

To: Agricultural and Agricultural Related Cooperative Act Drafting Committee,
Uniform Laws Commission

From: Tom Geu, Reporter

Date: March 28, 2005

Re: "Fiduciary Duties and Indemnification: Section 618, *et seq.* and Article 7"

I. Purpose and Format of Memo

The "fiduciary" duty concepts of this Draft Act were discussed at the November 2004 meeting. I was charged by the Committee to re-draft them. I thought I'd be able to draft *something* to meet most of the concerns. In retrospect I was naïve.

The purpose of this memo is to provide a very brief discussion of the difficulties I encountered and to provide several samples of existing models. Certainly, it is not necessary to parse the samples in any detail. Nonetheless, getting a "look and feel" of the approaches may be helpful. The samples, which appear as appendices A through D, contain word counts for comparison.

II. Brief Discussion

Standard of Care

The unincorporated law seems to be trifurcating into three camps: (1) Those (like Delaware LLCs) which attempt to do away with all "fiduciary" duties and rely on contract law principles only; (2) those which adopt the NCCUSL model (RUPA, ULPA) without modification; (3) those which modify the NCCUSL model by changing "only", as in "shall have only the following duties", to "includes" in its nonexclusive sense (thus, broadening the duties).

The MBCA approach (which, unlike the present draft, uses "as a person in like circumstances" rather than a "reasonably prudent person under similar circumstances") is being revisited by the ABA Corporate Laws Committee to see if it should be tightened given recent business scandals. The MBCA also provides for a standard of liability separate from its standard of care.

Indemnification

There is a clear difference between the corporate approach and the unincorporated approach concerning indemnification. The distinction has roots in the theory of the entities themselves; that is, partners and LLC managers have individual agency authority and board

members ostensibly do not. The unincorporated entities, therefore, can rely on agency law while board members “need” a statute. Under the current draft, cooperative board members do not have agency authority.

The Appendices

The sample laws reflect some of the differences discussed previously. In addition it seems some distinctions between acts may be based on when (how long ago) the statute was adopted. The following table shows raw word counts. I did not include the MBCA provisions – they are long.

	A	B	C	D	Draft
Standard of Conduct		387	219	282	233
Conflict of Interest		549	554	*	276
Limitation of Liability			158	232	134
Indemnification	175	1910	1747	49	458
Total	175	2846	2678	563	1101

* included in “Standard of Conduct”

I did not do an analysis of where and why the source of word count differences. Caution is urged on any use of the raw count beyond its rather rough and simple intended purpose.

Appendix A
Older “Traditional” Cooperative Law
South Dakota Codified Laws

INDEMNIFICATION

47-17-19. Indemnification of agents for liability from good faith acts on behalf of cooperative.

A cooperative may indemnify any person who has or is a party or is threatened to be made a party to any threatened pending or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative other than an action by or in the right of the cooperative by reason of the fact that that person is or was a director, officer, employee, or agent of the cooperative, or is or was serving at the request of the cooperative as a director, officer, employee, or agent of another corporation, limited liability company, partnership, joint venture, trust, or other enterprise, against expenses including attorneys’ fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by that person in connection with the action, suit, or proceeding if that person acted in good faith and in a manner that person reasonably believed to be in or not opposed to the best interests of the cooperative and, with respect to any criminal action or proceeding, had no reasonable cause to believe such conduct was unlawful.

Appendix B

“Traditional” Cooperative Law

Standard of Conduct

62.283. Board of directors; standard of conduct; limitation of liability

- (1) A director shall discharge the duties of a director, including the duties as a member of a committee, in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interests of the cooperative.
- (2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports or statements including financial statements and other financial data, if prepared or presented by:
- (a) One or more officers or employees of the cooperative whom the director reasonably believes to be reliable and competent in the matters presented;
 - (b) Legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
 - (c) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.
- (3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.
- (4) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.
- (5) When evaluating any offer of another party to make a tender or exchange offer for any equity security of the cooperative or any proposal to merge or consolidate the cooperative with another corporation or cooperative or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation or cooperative, the directors of the cooperative may, in determining what they believe to be in the best interests of the cooperative, give due consideration to the social, legal and economic effects on employees, customers and suppliers of the cooperative and on the communities and geographical areas in which the cooperative and its subsidiaries operate, the economy of the state and nation, the long term as well as short term interests of the cooperative and its members, including the possibility that these interests may be best served by the continued independence of the cooperative, and other relevant factors.

Conflict of Interest

62.284. Board of directors; conflict of interest

- (1) A conflict of interest transaction is a transaction with the cooperative, other than in the ordinary course of business for which the cooperative is organized, whether or not on a patronage basis, in which a director of the cooperative has a direct or indirect interest. A conflict of interest transaction is not voidable by the cooperative solely because of the director's interest in the transaction if any one of the following is true:
- (a) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors, and the board of directors or committee authorized, approved or ratified the transaction;
 - (b) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved or ratified the transaction; or

(c) The transaction was fair to the cooperative.

(2) For purposes of this section, a director of the cooperative has an indirect interest in a transaction if:

(a) Another entity in which the director has a material financial interest or in which the director is a general partner is a party to the transaction; or

(b) Another entity of which the director is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the cooperative.

(3) For purposes of subsection (1)(a) of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no direct or indirect interest in the transaction. A transaction may not be authorized, approved or ratified under this section by a single director, unless only one director is authorized to serve pursuant to ORS 62.280. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (1)(a) of this section if the transaction is otherwise authorized, approved or ratified as provided in subsection (1) of this section.

(4) For purposes of subsection (1)(b) of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the vote of a majority of the member votes entitled to be counted under this subsection. Any director who is a member who has a direct or indirect interest in the transaction, and any votes by a member under the control of an entity described in subsection (2)(a) of this section may be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under subsection (1)(b) of this section. A majority of the members, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

Indemnification

62.462. Definitions for ORS 62.462 to 62.482

(1) "Cooperative" includes any domestic or foreign predecessor entity of a cooperative in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" means an individual who is or was a director of a cooperative or an individual who, while a director of a cooperative, is or was serving at the cooperative's request as a director, officer, partner, trustee, employee or agent of another foreign or domestic cooperative, corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. A director is considered to be serving an employee benefit plan at the cooperative's request if the director's duties to the cooperative also impose duties on or otherwise involve services by the director to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" includes counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty or fine, including an excise tax assessed with respect to an employee benefit plan or reasonable expenses incurred with respect to a proceeding.

(5) "Officer" means an individual who is or was an officer of a cooperative or an individual who, while an officer of a cooperative, is or was serving at the cooperative's request as a director, officer, partner, trustee,

employee or agent of another foreign or domestic cooperative, corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. An officer is considered to be serving an employee benefit plan at the cooperative's request if the officer's duties to the cooperative also impose duties on or include services by the officer to the employee benefit plan or to participants in or beneficiaries of the plan. "Officer" includes, unless the context requires otherwise, the estate or personal representative of an officer.

(6) "Party" includes an individual who was, is or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative and whether formal or informal.

62.464. Indemnification of director; authority; report to members

(1) Except as provided in subsection (4) of this section, a cooperative may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if:

- (a) The conduct of the individual was in good faith;
- (b) The individual reasonably believed that the individual's conduct was in the best interests of the cooperative, or at least not opposed to its best interests; and
- (c) In the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (1)(b) of this section.

(3) The termination of a proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A cooperative may not indemnify a director under this section:

- (a) In connection with a proceeding by or in the right of the cooperative in which the director was adjudged liable to the cooperative; or
- (b) In connection with any other proceeding charging improper personal benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the cooperative is limited to reasonable expenses incurred in connection with the proceeding.

(6) If a cooperative indemnifies or advances expenses to a director under this section or ORS 62.466, 62.468 or 62.472 in connection with a proceeding by or in the right of the cooperative, the cooperative shall report the indemnification or advance in writing to the members with or before the notice of the next membership meeting.

62.466. Indemnification of director against reasonable expenses

Unless limited by its articles of incorporation, a cooperative shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the cooperative against reasonable expenses incurred by the director in

connection with the proceeding.

62.468. Expenses; reimbursement and advances

(1) A cooperative may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

- (a) The director furnishes the cooperative a written affirmation of the director's good faith belief that the director has met the standard of conduct described in ORS 62.464; and
- (b) The director furnishes the cooperative a written undertaking, executed personally or on the director's behalf, to repay the advance if it is ultimately determined that the director did not meet the standard of conduct.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) Any authorization of payments under this section may be made by provision in the articles of incorporation, or bylaws, by a resolution of the members or board of directors or by contract.

62.472. Court-ordered indemnification; application

Unless the cooperative's articles of incorporation provide otherwise, a director of the cooperative who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification if it determines:

(1) The director is entitled to mandatory indemnification under ORS 62.466, in which case the court shall also order the cooperative to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in ORS 62.464 or was adjudged liable as described in ORS 62.464 (4), whether the liability is based on a judgment, settlement or proposed settlement or otherwise.

62.474. Determination of indemnification; authorization

(1) A cooperative may not indemnify a director under ORS 62.464 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in ORS 62.464.

(2) A determination that indemnification of a director is permissible shall be made:

- (a) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;
- (b) If a quorum cannot be obtained under paragraph (a) of this subsection, by a majority vote of a committee duly designated by the board of directors consisting solely of two or more directors not at the time parties to the proceeding. However, directors who are parties to the proceeding may participate in designation of the committee;
- (c) By special legal counsel selected by the board of directors or its committee in the manner prescribed in paragraph (a) or (b) of this subsection or, if a quorum of the board of directors cannot be obtained under paragraph (a) of this subsection and a committee cannot be designated under

paragraph (b) of this subsection, the special legal counsel shall be selected by majority vote of the full board of directors, including directors who are parties to the proceeding; or
(d) By the members.

(3) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (2)(c) of this section to select counsel.

62.476. Officers, employees and agents; indemnification

Unless a cooperative's articles of incorporation provide otherwise:

(1) An officer of the cooperative is entitled to mandatory indemnification under 62.466, and is entitled to apply for court-ordered indemnification under ORS 62.472, in each case to the same extent as a director under ORS 62.466 or 62.472.

(2) The cooperative may indemnify and advance expenses under ORS 62.462 to 62.482 to an officer, employee or agent of the cooperative to the same extent as to a director.

62.478. Liability insurance

A cooperative may purchase and maintain insurance on behalf of an individual against liability asserted against or incurred by the individual who is or was a director, officer, employee or agent of the cooperative or who, while a director, officer, employee or agent of the cooperative, is or was serving at the request of the cooperative as a director, officer, partner, trustee, employee or agent of another foreign or domestic cooperative, corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. The cooperative may purchase and maintain the insurance even if the cooperative has no power to indemnify the individual against the same liability under ORS 62.464 or 62.466.

62.482. Application of ORS 62.462 to 62.482

(1) The indemnification and provisions for advancement of expenses provided by ORS 62.462 to 62.482 shall not be deemed exclusive of any other rights to which directors, officers, employees or agents may be entitled under the cooperative's articles of incorporation or bylaws, any agreement, general or specific action of its board of directors, vote of members or otherwise, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person. Specifically and not by way of limitation, a cooperative shall have the power to make or agree to make any further indemnification, including advancement of expenses, of:

(a) Any director as authorized by the articles of incorporation, any bylaws approved, adopted or ratified by the members or any resolution or agreement approved, adopted or ratified, before or after such indemnification or agreement is made, by the members, provided that no such indemnification shall indemnify any director from or on account of acts or omissions for which liability could not be eliminated under ORS 62.513 (4)(f); and

(b) Any officer, employee or agent who is not a director as authorized by its articles of incorporation or bylaws, general or specific action of its board of directors or agreement. Unless the articles of incorporation, or any such bylaws, agreement or resolution provide otherwise, any determination as to any further indemnity under this paragraph shall be made in accordance with ORS 62.474.

(2) If articles of incorporation limit indemnification or advance of expenses, any indemnification or advance of expenses is valid only to the extent consistent with the articles of incorporation.

(3) ORS 62.462 to 62.482 do not limit a cooperative's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to a proceeding.

Appendix C
Cooperative Associations Act
Minnesota Stat. Ann.

Standard of Conduct

308B.455. Standard of conduct

Subdivision 1. Standard and liability. A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the cooperative, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A person who so performs those duties is not liable by reason of being or having been a director of the cooperative.

Subd. 2. Reliance. (a) A director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) one or more officers or employees of the cooperative who the director reasonably believes to be liable and competent in the matters presented;

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

(3) a committee of the board upon which the director does not serve, duly established by the board, as to matters within its designated authority, if the director reasonably believes the committee to merit confidence.

(b) Paragraph (a) does not apply to a director who has knowledge concerning the matter in question that makes the reliance otherwise permitted by paragraph (a) unwarranted.

Conflict of Interest

308B.461. Director conflicts of interest

Subdivision 1. Conflict and procedure when conflict arises. (a) A contract or other transaction between a cooperative and one or more of its directors, or between a cooperative and a business entity in or of which one or more of its directors are governors, directors, managers, officers, or legal representatives or have a material financial interest, is not void or voidable because the director or directors or the other business entities are parties or because the director or directors are present at the meeting of the members or the board or a committee at which the contract or transaction is authorized, approved, or ratified, if:

(1) the contract or transaction was, and the person asserting the validity of the contract or transaction sustains the burden of establishing that the contract or transaction was, fair and reasonable as to the cooperative at the time it was authorized, approved, or ratified and:

(i) the material facts as to the contract or transaction and as to the director's or directors' interest are disclosed or known to the members; and

(ii) the material facts as to the contract or transaction and as to the director's or directors' interest are fully disclosed or known to the board or a committee, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a majority of the board or committee, but the interested director or directors are not counted in determining the presence of a quorum and must not vote; or

(2) the contract or transaction is a distribution, contract, or transaction that is made available to all members or patron members as part of the cooperative's business.

(b) If a committee is elected or appointed to authorize, ratify, or approve a contract or transaction under this section, the members of the committee must not have a conflict of interest and be charged with representing the best interests of the cooperative.

Subd. 2. Material financial interest. For purposes of this section:

(1) a resolution fixing the compensation of a director or fixing the compensation of another director as a director, officer, employee, or agent of the cooperative, is not void or voidable or considered to be a contract or other transaction between a cooperative and one or more of its directors for purposes of this section even though the director receiving the compensation fixed by the resolution is present and voting at the meeting of the board or a committee at which the resolution is authorized, approved, or ratified or even though other directors voting upon the resolution are also receiving compensation from the cooperative; and

(2) a director has a material financial interest in each organization in which the director or the spouse; parents; children and spouses of children; brothers and sisters and spouses of brothers and sisters; and the brothers and sisters of the spouse of the director or any combination of them have a material financial interest. For purposes of this section, a contract or other transaction between a cooperative and the spouse; parents; children and spouses of children; brothers and sisters and spouses of brothers and sisters; and the brothers and sisters of the spouse of a director or any combination of them, is considered to be a transaction between the cooperative and the director.

Limitation of Liability

308B.465. Limitation of director's liability

Subdivision 1. Articles may limit liability. A director's personal liability to the cooperative or members for monetary damages for breach of fiduciary duty as a director may be eliminated or limited in the articles or bylaws except as provided in subdivision 2.

Subd. 2. Restrictions on liability limitation. The articles or bylaws may not eliminate or limit the liability of a director:

(1) for a breach of the director's duty of loyalty to the cooperative or its members;

(2) for acts or omissions that are not in good faith or involve intentional misconduct or a knowing violation of law;

(3) for knowing violations of securities laws under section 80A.23 or for illegal distributions;

(4) for a transaction from which the director derived an improper personal benefit; or

(5) for an act or omission occurring before the date when the provision in the articles or bylaws eliminating or limiting liability becomes effective.

Indemnification

308B.471. Indemnification

Subdivision 1. Definitions. (a) The definitions in this subdivision apply to this section.

(b) "Cooperative" includes a domestic or foreign cooperative that was the predecessor of the cooperative referred to in this section in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(c) "Official capacity" means:

(1) with respect to a director, the position of director in a cooperative;

(2) with respect to a person other than a director, the elective or appointive office or position held by the person, member of a committee of the board, the employment relationship undertaken by an employee of the cooperative, or the scope of the services provided by members of the cooperative who provide services to the cooperative; and

(3) with respect to a director, chief executive officer, member, or employee of the cooperative who, while a member, director, chief executive officer, or employee of the cooperative, is or was serving at the request of the cooperative or whose duties in that position involve or involved service as a governor, director, manager, officer, member, partner, trustee, employee, or agent of another organization or employee benefit plan, the position of that person as a governor, director, manager, officer, member, partner, trustee, employee, or agent, as the case may be, of the other organization or employee benefit plan.

(d) "Proceeding" means a threatened, pending, or completed civil, criminal, administrative, arbitration, or investigative proceeding, including a proceeding by or in the right of the cooperative.

(e) "Special legal counsel" means counsel who has not represented the cooperative or a related organization, or a director, manager, member of a committee of the board, or employee whose indemnification is in issue.

Subd. 2. Indemnification. (a) Subject to the provisions of subdivision 4, a cooperative shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines, including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorney fees and disbursements incurred by the person in connection with the proceeding, if, with respect to the acts or omissions of the person complained of in the proceeding, the person:

(1) has not been indemnified by another organization or employee benefit plan for the same judgments, penalties, fines, including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorney fees and disbursements incurred by the person in connection with the proceeding with respect to the same acts or omissions;

(2) acted in good faith;

(3) received no improper personal benefit and the person has not committed an act for which liability cannot be eliminated or limited under section 308B.465, subdivision 2;

(4) in the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful; and

(5) in the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (1) or (2), reasonably believed that the conduct was in the best interests of the cooperative, or in the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (3), reasonably believed that the conduct was not opposed to the best interests of the cooperative. If the person's acts or omissions complained of in the proceeding relate to conduct as a director, officer, trustee, employee, or agent of an employee benefit plan, the conduct is not considered to be opposed to the best interests of the cooperative if the person reasonably believed that the conduct was in the best interests of the participants or beneficiaries of the employee benefit plan.

(b) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent does not, of itself, establish that the person did not meet the criteria set forth in this subdivision.

Subd. 3. Advances. Subject to the provisions of subdivision 4, if a person is made or threatened to be made a party to a proceeding, the person is entitled, upon written request to the cooperative, to payment or reimbursement by the cooperative of reasonable expenses, including attorney fees and disbursements incurred by the person in advance of the final disposition of the proceeding:

(1) upon receipt by the cooperative of a written affirmation by the person of a good faith belief that the criteria for indemnification set forth in subdivision 2 have been satisfied, and a written undertaking by the person to repay all amounts paid or reimbursed by the cooperative, if it is ultimately determined that the criteria for indemnification have not been satisfied; and

(2) after a determination that the facts then known to those making the determination would not preclude indemnification under this section.

The written undertaking required by clause (1) is an unlimited general obligation of the person making it, but need not be secured and shall be accepted without reference to financial ability to make the repayment.

Subd. 4. Prohibition or limit on indemnification or advances. The articles or bylaws either may prohibit indemnification or advances of expenses otherwise required by this section or may impose conditions on indemnification or advances of expenses in addition to the conditions contained in subdivisions 2 and 3, including, without limitation, monetary limits on indemnification or advances of expenses if the conditions apply equally to all persons or to all persons within a given class. A prohibition or limit on indemnification or advances of expenses may not apply to or affect the right of a person to indemnification or advances of expenses with respect to any acts or omissions of the person occurring before the effective date of a provision in the articles or the date of adoption of a provision in the bylaws establishing the prohibition or limit on indemnification or advances of expenses.

Subd. 5. Reimbursement to witnesses. This section does not require, or limit the ability of a cooperative to reimburse expenses, including attorney fees and disbursements incurred by a person in connection with an appearance as a witness in a proceeding at a time when the person has not been made or threatened to be made a party to a proceeding.

Subd. 6. Determination of eligibility. (a) All determinations whether indemnification of a person is required because the criteria set forth in subdivision 2 have been satisfied and whether a person is entitled to payment or reimbursement of expenses in advance of the final disposition of a proceeding as provided in subdivision 3 must be made:

(1) by the board by a majority of a quorum, if the directors who are, at the time, parties to the proceeding are not counted for determining either a majority or the presence of a quorum;

(2) if a quorum under clause (1) cannot be obtained by a majority of a committee of the board consisting solely of two or more directors not at the time parties to the proceeding duly designated to act in the matter by a majority of the full board, including directors who are parties;

(3) if a determination is not made under clause (1) or (2) by special legal counsel selected either by a majority of the board or a committee by vote under clause (1) or (2) or if the requisite quorum of the full board cannot be obtained and the committee cannot be established by a majority of the full board, including directors who are parties;

(4) if a determination is not made under clauses (1) to (3) by the affirmative vote of the members, but the membership interests held by parties to the proceeding must not be counted in determining the presence of a quorum, and are not considered to be present and entitled to vote on the determination; or

(5) if an adverse determination is made under clauses (1) to (4) or paragraph (b), or if no determination is made under clauses (1) to (4) or paragraph (b) within 60 days after (i) the later to occur of the termination of a proceeding or a written request for indemnification to the cooperative, or (ii) a written request for an advance of expenses, as the case may be, by a court in this state, which may be the same court in which the proceeding involving the person's liability took place upon application of the person and any notice the court requires. The person seeking indemnification or payment or reimbursement of expenses under this clause has the burden of establishing that the person is entitled to indemnification or payment or reimbursement of expenses.

(b) With respect to a person who is not, and was not at the time of the acts or omissions complained of in the proceedings, a director, chief executive officer, or person possessing, directly or indirectly, the power to direct or cause the direction of the management or policies of the cooperative, the determination whether indemnification of this person is required because the criteria set forth in subdivision 2 have been satisfied and whether this person is entitled to payment or reimbursement of expenses in advance of the final disposition of a proceeding as provided in subdivision 3 may be made by an annually appointed committee of the board, having at least one member who is a director. The committee shall report at least annually to the board concerning its actions.

Subd. 7. Insurance. A cooperative may purchase and maintain insurance on behalf of a person in that person's official capacity against any liability asserted against and incurred by the person in or arising from that capacity, whether or not the cooperative would have been required to indemnify the person against the liability under the provisions of this section.

Subd. 8. Disclosure. A cooperative that indemnifies or advances expenses to a person in accordance with this section in connection with a proceeding by or on behalf of the cooperative shall report to the members in writing the amount of the indemnification or advance and to whom and on whose behalf it was paid not later than the next meeting of members.

Subd. 9. Indemnification of other persons. Nothing in this section must be construed to limit the power of the cooperative to indemnify persons other than a director, chief executive officer, member, employee, or member of a committee of the board of the cooperative by contract or otherwise.

Appendix D
Limited Partnership
ULPA (2001)

Standard of General Partner Conduct

§ 408. General Standards of General Partner's Conduct.

(a) The only fiduciary duties that a general partner has to the limited partnership and the other partners are the duties of loyalty and care under subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A general partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interest.

Indemnification

§ 406. Management Rights of General Partner.

...

(c) A limited partnership shall reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property.

...

Limitation of Liability

§ 110. Effect of Partnership Agreement; Nonwaivable Provisions.

(b) A partnership agreement may not:

- (1) vary a limited partnership's power under Section 105 to sue, be sued, and defend in its own name;
- (2) vary the law applicable to a limited partnership under Section 106;
- (3) vary the requirements of Section 204;
- (4) vary the information required under Section 111 or unreasonably restrict the right to information under Sections 304 or 407, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;
- (5) eliminate the duty of loyalty under Section 408, but the partnership agreement may:
 - (A) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and
 - (B) specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
- (6) unreasonably reduce the duty of care under Section 408(c);
- (7) eliminate the obligation of good faith and fair dealing under Sections 305(b) and 408(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;...