

TO: Uniform Limited Cooperative Association Act Drafting Committee
Incl. Advisor & Observers

FROM: Peter Langrock (Chair), Tom Geu, Jim Dean

DATE: February 24, 2007

RE: Meeting Agenda; Briefing Memo

AGENDA

Friday, March 9, 2007

- Item 1. Introductions
- Item 2. Discussion of articles and sections not being read. (See explanation and listing at Appendix A of this memo.)
- Item 3. Discussion of Selected Issues and Sections.
- a. Section 1702. (See discussion at Appendix B of this memo.)
 - b.
 - i. Allocations and Distributions. (See Appendix C.)
 - ii. Voting & Board of Director Election. (See Appendix C.)
- Item 4. Line-by-Line reading and discussion beginning with Section 102 except as excluded from reading and covered in agenda item 1.
- Item 5. If time permits:
- a. “Second thought” topic discussion (brief).
 - b. Line-by-line reading of sections not read under Agenda Item 1.
 - i. Skipped material in Art. 9 then Art. 15.
 - ii. Other skipped sections chronologically starting with Section 101.

APPENDIX A**Agenda Item 2: “Articles and Sections Not To Be Read In Initial Line-By-Line Reading under Agenda Item 3.”**

These sections and articles will be discussed only to the extent there are specific questions and comments concerning them in agenda item 2 or to the extent there is time available for Agenda Item 5(b).

Meeting participants are encouraged to read these sections carefully before meeting and be prepared to question and comment on them.

Section 101. Short Title.
Section 106. Powers.
Section 110. Reservation of Name.
Section 114. Business Transactions of Member with LCA.
Section 115. Dual Capacity.
Section 119. Service of Process.

Article 2 Filing and Annual Reports (Section 208 will be read).

Section 402. Becoming a Member.
Section 403. No Right or Power as Member to Bind LCA.
Section 404. No Liability as Member for LCA Obligations.

Section 711. Meetings (BOD).
Section 712. Action Without Meeting.
Section 714. Waiver of Notice of Meeting.

Article 8. Indemnification.

Section 901. Members' Contributions.
Section 902. Forms of Contribution and Valuation.
Section 903. Contribution Agreements.
Section 906. Redemption of Equity.

Article 11. (Dissolution, Sections 1101, 1102, 1103 will be read.)

Article 13. (Foreign Cooperatives.)

Article 15. (Conversion, Merger, Consolidation; Sections 1501, 1504, 1512 will be read.)

Section 1703. Uniformity of Application and Construction.

Section 1704. Relation to Electronic Signatures in Global and National Commerce Act.

Section 1706. Savings Clause.

APPENDIX B

MEMORANDUM

February 2007

TO: Drafting Committee, Advisors and Observers
Uniform Limited Cooperative Association Act

FROM: Tom Geu and Jim Dean

RE: Section 1702

Section 1702 of the draft of the Uniform Limited Cooperative Association Act (ULCAA) endeavors to provide a statement that Limited Cooperative Associations (LCAs) used for activities governed by other laws (and the members of those LCAs) will continue to be subject to those laws. The Section has presented your Reporters with a significant challenge and remains incomplete despite input from, and discussions with, several sources. One of the Committee's Commissioners has spent considerable time on the Section trying to help us and has provided extremely valuable input. Advice we have received varies widely as to the approach that should be taken.

The Committee on Style has suggested there is no need for the Section at all. Our examination of the original Uniform Limited Liability Company Act, when there was concern about what the LLC was and for what it could be used, disclosed that those concerns led to include a addressing the concerns with a section that sought to address what we have tried to address. For this same reason, we continue to believe Section 1702 in ULCAA is important.

Some of the input we have received suggests the Section should identify specifically by generic characterization (*e.g.*, laws governing lawyers, accountants, real estate brokers, securities distributions) all possible regulated activities in a particular adopting state's laws that might be construed as being applicable to ULCAA. This approach has the great benefit of providing a road map for practitioners seeking to use ULCAA. The obvious downside and hazard is this approach could suffer from an unintended omission from the list. That could lead to a negative implication that ULCAA **was** intended to supplant any statute not included in the list.

Other input has sought to identify a particular statute as being applicable to LCAs organized in a field covered by the statute. This approach has been particularly emphasized by the Joint Editorial Board for Uniform Real Property Acts (JEB). JEB has suggested Section 1702 should contain the following, probably as a subsection (c) in the current draft:

If a limited cooperative association owns or operates residential housing:

- (1) the organic rules of the association must conform to any requirements established by other law of this [state] governing the organization of a residential housing cooperative; and

- (2) the association must comply with any requirements established by other law of this [state] governing the activities of a residential housing cooperative.

A similar but somewhat different approach has also been furnished to us:

- (c) A limited cooperative association which is organized to create real estate interests in real property together with the governing instruments shall be subject to:
- (i) Registration and public offering statements for the type of real estate interests created according to the laws of this [state]. {This should cover condos, co-ops, PUD, common interest ownership communities.}
 - (ii) The requirements of governance of the Association and the maintenance of the property covered by the Association provided by other laws of this [state]. {If the laws of the jurisdiction have particular consumer oriented protective provisions this should cover that situation.}

This approach is significant because of the potential use of an LCA in the housing area where there are significant consumer protection statutes in place under the Uniform Common Interest Ownership Act (UCIOA) and other statutes in states that have not adopted that Act. Cooperative housing is used especially in the northeastern states. Once again, however, if one seeks to identify this particular statute, how many others need to be identified because of similar concerns.

JEB has expressed a number of concerns about ULCAA. A primary one is that the definition of “cooperative” in UCIOA and other state enabling acts, Section 216 IRC, the Federal Condo and Co-op Abuse Relief Act, Section 203n of the National Housing Act, and all the secondary mortgage market programs is that ownership of the membership entitles one to occupy a specific unit. ULCAA allows creation of entities in which some members are not entitled to occupancy, but rather receive a return on investment. The JEB concern is that ULCAA could be construed as overriding the provisions of those types of statutes.

Our view has been that Section 1-201 of UCIOA makes it clear UCIOA applies to *all* common interest communities after the effective date of UCIOA. In the absence of a separate “declaration” required for there to be a common interest community, the Articles and Bylaws of an LCA would be the declaration. The UCIOA would apply to an LCA if the LCA is organized such that any person owns a “unit” and, because of the ownership the person is obligated to pay a share of the common expenses of the community. If UCIOA does not work in the context of ULCAA, then it should not work in the limited liability company or limited partnership contexts either and we have not heard JEB express a concern about those entities vis-a-vis UCIOA.

A third approach is the one reflected in the current draft which is to make general references to other statutes. This approach if properly written could address concerns received from those persons who have suggested a more specific approach. The problem with this approach is to find the proper words to accomplish the purpose.

With this background, we offer you two approaches (our general approach draft and one furnished to us dealing with matters specifically). These, together with the JEB suggestion above, that could be appended to either approach will hopefully help in considering Section 1702.

The General Approach

SECTION 1702. REQUIREMENTS OF OTHER LAWS.

(a) This act does not alter or amend any laws that govern the licensing and regulation of individuals or entities in carrying on specific businesses or professions even if those laws permit the businesses or professions to be conducted in or by a limited cooperative association, any foreign cooperative, or its members.

(b) A limited cooperative association may not conduct activities that, under other laws, must be conducted in an entity that meets specific requirements for the internal affairs of that entity unless the organic rules of the limited cooperative association conform to those requirements.

The Specific Approach

SECTION 1702. REQUIREMENTS OF OTHER LAWS.

Cooperative associations and foreign cooperatives authorized to conduct business and activities in this state are authorized to conduct any type of activities in this state. There are activities that may conflict in part with the provisions of this [act]. Therefore, in the application of the provisions of this [act] the cooperative associations and foreign cooperatives must comply with the laws and regulations of this state that are otherwise applicable to the activities conducted by them in this state. The other laws that would apply to the persons who are individually responsible and when forming a cooperative association, or qualifying a foreign cooperative to conduct business and activities in this state, would similarly be required to comply with the other laws, are as follows:

(a) The application for, the qualification of and the licensing of the persons and continuing review and qualification of, the revocation of and suspension of licenses of the following:

(1) Legal, medical and dental, optometry, engineers, architects, surveyors, public accountancy, Opticians, psychologists, veterinary medicine, speech pathologists, audiologists and other similar professions.

(2) Financial institutions, savings and loan associations, credit unions, mortgage brokers, securities dealers, investment counselors, collection agencies and other similar financial activities.

(3) Contractors, fumigation, pest control operators, real estate brokers and sales persons, electricians, plumbers, elevator mechanics, Real estate appraisers, Escrow depositories, photographers, pest control operators, radioactive technology and other similar activities.

(4) Health care professionals, pharmacists and pharmacy, physical therapy, podiatry, acupuncture practitioners, barbering, beauty culture, chiropractic, dental hygienists, electrologists, massage, naturopathy, nurses, nurses aides, social workers, undertakers, embalmers and funeral directors and other similar activities.

(5) Motor vehicle licensing of dealers, motor vehicle repairs and rental industry.

(6) Boxing contests, cable television, unaccredited degree granting institutions, escort agencies, pilotage, private investigators, pawnbrokers, second hand dealers and other similar activities.

(b) The trade regulation and practices relating to those persons whose business are in the area of various business practices, as follows: Financial, insurance, monopolies, fair trade regulations, motor vehicle sales and warranties, trademarks and trade names, copy rights, trade secrets, franchise investment law, franchise investment law, land sales practices, Securities transactions, measurements and standards, hotels, health clubs, consumer protection, discrimination in public accommodations and similar activities.

APPENDIX C

TO: Drafting Committee, Advisors and Observers
Uniform Limited Cooperative Association Act

FROM: Tom Geu and Jim Dean

RE: Allocations, Distributions, Voting and the Board of Directors:
Relationships and Tensions

DATE: February 2007

The policy gravamen of the draft is the balance between provisions concerning patron members and investor members and the synergism created between select governance and finance sections. In order to help tune the next ULCAA draft and compare ULCAA with “existing” acts, two comparative charts (one summary; one a bit more detailed) follow on subsequent pages.

Related ULCAA sections not cited in the second chart include Section 115 (“Dual Capacity”); Section 417 (“Districts and Delegates; Classes of Members”); and, for example, Section 1405 (“Voting By District, Class or Voting Group”). Note that definitions supporting these topics include subsections 102(13), (15), (22), (31), (32), and (33).

KEY PROVISIONS, NEW STATE LLC/COOPERATIVE STATUTES¹

	<u>Minnesota</u>	<u>Tennessee</u>	<u>Iowa</u>	<u>Wisconsin</u>	<u>NCCUSL</u>
Scope	Anyone	Ag and other	Ag and other	Ag and other except utilities	Anyone except (?) ²
Members	Patrons / Non-patrons	Patrons / Non-patrons	Patrons / Non-patrons	Patrons / Non-patrons	Patrons / Non-patrons
Patron Votes ³	15% or less, collectively	No minimum	15% or less, collectively	51% collectively	2/3's; 1/2 of votes to approve ⁴
Patron Elected Directors ⁵	1 or more / 50% of votes	1 or more / 51% of votes	Majority, or less / 50% of votes	Majority, down to none	Majority or more
Patron Refunds ⁶	15% or less	15% or less	15% or less	30% or less	50% or more

¹ Wyoming has been left off this list because it is ag-specific and not likely to be used much.

² The current NCCUSL draft provides a cooperative association may be formed "for any lawful purpose...except [designated prohibited purposes]." The list of designated prohibited purposes is still under consideration.

³ The 15% minimum allocation of voting control to patrons can be further diluted by language allowing the transfer of patron voting rights to non-patron creditors, security holders, and "other persons." See, e.g., Minn. 308B.555, Subd. 3.

⁴ The current NCCUSL draft provides patron participants are entitled to not less than 2/3's of the voting power and any matter can only be approved if at least 1/2 of the affirmative votes are cast by patron participants.

⁵ The States allow for most directors to be selected by non-patron members. WY, MN, and IA provide patron-member elected directors at least 50% voting control on the board (TN makes it at least 51%) on "general matters of the cooperative."

⁶ The "or less" phrase reflects language in the statutes that provides the minimal 15% earnings allocations to patron members can be further reduced, or eliminated, by a provision allowing reserves to come solely from earnings allocations to patrons.

CITATION ¹	SCOPE	PATRON VOTES	PATRON ELECTED DIRECTORS	AMENDMENT OF ARTICLES	MEMBER VOTING	ALLOCATION ²
<p>“Wyoming Processing Cooperative law [sic]” (enacted 2001). <i>Wyo.</i> <i>Stat. Annot.</i> §17-10-201.</p>	<p>Formed under a cooperative plan to market and “Change the form or marketability of crops, livestock and other agricultural products and other purposes that are necessary or convenient to facilitate the production or marketing of agricultural products by patron members and other purposes that are related to the business of the cooperative.” <i>Wyo. Stat. Annot.</i> §17-10-205.</p>	<p>Each patron has one vote but may have more. “On any matter of the cooperative, the entire patron members voting power shall be voted collectively based upon the majority of patron members voting on the issue.” <i>Wyo. Stat. Ann.</i> §17-10-230.</p>	<p>At least one-half of the voting power on general matters shall be allocated to 1 or more directors elected by patron members. <i>Wyo. Stat. Annot.</i> §17-10-217.</p>	<p>Typical corporate-like process. Majority of member votes cast (assuming a quorum).</p>	<p>Present, alternative method if authorized by the board; no proxy (but delegate voting not proxy). <i>Wyo. Stat. Annot.</i> §17-10-230.</p>	<p>Based on contributions unless otherwise provided. Patrons, collectively, shall have not less than 15 percent. Same rule for distributions. <i>Wyo. Stat. Annot.</i> §17-10-222; §17-10-233. For reserves etc. see §17-10-234.</p>
<p>“Minnesota Cooperative Associations Act” (2003 session laws). <i>Minn. Stat.</i> <i>Annot.</i> §305B.001.</p>	<p>Based on a cooperative plan “for any lawful purpose.” The general language is followed by delineated items preceded by “including.” The delineated items are themselves broad including “for any other purposes that cooperatives are authorized by law.” <i>Minn. Stat. Annot.</i> §305B.201.</p>	<p>Patron vote based on block voting; bylaws may not reduce the collective patron vote to less than 15 percent of the total vote. <i>Minn. Stat. Annot.</i> §305B.545(1).³</p>	<p>At least one-half of the voting power on general matters shall be allocated to 1 or more directors elected by patron members. <i>Minn. Stat. Annot.</i> §305B.411(b), (c).</p>	<p>Typical corporate process; default by majority of votes cast (assuming quorum is present). <i>Minn. Stat. Annot.</i> §308B.221 Subdiv. 1(2)(i).</p>	<p>Present; alternative method if authorized by board; no proxy (but delegate voting not proxy). <i>Minn. Stat. Annot.</i> §308B.565 which seems to allow voting by proxy.</p>	<p>Based on contributions unless otherwise provided. Patrons must have 50 percent of profits allocation in any fiscal year except articles or bylaws may reduce to 15 percent. Same rule for distributions. <i>Minn. Stat. Annot.</i> §308B.721.</p>
<p>“Tennessee Processing Cooperative Law” (effective 2005). <i>Tenn.</i> <i>Code Annot.</i> §43-38-101.</p>	<p>Requires a cooperative plan, lists specific ag. processing and marketing functions and “for all other purposes that cooperatives are authorized.”). <i>Tenn. Code Annot.</i> §43-38-201. Commissioner of Agriculture must approve articles and its approval seems constrained to ag. processing. <i>Tenn. Code Annot.</i> §43-38-203(g).</p>	<p>Each patron member has one vote but may have more. “On any matter of the cooperative, the entire patron members voting power shall be voted collectively based upon the vote of the majority of patron members’ voting on the issue.” <i>Tenn. Code Annot.</i> §43-38-522. <i>See Tenn. Code Annot.</i> §§43-38-501(?).</p>	<p>At least one director must be elected by patron members but at least 51 percent of the voting power on general matters must be allocated to directors elected exclusively by patron members. <i>Tenn. Code Annot.</i> §43-38-606(a).</p>	<p>Typical corporate process; default is by majority of votes cast (assuming a quorum is present). <i>Tenn. Code Annot.</i> §43-38-402(a)(2).</p>	<p>Present; mail or alternative method if authorized by board; not by proxy (district etc. not proxy). <i>Tenn. Code Annot.</i> §43-38-522(c), (d); 43-38-521.</p>	<p>Based on contributions unless otherwise provided and patrons must have at least 15 percent of both allocations and distributions. <i>Tenn. Code Annot.</i> §43-38-901. <i>See Tenn. Code Annot.</i> §43-38-902 (creation of reserves); §43-38-501(e).</p>
<p>“Iowa Cooperative Associations Act” (effective 2005) <i>Iowa</i> <i>Code Annot.</i> Ch. 501A.</p>	<p>Any lawful purpose followed by a nonexclusive listing (“including but not limited to”). One of the listed items is “[f]or any other purpose that a cooperative is authorized by law under chapter 499 [“Cooperative Associations”; “any lawful purposes” therein, expressly incl. agriculture and electric by discussing them elsewhere] or 501 [“Cooperative Corporations”; “any lawful business” therein.] <i>Iowa Code Annot.</i> Ch. 501A.501.</p>	<p>Patron members vote on a collective block vote; bylaws may not reduce patron member vote to less than 15 percent of the total vote. <i>Iowa Code Annot.</i> Ch. 501A.810.⁴</p>	<p>The quick rule of thumb is at least one-half of the voting power “shall be allocated” to the board members elected by patron members. However, it may be less on certain matters.⁵</p>	<p>Typical corporate process; default is by majority of the votes cast (assuming a quorum is present). <i>Iowa Code Annot.</i> Ch. 501A.506.</p>	<p>Present, mail, or other authorized method. No proxy (delegates not proxy). <i>Iowa Code Annot.</i> Ch. 501A.810.</p>	<p>Based on contributions unless otherwise provided and patrons must be allocated at least 50 percent of profits in any fiscal year. Articles, bylaws, or patron member votes may reduce to 15 percent. <i>Iowa Code Annot.</i> Ch. 501A.1005(1). Distributions are governed similarly. <i>Iowa Code Annot.</i> Ch. 501A.1005(2). <i>See also Iowa Code Annot.</i> Ch. 501A.1006 (defining net income).</p>

CITATION	SCOPE	PATRON VOTES	PATRON ELECTED DIRECTORS	AMENDMENT OF ARTICLES	MEMBER VOTING	ALLOCATION ²
<p>“Wisconsin Cooperative Associations Act” (effective 2006) <i>Wisc. Stat. Annot.</i> §193.005 (note that the reviser of statutes captions the chapter, “Unincorporated Cooperative Associations”).</p>	<p>Any lawful purpose (<i>Wisc. Stat. Annot.</i> §193.201); BUT not “furnishing natural gas, heat, light, power, or water to its members” (<i>Wisc. Stat. Annot.</i> §193.203).</p>	<p>Patron members vote on a collective block vote; the articles or bylaws may not reduce the collective patron member vote to less than 51 percent of the total member vote. The following language appears in the same section: “Unless the articles or bylaws provide otherwise, no issue that patron members may vote upon may be approved unless, in determining the collective vote of the patron members, the number of patron members voting to approve the issue is a majority of all members voting on the issue.” <i>Wisc. Stat. Annot.</i> §193.545.⁶</p>	<p>“[A] majority of the directors shall be elected exclusively by patron members, unless otherwise provided in the articles or bylaws.” Also provides for a non-voting financial expert. <i>Wisc. Stat. Annot.</i> §193.411(2)(b).</p>	<p>Assuming a quorum, by a majority of votes cast. <i>Wisc. Stat. Annot.</i> §193.221.</p>	<p>Present, mail, authorized alternate ballot, proxy. <i>Wisc. Stat. Annot.</i> §193.545(2), (3); §193.565 (proxy).</p>	<p>Patron members must have 51 percent of both profit allocations and distributions. The patron members, by majority vote, may authorize lower amount but not less than 30 percent. <i>Wisc. Stat. Annot.</i> §193.601(4).</p>
<p>“Nebraska Limited Cooperative Association Act” (as of first reading 01/12/2007, not yet passed) LB 368, §1, 100th Leg., 1st Sess. (2007).</p>	<p>For any lawful purpose EXCEPT for the purpose of being a financial institution which is subject to supervision by the Department of Banking (or which would be if chartered by the Nebraska) or the business of insurance. LB 368 §4(2).</p>	<p>Each patron participant must have at least one vote. The aggregate voting power of patron participants must be 51 percent, voted collectively, but may be reduced by the articles or bylaws to no less than 15 percent. LB 368 §39(2).</p>	<p>At least fifty percent of the board of directors members must be elected exclusively by patron participants. LB 368 §56.</p>	<p>Corporate-style process. Approved by at least two-thirds vote (bylaws by majority). LB 368 §113.</p>	<p>Presence required except the articles or bylaws may provide for alternative means for voting. Proxy voting is prohibited. LB 368 §43.</p>	<p>The default rule is at least 50 percent of the net proceeds, savings, margins, profits and losses must be allocated to patron participants in a fiscal year. Articles or bylaws may reduce to no less than 15 percent. LB 368 §80(2). Reserves, etc., see §80(3). The board of directors is authorized to make distributions to participants. LB 368 §81.</p>
<p>“Uniform Limited Cooperative Association Act”, NCCUSL, March 2007, Committee Draft (hereinafter “ULCAA”), §101.</p>	<p>For “any lawful purpose, whether or not for profit, [except] [designated prohibited purposes].” ULCAA §105(b) (no designated prohibited purposes in current draft). Cf. ULCAA §104 (“Nature of Limited Cooperative Association”).</p>	<p>Each patron member has at least one vote. ULCAA §411. See ULCAA §412 (“Determination of Voting Power of Patron Member”). Requires two-thirds of voting power be held by patron members. Majority of all members voting at the meeting unless it is an extraordinary matter AND at least one-half the votes cast by patron members are in the affirmative. ULCAA §414.</p>	<p>A majority of the board must be elected exclusively by patron members. ULCAA §704. Each director has one-vote. ULCAA §716.</p>	<p>Approval of amendment of articles and specific items whether in articles or bylaws is by two-thirds vote and <i>at least</i> a majority of the patron vote. The two-thirds may be modified by organic rule. The majority can be modified upward. ULCAA §1406.</p>	<p>Present; alternative method if provided in organic rules; no proxies. ULCAA §415.</p>	<p>The default is “all to patrons”; if investor members are present then default allocation is based on contributions to investor members and patronage for patron members. The organic rules may reduce to no less than 50 percent BUT sums paid to members on product or services and sums due “as stated fixed return on equity” do not “count” in determining the numerator. The board may set aside, whether allocated or unallocated, capital reserves and reserves for specific purposes. ULCAA §904. Distributions are at discretion of board and (implicitly) are not subject to the allocation requirements. ULCAA §905.</p>

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- ¹ Listed in chronological order.
- ² It is possible that the required percentage may be reduced further in some states through provision that reserves be allocated solely from patron members.
- ³ It appears §308B.555 may reduce the percentage further through transfer but the provision is subject to different interpretation. Subdivision 3 states: "The articles or bylaws may give or prescribe the manner of giving a creditor, security holder, or other person a right to vote on patron membership interests under this section."
- ⁴ Iowa uses the same language as Minnesota with the same effect. *Iowa Code Annot.* §501A.812(2).
- ⁵ The statutory provision follows: "b. A majority of the directors shall be members and a majority of the directors shall be elected exclusively by the members holding patron membership interests unless otherwise provided in the articles or bylaws. c. The voting power of the directors may be allocated according to equity classifications or allocation units of the cooperative. If the cooperative authorizes non-patron membership interests, one of the following must apply: (1) At least one-half of the voting power on matters of the cooperative that are not specific to equity classifications or allocation units shall be allocated to the directors elected by members holding patron membership interests. (2) The directors elected by the members holding patron membership interests shall have at least an equal voting power or shall not have a minority voting power on general matters of the cooperative that are not specific to equity classifications or allocation units." *Iowa Code Annot.* Ch. 501A.703(2)(b) & (c).
- ⁶ The articles or bylaws may provide for voting by nonmembers. *Wisc. Stat. Annot.* §193.555. It does not effect, however, the required percentage of patron member vote.