by each constituent organization that ceases to
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 ~~consolidation or~~ merger had not
18 occurred;

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

22 (7) except as otherwise provided in the plan of ~~consolidation or~~ merger,

1 the terms and conditions of the plan take effect;

2 (8) except as otherwise agreed, if a constituent cooperative association
3 ceases to exist, the ~~consolidation or~~ merger does not dissolve the cooperative association for
4 purposes of [Article] 11; 10;

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

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

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

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

13 **Reporter's Note**

14 Source: ULPB (2001). The plan will by necessity address the pre-merger terms of the
15 directors and board officers.
16

17 **SECTION 1512. CONSOLIDATION.**

18 (a) The cooperative associations may agree to substitute the word
19 “consolidations” for the term “merger” under this [article] if:

20 (1) each constituent organization is a cooperative association or its
21 governing statute expressly provides consolidation; and,

22 (2) the surviving organization is a cooperative association or its governing
23 statute expressly provides for a consolidation.

1 **(b) All provisions governing mergers or using the term merger in this [act] shall**
2 **apply equally to mergers that the constituent organizations choose to name consolidations under**
3 **subsection (a).**

4 **Reporter's Note**

5 **This is the Reporter's second attempt to draft "consolidations" into the draft at the**
6 **direction of the Committee. The first attempt simply defined "consolidation" in Section 1501.**
7 **Unfortunately that attempt was, at best, confusing. This attempt still stops short of segregating**
8 **and repeating all of the sections governing merger.**

9
10 **One reason to avoid the repetition is length.**

11
12 **The most important reason, however, is to avoid creating inconsistencies between this act**
13 **and the overwhelming majority of both corporate and unincorporated statutes which no longer**
14 **distinguish between "mergers" and "consolidations" and which use the term "mergers" to**
15 **encompass all combinations. This is more than a mere drafting issue because: (a) if**
16 **"consolidation" is not deemed to be a merger under this act many constituent organizations will**
17 **be unable to combine in the precise form of "consolidation" as provided herein because the**
18 **statutory authorization in their statute will not authorize it; and (b) it is assumed many secretaries**
19 **of state will having filing issues for articles of consolidation if the constituents or survivor is**
20 **anything but a cooperative association formed under this act or the other law expressly provides**
21 **for a filing with a "consolidation" caption.**

22
23 **For the foregoing reasons, this Section requires all organizations involved in a**
24 **"consolidation" to be cooperative association have express authority to use the term**
25 **"consolidation" under their governing law. It should be reported that there was a question**
26 **generally consistent with this note from the floor of the 2005 Annual Meeting asserting the draft**
27 **used archaic language.**

28
29
30 **SECTION 1513. ~~1408~~. METHOD OF VOTING. Participants ~~Members~~ may vote in**
31 **the same manner as provided in Section 415. ~~person or, as provided by the organic rules, by mail~~**
32 **or proxy.**

33 **Reporter's Note**

34 **The February 2006 draft alleviates the prior inconsistency between this Section and the**
35 **voting provisions in Article 3 regarding proxies. Proxies are not allowed under this draft but**

1 “secret ballot by mail or other means” may be allowed by the organic rules. See Reporter’s Note
2 § 1303.
3

4 **SECTION 1514. ~~1409.~~ [ARTICLE] NOT EXCLUSIVE.** This [article] does not
5 preclude a cooperative association from being converted, consolidated, or merged under other
6 law.

7 **Reporter’s Note**

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

16
17 One change incorporated in this draft is the use of both the terms “merger” and
18 “consolidation”. The advisors to this act have urged that the term “consolidation” be used where
19 the surviving entity is a new organization. The Minnesota Cooperative Association Act deals
20 with “consolidations” by definition like a prior draft of this [act]. That approach, at the direction
21 of the Committee, has been reviewed by the Reporters and a different approach is attempted in
22 the February 2006 draft. See the Reporter’s Note to the previous Section. The term “new”,
23 unfortunately, is ambiguous and the term has been deleted from the MBCA but remains in many
24 state cooperative acts. The return of the term consolidation should not raise substantive concerns
25 beyond being somewhat inconsistent with the laws of other organization.

26
27 ~~The new definitions of consolidation and merger attempt to make the distinction clerical,~~
28 ~~nonsubstantive, and bright-lined to avoid transaction and opinion letter complications.~~

1 ~~{ARTICLE}~~ 16 15

2 DISPOSITION OF ASSETS ~~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.

8 **SECTION 1601. DISPOSITION OF ASSETS NOT REQUIRING PARTICIPANT**

9 **APPROVAL.** Unless the articles of organization otherwise provide, no participant approval
10 under Section 1602 is required for a cooperative association to:

11 (a) sell, lease, exchange, or otherwise dispose of all or any part of the assets of the
12 cooperative association; or

13 (b) mortgage, pledge, dedicate to the repayment of indebtedness or encumber in
14 any way all or any part of the assets of the cooperative association.

15 **Reporter's Note**

16 This Section is new to the February 2006 draft and is similar to the MBCA formulation
17 except the term "ordinary" has replaced "usual and regular" to conform to the language used in
18 other conference products. The Model Business Corporation Act contains two additional
19 subsections which were not included in the text of this draft. They are:

20
21 (3) to transfer any or all of the corporation's assets to one or more
22 corporations or other entities all of the shares or interests which are
23 owned by the corporation; or

24 (4) to distribute assets pro rata to the holders of one or more classes
25 or series of the corporation's shares.

26
27 Subsection (3) of the MBCA allows the transfer of all the assets to wholly owned subsidiaries.
28 The Comments for subsection (4) state that it applies to traditional spin-offs but not split-offs
29 ("non pro rata distribution of shares of a sub to some or all shareholders in exchange for some of

1 their shares”) or split-ups (which would be governed by the dissolution provisions rather than the
2 disposition section.

3
4 **SECTION 1602. PARTICIPANT APPROVAL OF OTHER DISPOSITION OF**

5 **ASSETS.** Subject to Section 1601 and unless otherwise provided in the articles of organization,
6 a sale, lease, exchange, or other disposition of assets requires approval of the cooperative
7 association’s participants under Sections 1603 through 1605 if the disposition leaves the
8 cooperative association without significant continuing business activity.

9 **Reporter’s Note**

10 Source: MBCA Section 12.02.

11 The MBCA provides greater textual detail as follows:

12 _____ If a corporation retains a business activity that represented at least
13 25 percent of total assets at the end of the most recently completed
14 fiscal year, and 25 percent of either income from continuing
15 operations before taxes or revenues from continuing operations for
16 that fiscal year, in each case of the corporation and its subsidiaries
17 on a consolidated basis, the corporation will conclusively be
18 deemed to have retained a significant continuing business activity.

19
20 Another alternative is to replace Sections 1601 and 1602 with language similar to older corporate
21 statutes, something like:

22
23 The sale, lease, exchange, mortgage, pledge, dedication of
24 indebtedness or other encumbrance of substantially all of the assets
25 of the cooperative association not in the ordinary course of
26 business must be approved by the participants under Sections
27 through _____.

28
29 **SECTION 1603. NOTICE AND ACTION ON DISPOSITION OF ASSETS. To**

30 dispose of assets subject to Section 1602:

31 _____ (a) the proposed disposition must be approved by a majority vote of the board of
32 directors unless a greater vote is required by the organic rules;

1 **(b) the board of directors shall mail or otherwise transmit or deliver in a record to**
2 **each participant:**

3 **(1) the terms of the proposed disposition;**

4 **(2) a recommendation that the participants approve the disposition unless**
5 **the board determines because of conflict of interest or other special circumstances it should not**
6 **make such a recommendation;**

7 **(3) if the board makes no recommendation, the basis of that decision;**

8 **(4) any condition of its submission of the proposed disposition to the**
9 **participants; and,**

10 **(5) give notice of the meeting in the same manner as a special participants**
11 **meeting under Section ____.**

12 **Reporter's Note**

13 **This Section is consistent with the provisions governing amendment of the organic rules.**

14 **Should the next draft provide that the vote shall take place at a special participant**
15 **meeting?**

16
17 **SECTION 1604. METHOD OF VOTING. Participants may vote in the same manner**
18 **as provided in Section 415.**

19 **SECTION 1605. ACTION ON DISPOSITION OF ASSETS. The proposed**
20 **disposition of assets must be consented to by:**

21 **(a) at least two-thirds vote of patron participants voting under Section 410;**

22 **(b) at least two-thirds vote of investor participants, if any, under Section 414.**

23 **Reporter's Note**
24

1 This is substantively consistent with mergers, consolidations, and conversions though in a
2 slightly different format. *See, e.g.*, Section 1503(a). Note that it does not include any of the
3 abandonment machinery that is included in Article 15. *See, e.g.*, Section 1503(b).

1 [DELETED: ARTICLE 17 ~~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 associations with investor participants ~~nonpatron members~~ it is probable those
22 members will demand the inclusion of such rights to avoid capital lock-in. In any event, the
23 directors are subject to duties of care and loyalty and could be held responsible under those
24 duties.

1 [ARTICLE] 18 17
2 MISCELLANEOUS PROVISIONS
3
4

5 SECTION 1801. ~~1701.~~ EXEMPTION FROM SECURITIES LAWS. Participant
6 ~~Membership~~ interests offered ~~issued~~ or sold by a cooperative association ~~as an investment in the~~
7 ~~cooperative~~ are exempt from the securities laws of this state to the extent interests offered or sold
8 by other types of cooperative organizations are exempt under [citation to the provision applicable
9 to other existing forms of cooperatives associations].

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 909 ~~809~~ of this draft.
17

18 The language has been modified from prior drafts in response to concerns expressed on
19 the floor at the 2005 annual meeting that the former language could have broader implications
20 than intended.
21

22 The Uniform Securities Act (2002) contains a limited exemption at USA § 201(8). It is
23 limited to "nonprofit membership cooperatives" and, even there, does *not* apply to "a member's
24 or owner's interest, retention certificate, or like security sold to persons other than bona fide
25 members of the cooperative." Comment 8 to Section 201 states:
26

27 "The 1956 Act... had instead provided: 'insert any desired
28 exemption for cooperatives'. The Reporter for the 1956 Act had
29 found such sharp variation among the 18 states that then had
30 adopted a cooperative exemption that 'no common patter can be
31 found.' Louis Loss, Commentary on the Uniform Securities Act
32 118 (1976).
33

34 The Committee suggests it unlikely to achieve further uniformity than that proposed by
35 the USA (2002) and that states have already made policy decisions that are unlikely to change
36 based upon anything stated in this limited purpose unincorporated cooperative act. A strong
37 legislative not should be drafted.

SECTION 1802. ~~1702~~. EXEMPTION FROM RESTRAINT OF TRADE AND ANTITRUST LAWS. Cooperatives associations have the same immunities, rights, and privileges provided cooperatives associations formed under [other law of this state] and are governed by [citation to the applicable restraint of trade and antitrust provisions] and shall be exempt from those laws to the extent, but only to the extent, cooperatives organized under [other law of this state] are exempt.

Reporter's Note

It is most certainly *not* the intent of this Section to expand any such exemptions beyond the purposes provided in those other laws. The addition is intended to clarify that, but more consideration may need to be given to the wording as was suggested from the floor at the 2005 annual meeting. See the last paragraph of this Note. A question of both interpretation and policy is raised, however, by a slippery-slope hypothetical. Assume the referenced statute states “controlled by agricultural producers” versus “exclusively owned and controlled by agricultural producers.”

See the Note to Section 1801 ~~1701~~, Section 1803 ~~1703~~, and to a lesser extent Section 1802 ~~1702~~, might be better placed in Article 6 ~~5~~ (“Marketing Contract”) but are in Article 18 ~~17~~ of this draft for purposes of discussion.

In any event, these sections will require a strong legislative note. One of the issues that needs to be addressed by the legislative note is how to conform the provision to apply to this Act if it is not completely self-executing. *E.g.*, if it simply states that “cooperatives complying with...”.

SECTION 1803. ~~1703~~: INDUCING BREACH OF MARKETING OR PURCHASE CONTRACTS. The remedies provided by [citation to the applicable statutory provisions] apply to cooperatives associations.

Reporter's Note

See the Note to Section 1802 ~~1702~~.

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[SECTION 1705. Deleted].

Reporter's Note

The October 2005 draft conforms to a second suggestion by the Style Committee for its deletion but does not yet renumber subsequent sections pending Committee discussion.

SECTION 1806. ~~1706.~~ RELATION TO ELECTRONIC SIGNATURES IN

SECTION 1807. ~~1707~~. EFFECTIVE DATE. This [act] takes effect [effective date].

SECTION 1808. ~~1708~~. SAVINGS CLAUSE. This [act] does not affect an action or proceeding commenced, or right accrued before [this [act] takes effect].