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Legislative Provisions for Agricultural Cooperatives: Adjusting to Changed Circumstances

by

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LEGISLATIVE PROVISIONS FOR AGRICULTURAL COOPERATIVES: ADJUSTING TO CHANGED CIRCUMSTANCES

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I. INTRODUCTION

Agrarian interests of past eras succeeded in convincing Congress and state legislatures that cooperatives were unique business organizations of farmers, laborers or other worthy individuals warranting special consideration. Commencing in the latter part of the nineteenth century, many states enacted one or more sets of legislation providing for the formation of cooperative organizations.[1] In 1914, Congress enacted section six of the Clayton Act[2] which operated to shield nonstock farmers' cooperatives from the antitrust laws. This exception was expanded eight years later, with the passage

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1. The Michigan Legislature enacted "An Act to Authorize the Formation of Mechanics' and Laboring Men's Cooperative Associations" in 1865. 1865 Mich. Pub Acts 228. Massachusetts and Pennsylvania also enacted cooperative statutes prior to 1870 that provided for the formation of cooperative associations. 1866 Mass. Acts 290; 1868 Pa. Laws 62. *See* M. ABRAHAMSEN, COOPERATIVE BUSINESS ENTERPRISE 185-89 (1976).

2. Ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (1982)). *See infra* notes 142-143 and accompanying text.

of the Capper-Volstead Act,[3] to allow persons engaged in the production of agricultural products to act together in associations in selected collective activities. In the area of securities regulation, both the Securities Act of 1933[4] and the Securities Exchange Act of 1934[5] recognized exceptions for agricultural cooperatives. The Internal Revenue Code contains special provisions in section 521 and Subchapter T[6] which operate to enable qualifying cooperative earnings to avoid taxation at the firm level. The Cooperative Marketing Act of 1926,[7] the Agricultural Marketing Act of 1929,[8] the Robinson-Patman Anti-Discrimination Act of 1936,[9] the Agricultural Marketing Act of 1946,[10] and the Agricultural Fair Practices Act of 1967[11] also evince an attitude that cooperatives are special.

The special legislative provisions for cooperatives were adopted in response to the problems and circumstances existing at the time of their enactment. For the most part, the problems and the economic ills that served as a justification for some of the special legislation have been cured or have changed.[12] More important, perhaps, are the marked structural changes that have occurred at the farm level as well as in the marketplace.[13] While our country's population has more than doubled between 1920 and 1980,[14] the farm population has decreased fivefold.[15] In 1980, there were less than half the number of farms as had existed in 1920,[16] but total farm acreage had increased.[17] Cooperatives have undergone an equally marked change. From

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3. Co-operative Marketing Associations Act, ch. 57, 42 Stat. 388 (1922) (current version at 7 U.S.C. §§ 291-292 (1982)).

4. 15 U.S.C. § 77a *et seq.* (1982); 15 U.S.C.A. § 77b(1) (1983).

5. 15 U.S.C. § 78a *et seq.* (1982); 15 U.S.C. § 78c(a)(10) (1983).

6. I.R.C. §§ 1381-1388 (West 1983).

7. 7 U.S.C. §§ 451-457 (1982).

8. 12 U.S.C. § 1141 *et seq.* (1982).

9. 15 U.S.C. §§ 13, 13a, 13b and 21a (1982).

10. 7 U.S.C. § 1621-1629 (1982).

11. 7 U.S.C. § 2301 *et seq.* (1982).

12. *See* Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives,* 61 VA. L. REV. 341 (1975). *See also* Recent Development, *The Agricultural Cooperative Antitrust Exemption — Fairdale Farms, Inc. v. Yankee Milk, Inc.,* 67 CORNELL L. Q. 396 (1982); Comment, *Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption,* 27 S.D. L. REV. 476 (1982).

13. *See* Note, *supra* note 12, at 346.

14. In 1920 the population was approximately 105 million. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83 at 6 (1983) (hereinafter cited as STATISTICAL ABSTRACT 1982-83). In 1980 our population was over 225 million. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 1982 at 397 (1983) (hereinafter cited as AGRICULTURAL STATISTICS 1982).

15. From 31 million in 1920 to six million in 1980. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1962 at 608 (hereinafter cited as STATISTICAL ABSTRACT 1962); STATISTICAL ABSTRACT 1982-83 at 649.

16. There were less than 2.5 million farms in 1980 compared to nearly 6.5 million in 1920. STATISTICAL ABSTRACT 1982-83 at 652; STATISTICAL ABSTRACT 1962 at 618.

17. Farm acreage rose from 955 million acres in 1920 to over one billion acres in 1980.

the small local farmer organizations generally prevalent in the 1920's, many cooperatives have evolved and consolidated into large regional, national, and international business organizations. Cooperatives increased their business from an estimated $806 million of sales and purchases in 1920[18] to over $92 billion worth of business in 1980,[19] while the number of organizations decreased from 10,700 in 1935[20] to 6,293 in 1980.[21]

The economical, social, and cultural changes that have transpired since the enactment of much of the legislation affecting cooperatives raises the issue of the validity of some of the exceptions. Should cooperatives be treated differently from other business organizations? The answer to this question may be dependent upon the type of cooperative. Small cooperatives in which members themselves participate in the management and control of their business organization have a considerable number of similarities with the organizations prevalent when a majority of the cooperative legislation was enacted. Some of the large cooperatives, however, have emasculated the cooperative principles on which they are based and tend to be more analogous to the corporate form of business.

The digression of some cooperatives from cooperative principles and, more importantly, the structural, operational, and management changes of their business activities greatly alter the legislative needs of these organizations and beg for legislative reform.[22] The poor economic performance by the 100 largest American agricultural cooperatives in 1981[23] suggests that the cooperative form of business may act to impede the economic success of some of these organizations. The activities of cooperatives and the principles safeguarding cooperation should be reexamined to determine whether existing cooperative legislation might be amended to strengthen the economic performance of these business organizations to better serve farmers and the general public.

Five troublesome issues may be identified as warranting special attention by cooperatives under existing legislation. The first issue is the inadequacy of the state statutes that provide for the formation of cooperatives. Many of these state statutes are poorly written, ambiguous, contain antiquated provisions, and fail to provide a modern set of legislative guidelines for the organization, management, and operation of cooperatives.[24] Second,

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STATISTICAL ABSTRACT 1962 at 618; STATISTICAL ABSTRACT 1982-83 at 652.

18. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, ABSTRACT OF THE FOURTEENTH CENSUS OF THE UNITED STATES 1920 at 747 (1923).

19. AGRICULTURAL STATISTICS 1982 at 457.

20. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 1936-1937 at 400 (1936).

21. AGRICULTURAL STATISTICS 1982 at 457.

22. *See supra* note 12 and accompanying text.

23. Davidson & Street, *Patronage Refunds Drop 44 Percent Reflecting Lower Margins, Losses*, 49 FARMERS COOPERATIVES, Nov. 1982, at 4.

24. Centner, State Cooperative Statutes — Conflict of Cooperative Concept with Efficiency," 12 *Northeast J. Agric. Econ.* 91 (1983). *See infra* Part III.

the state cooperative statutes may preclude cooperatives from adopting an organizational structure which can best deal with the forces and competition of today's business world. It appears that some of the ideals and democratic principles of cooperativism embodied in the state cooperative statutes impede, erode or destroy the competitive advantage to be achieved through cooperation.[25] Next, the failure of many cooperatives to provide for the orderly and timely return of monies belonging to inactive members creates an equity redemption problem that begs for judicial or legislative relief.[26] Finally, it may be argued that the large regional, national, and international cooperatives do not need, or are not entitled to, the antitrust protection provided by the Capper-Volstead Act[27] or the securities regulation exceptions of the Federal Securities acts.[28]

II. The Cooperative Concept

There is no single definition for cooperatives that enumerates the specific principles that differentiate these organizations from other forms of business. Several principles, however, may be identified that are important to the cooperative form of business. Perhaps the most important principle is membership control.[29] Members elect the directors to manage the cooperative and thereby theoretically control the business activities of their cooperative. Membership control may also encompass a rule limiting a member to one vote and, pursuant to a statutory or bylaw provision, restrict membership of the board of directors to members.[30]

A second weighty cooperative principle is that cooperatives conduct their business activities without attempting to make a profit for the benefit of investors.[31] Nearly all of the state statutes provide that cooperatives are nonprofit organizations, but they may have earnings or profits which accrue to their members as producers[32] that are taxable under the Internal Revenue Code (IRC). The special cooperative tax provisions of Subchapter T of the IRC provide that qualifying cooperative profits need not be taken into account in determining the cooperative's taxable income.[33]

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25. *Id. See infra* Part IV.
26. *See infra* Part V.
27. *See infra* Part VI.
28. *See infra* Part VII.
29. Abrahamsen, *supra* note 1, at 56-59.
30. *Id.*
31. Abrahamsen, *supra* note 1, at 54-56. *See also* J. Baarda, State Incorporation Statutes for Farmer Cooperatives 20; Agricultural Cooperative Service, U.S. Dep't of Agriculture, Cooperative Information Report 30 (1982).
32. "Associations organized under this article shall be deemed to be nonprofit since they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers." O.C.G.A. § 2-10-82 (1983).
33. Section 1382(b) of the Internal Revenue Code (IRC) provides that a cooperative's taxable income shall not include amounts paid pursuant to the provisions of that section. It should

The concept of cooperation also involves member ownership of their business organization.[34] This ownership arises by virtue of the members' investment in the cooperative. Although part of this investment may be in the form of membership[35] or preferred stock, the most important investments are patronage dividends[36] and per-unit retain allocations[37] which the cooperative has allocated but not paid to individual patrons.[38] Patrons report these allocated monies as taxable income in the year they are allocated even though they have not actually received the funds.[39] The monies are later paid to the patrons as provided by the cooperative's bylaws or the membership contract. A patronage dividend, also commonly referred to as a patronage refund, means an amount a qualifying cooperative is obliged to pay a patron on the basis of quantity or value of business done with or for such patron determined by reference to the net earnings of the cooperative done with or for its patrons.[40] A cooperative need not pay all of the patrons' patronage dividends to the patrons. Rather, it may issue a written notice of allocation evidencing the unpaid amount allocated to each patron. A per-unit retain allocation means an allocation by a qualifying cooperative to a patron with respect to products marketed for the patron, the amount of which is fixed without reference to the net earnings of the cooperative pursuant to an agreement between the cooperative and the patron.[41] The agreement may allow the cooperative to retain a portion of the per-unit retain allocation and issue the patron a per-unit retain certificate.

A fourth principle of many cooperatives is that the cooperative pays a limited return on invested capital.[42] This principle is related to the principles of operation at cost and member investment. Since the cooperative is not organized to make profits and members are expected to invest in their cooperative, there is no need to provide a return on invested monies at or near the market rate. Most cooperatives do not provide any return to patrons holding written notices of allocation or per-unit retain certificates. In many cases, return on stock is limited to eight percent[43] in order to qualify

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be noted that section 1382(c) provides that cooperatives meeting the definitional requirement of section 521 of the Code may qualify for an additional deduction.

34. ABRAHAMSEN, *supra* note 1, at 59-60.

35. Stock cooperatives issuing one share of membership stock to each member raise some funds in this manner.

36. I.R.C. § 1388(a) (West 1983).

37. I.R.C. § 1388(f) (West 1983).

38. Patrons may be members of the cooperative or may be nonmembers using the cooperative. The distinction between members and patrons is important for qualifying for special tax deduction available under section 1382(b) of the IRC and for qualifying for the antitrust exemptions.

39. I.R.C. § 1388 (West 1983).

40. I.R.C. § 1388(a) (West 1983).

41. I.R.C. § 1388(f) (West 1983).

42. ABRAHAMSEN, *supra* note 1, at 60-61.

43. A cooperative may limit this return in its articles of incorporation or bylaws.

under the Capper-Volstead Act for antitrust protection,[44] to qualify under section 521 of the IRC,[45] or to qualify for the cooperative exemption from the federal Securities Act of 1933.[46] In some cases, the state statute of incorporation also limits dividends on capital stock to eight percent.[47]

Another common cooperative principle is that each member shall have one vote regardless of the member's interest in the cooperative.[48] Some type of voting limitation has been incorporated into two-thirds of the state cooperative statutes,[49] and a one-vote limitation has been incorporated in over one-third of the state cooperative statutes.[50] Several statutes provide that each member shall have one vote unless the articles or bylaws provide otherwise.[51] Other statutes exempt member associations from the one-vote requirement.[52] In addition, although the state cooperative statute may not limit members to one vote, the cooperative's bylaws may contain a voting restriction.

III. Development of a Model Statute

American agricultural cooperatives may be organized pursuant to provisions of one of the ninety-four different state cooperative statutes that have been enacted by the legislatures of the fifty states and the District of Columbia.[53] The diverse provisions of these statutes constitute a confusing array of rules and restrictions governing the activities and operations of cooperatives. The many distinctions among the provisions of the statutes create difficulties in developing a consistent and hegemonistic body of cooperative

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44. 7 U.S.C. §§ 291-92 (1982). Cooperatives which meet the requirements of the provisions of the Capper-Volstead Act have an affirmative defense to a charge of an antitrust violation.

45. Section 521 of the IRC exempts farmers' cooperatives, known as section 521 cooperatives, from taxation except as provided in Subchapter T. Under the provisions of section 1382(c), section 521 cooperatives are eligible to deduct from their taxable income amounts paid as dividends on their capital stock and certain amounts derived from nonpatronage business that are paid on a patronage basis. One of the qualifications for section 521 cooperatives is that dividends on capital stock must be limited to no more than eight percent.

46. Section 3 of the Securities Act of 1933 exempts securities of farmer cooperatives that qualify under section 521 of the IRC. 15 U.S.C. § 77c(a)(5)(B)(i) (1982).

47. For example: "Unless the articles provide that common stock shall receive no dividends, the directors may declare noncumulative dividends thereon at such rate as they may fix, not exceeding eight percent per annum." Iowa Code Ann. § 499.23 (West 1983). *See* Baarda, *supra* note 31, at 112-13, 633-36.

48. "No single feature of cooperative incorporation statutes sets them apart from other incorporation statutes more than the voting power given to individual members." Baarda, *supra* note 31, at 73.

49. Baarda, *supra* note 31, at 412-16.

50. *Id.*

51. *Id.*

52. *Id.* at 416.

53. 14 N. Harl, Agricultural Law § 131.08 (Supp. 1984) (hereinafter cited as Harl). *See also* Baarda, *supra* note 31, at 3-13.

law. Thereby, cooperative law cannot be transposed from jurisdiction to jurisdiction except where the particular provisions governing the issue happen to be the same in both jurisdictions.

The state cooperative statutes were adopted by state legislatures in order to enable individuals to come together and form self-help organizations.[54] The earliest cooperative statutes were adopted during the latter part of the nineteenth century.[55] In many cases these statutes have evolved into what may be called general cooperative statutes since they allow persons to form cooperatives for most any purpose.[56] In the 1920's many states adopted a second statute modeled after "The Bingham Cooperative Marketing Act."[57] These statutes were to promote, foster, and encourage the marketing of agricultural products by persons engaged in the production of these products.[58] This set of statutes is referred to as the cooperative marketing statutes.[59]

The diversity of the separate state cooperative statutes and the antiquated provisions of many of these statutes limit the organization, management, and operational activities of American cooperatives. The absence of a succinct, consistent, and modern set of state statutory provisions for cooperatives means that there is ambiguity and confusion concerning the legal restrictions applicable to these business organizations. Many of the statutory provisions have not been amended to reflect the technological changes, business developments, governmental regulations, and legal reforms that generally affect various forms of business. These antiquated statutes unduly restrict or impede the activities and operations of cooperatives. There is a need for a model cooperative enabling law emulating the appropriate provisions of the model corporation code and partnership law.

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54. Some statutes contain a declaration of policy which sets forth the legislative objective:

> In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; to eliminate speculation and waste; to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; to stabilize the marketing of agricultural products, and to provide for the organization and incorporation of agricultural co-operative associations and societies, this Act is passed.

ILL. ANN. STAT. ch. 32, § 440 (Smith-Hurd 1982). *See also* BAARDA, *supra* note 31, at 17-18.

55. *See* ABRAHAMSEN, *supra* note 1, at 185.

56. Illinois enacted the Illinois Co-operative Act for general cooperatives, ILL. ANN. STAT. ch. 32, §§ 305-31 (Smith-Hurd 1970), and the Illinois Agricultural Co-operative Act for agricultural cooperatives. ILL. ANN. STAT. ch. 32, §§ 440-72 (Smith-Hurd 1970). Missouri distinquishes general cooperatives under "Cooperative Companies," from "Cooperative Marketing Associations," even though the general cooperatives must organized for the purpose of conducting an agricultural or mercantile business. MO. ANN. STAT. §§ 274.010, 357.010 (Vernon 1959).

57. 1922 Ky. Acts 1.

58. *See* BAARDA, *supra* note 31, at 17.

59. While some states clearly have a general and a cooperative marketing statute, states with a single statute may have a general statute. *See, e.g.*, IOWA CODE § 499 (1983). Or the state may have a cooperative marketing statute. *See, e.g.*, O.C.G.A. art. 3, ch. 10 (1983).

The state cooperative statutes are in marked contrast to the statutory provisions governing corporations and partnerships. The modern state legislative guidelines governing corporations and partnerships show a marked degree of consistency among the states since most of the enabling statutes follow a model set of enabling provisions. The corporation laws govern the rights, powers, and activities of business and nonprofit corporations. A majority of these laws were modeled after the Model Business Corporation Act which was laborously developed by the Committee on Business Corporations of the Section of Corporations, Banking and Business Law of the American Bar Association in 1950.[60] Each state's corporation law has subsequently incorporated new and amended provisions in response to technological changes, business developments, additional governmental regulation, and legal reforms.[61]

State partnership laws govern the formation and activities of general and limited partnerships. Legal experts serving on the Committee on Continuing Professional Education of the American Law Institute and the American Bar Association have developed and recommended new statutory provisions for partnerships that are responsive to current economic and social conditions.[62] Recommendations by this national group of legal experts have assisted state legislatures in the amendment of their partnership laws in response to similar conditions that led to the changes in the laws governing corporations.

Model codes, statutes, and provisions abound in other areas of state law.[63] The obvious advantage of consistent legal provisions among states should lead cooperatives and their leaders to seek the appointment of a model commission by the American Bar Association, the American Law Institute, a philanthropic foundation, or other national organization of legal experts charged with the responsibility of developing a model cooperative enabling statute.

IV. Management Limitations

The business and affairs of a cooperative are managed by the board of directors. This management function requires the board to perform definite functions, but allows for the election or appointment of officers and other management personnel to assist with the management of the cooperative's business activities.[64] In this manner many boards avoid excessive participa-

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60. American Bar Association — American Law Institute, Committee on Business Corporations, Model Corporation Act (1950).

61. *See* A. Todd, The Corporation Manual (1982).

62. ALI-ABA, Committee on Continuing Professional Education, Partnerships: UPA, UPLA, Securities, Taxation, and Bankruptcy (3d ed. 1982).

63. Perhaps the most successful collection of uniform legal provisions is the Uniform Commercial Code. *See, e.g.*, Iowa Code § 554 (1983).

64. *See* Harl, *supra* note 53, at § 131.01.

tion in day to day management decisions which are better handled by non-director management.[65] Regardless of the authority delegated to non-director management, however, the business direction and control exercised by the board of directors constitutes an extremely important determinant of the economic success of the cooperative. The competence, experience, expertise, and other qualifications of the directors are critical to the well-being of the cooperative.

A majority of the state cooperative statutes preclude cooperatives from securing the best qualified persons to manage their operations. This is the result of limitations concerning membership and the eligibility of directors. Approximately one-half of the statutes, especially the cooperative marketing statutes, restrict membership to members or producers of agricultural products.[66] Next, a directorship provision reflecting the principle of membership control has been incorporated into nearly one-half of the state statutes. The most frequent statutory requirement mandates that a majority of the directors must be members or shareholders.[67] Approximately one-third of the statutes allow only members, shareholders, or representatives of members or shareholders other than natural persons to serve as directors.[68]

These directorship restrictions are not related to the competency, experience, or expertise of the persons who are selected as directors. Rather, the belief is that a cooperative should be controlled by its members. The restrictions reduce the diversity of the board of directors and thereby presumably diminish the board's collective decisionmaking and management abilities. The restrictions may preclude directors who could furnish know-how and expertise in subjects that a cooperative cannot afford to obtain through the employment of consultants.[69] Such directors might be especially beneficial to small cooperatives. The director-membership requirements may also prevent cooperative members from selecting persons to serve as directors who have substantial business experience.[70] This may adversely limit the management capabilities of large cooperatives. The absence of directors with business experience may limit the expertise of the board in selecting a man-

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65. Lagges, *The Board of Directors: Boon or Bane for Stockholders and Management?*, 25 BUSINESS HORIZONS 45-50 (1982); K. LOUDEN, THE DIRECTOR (1982).

66. BAARDA, *supra* note 31, at 375-77.

67. *Id.* at 455-58.

68. HARL, *supra* note 53, at § 131.02[2]. Members or shareholders other than natural persons are corporations, partnerships, associations and cooperatives. For example: "The affairs of each association shall be managed by a board of not less than five directors, who must be members of the association or officers or members of a member-association. . . ." IOWA CODE § 499.36 (1983).

69. Jain, *Look to Outsiders to Strengthen Small Business Boards*, 58 HARV. BUS. REV. July-Aug. 1980, at 162; Stokes, *Involving New Directors in Small Company Management*, 58 HARV. BUS. REV. July-Aug. 1980, at 170.

70. M. LAUENSTEIN, BUILDING AND OPERATING AN EFFECTIVE BOARD OF DIRECTORS (1979).

ager or in overseeing the cooperative's management direction.[71]

The size variations of cooperatives and differences in the objectives of these organizations make it difficult to reach a consensus on an ideal membership for a board of directors. Although some consideration should be given to the cooperative concept of membership control, it does not follow that complete control should be legislatively mandated.[72] Within certain parameters, each cooperative should determine this item through an appropriate provision in its bylaws or articles of incorporation. One suggestion would be to have the cooperative's articles or bylaws, or the state enabling statute, limit nonmember directors to a minority percentage of the board of directors. Several state cooperative statutes already provide for a limited number of nonmember directors who are often referred to as public directors.[73] Most of these laws, however, provide for the selection of public directors by a public official or the other directors.[74] These statutes thereby foster a diversified board of directors, but preclude the membership from participating in the election process of the nonmember directors.

Another management limitation concerns the statutory officer membership requirements that govern some cooperatives. One-half of the state statutes require a number of the cooperative's officers to be members.[75] Such a restriction is similar to the director-membership requirement and precludes boards of directors from selecting the most qualified individuals to serve their cooperative as officers. This unnecessarily restricts the options available to cooperatives. The restriction could especially be disadvantageous for large cooperatives with business demands which necessitate full-time officers as the officers may not have the time to manage their own farming operations. If a particular cooperative should desire to have an officer-membership restriction, it could incorporate this requirement in its articles of incorporation.[76] In addition, it is not clear that the cooperative concept requires member officers. Since most state statutes provide that officers are selected by the directors and report to the directors, it may be argued that an officer-

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71. Ferguson & Dickinson, *Critical Success Factors for Directors in the Eighties*, 69 MANAGEMENT REV. 26 (April 1980).

72. Centner, *supra* note 24.

73. *See, e.g.*, ILL. ANN. STAT. ch. 32 § 451 (Smith-Hurd 1970):

> The by-laws may provide that one or more directors may be nominated by any public official or commission or by the other directors nominated by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. Such directors shall not number more than one-fifth of the entire number of directors.

Id.

74. *Id.*

75. *See, e.g.*, IOWA CODE § 499.37 (1983): "The directors shall select from their own number a president, one or more vice-presidents, a secretary-treasurer or a secretary and a treasurer. . . ." *Id.* Since section 499.37 of the Iowa Code requires directors to be members or officers or members of a member-association, there is an officer membership requirement. *Id.*

76. Centner, *supra* note 24.

membership limitation is unnecessary in order to maintain membership control of the cooperative.

V. Equity Redemption

Equity redemption is undoubtedly the most troublesome issue facing cooperatives today. The U.S. Department of Agriculture's Agricultural Cooperative Service and numerous authors[77] have studied and written about

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77. Allewelt, *Tri/Valley Revamps Equity Plan*, 46 Farmer Cooperatives, March 1980, at 6; Baarda, *Debts, Equity, Farmer Merchants, and the Wrong Okra*, 45 Farmer Cooperatives, May 1979, at 23; Brown & Volkin, *Programming Takes Strain out of Equity Redemptions*, 44 Farmer Cooperatives, June 1977, at 4; Brown & Volkin, *Ways to Meet Equity Redemption Challenges*, in American Cooperation 1976-77 (1977); Cobia, *Equity Redemption: Issues and Alternatives*, 47 Farmer Cooperatives, July 1980, at 18; Cobia, *Equity Redemption Policies Vary in Cooperatives*, in American Cooperation 1980-81 at 394 (1981); Cobia, *Indiana's Plan Ties Equity Redemption to Use of Cooperative*, 47 Farmer Cooperatives, Sept. 1980, at 4; Cobia, *Equity Redemption: Issues and Alternatives for Farmer Cooperatives*, in Agricultural Cooperative Service, U.S. Dep't of Agriculture, ACS Rep. 23 (October 1982); Conley & Lewis, *Equity Redemption, Financial Strength and No-Program Cooperatives*, 30 The Cooperative Acct. 14 (1980); Conley & Lewis, *Equity Redemption, Membership and Voting Rights*, 34 The Cooperative Acct. 53 (1981); Conley & Lewis, *Evaluating Financial Obstacles to Equity Redemption in Cooperatives: Program Compared to No-Program Cooperatives*, 40 Agric. Fin. Rev., April 1979, at 51; Conley & Lewis, *The Relationship of Membership Voting Policies to Equity Redemption: Grain Cooperatives in Illinois*, 2 N. Cent. J. Agric. Econ. 151 (1980); Cook, *Increased Institutional Pressure for Mandatory Equity Redemption in Farmer Cooperatives*, 29 The Cooperative Accountant 3 (1976); Cook, Vilstrup & Groves, *Cooperatives, Equity Retirement: Some Guidelines and Practices*, in University Center for Cooperatives Occasional Paper No. 3, University of Wisconsin, Madison (Feb. 1980); Davidson, *Quarter of Cooperatives Lack Program for Redeeming Equity of Members*, 48 Farmer Cooperatives, Oct. 1981, at 13; Davidson & Cobia, *Inflation, Need for Capital Prompt Equity Program Reviews*, 48 Farmer Cooperatives, April 1981, at 9; Dryer, *Individual Members Receive Valuable Cash Patronage Refund Tied to Member Equity Level*, 44 Farmer Cooperatives, June 1977, at 9; Groves, *Equity Redemption Practices of Wisconsin Agricultural Cooperatives*, in University Center for Cooperatives Occasional Paper No. 5, University of Wisconsin, Madison (Feb. 1981); Harling, *Need Workable Equity Redemption Policy*, in American Cooperation 1980-81 391 (1981); Harling, *Quick, Positive Action Must Answer Legislative Threat on Equity Issue*, 47 Farmer Cooperatives, Nov. 1980, at 8; Liuzzi, *Member Investment Plan Based on Assets Employed*, 47 Farmer Cooperatives, Jan. 1981, at 18; Lurya, *Board Members Must Know Member Equity Redemption Rights*, 48 Farmer Cooperatives, Aug. 1981, at 14; Lurya & Royer, *Equity Redemption Increases Through Investment Tax Credit*, 47 Farmer Cooperatives, May 1980, at 6; Mather, *More Co-ops Need Equity Redemption Programs*, 46 Farmer Cooperatives, Jan.-Feb. 1980, at 11; Mather & Krueger, *The Base of Adjustable Capital Plan: An Approach to Equity Redemption*, 47 Farmer Cooperatives, Mar. 1981, at 11; Royer, *Adopting More Equitable Redemption Programs Desirable*, in American Cooperation 1980-81 400 (1981); Royer, *Capital Retains Can Be Important Equity Source, Improve Redemption Program*, 48 Farmer Cooperatives, May 1981, at 4; Royer, *Equity Redemption Affects Cooperative Financial Structure*, 47 Farmer Cooperatives, Oct. 1980, at 8; Royer, *Equity Redemption: Issues and Alternatives*, 35 The Cooperative Acct. 19 (1981); Royer, *Mandatory Equity Programs Could Alter Traditional Cooperative Financing Methods*, 48 Farmer Cooperatives, Sept. 1981, at 12; Royer & Lurya, *Nonqualified Allocations: One Way to Improve Equity Redemption Program*, 47 Farmer Cooperatives, June 1980, at 21; Shereff and Rothberg, *Equity*

this problem since this subject was projected into the spotlight at the congressional hearings in 1969 concerning a change in the cooperative tax provisions in the Internal Revenue Code.[78] The Report to Congress by the Comptroller General of the General Accounting Office in 1976 again highlighted the problem with the advice that legislation for mandatory equity redemption programs be proposed if cooperatives fail to voluntarily adopt systematic redemption programs.[79] More recently, it has been suggested that the equity redemption shortcomings of a cooperative could constitute grounds for an argument of a violation of the federal Securities Acts.[80]

The failure of many American cooperatives to provide for an equitable plan for the redemption of member funds retained by the cooperative is a serious problem. It could lead to federal tax changes[81] or other legislation which would adversely affect the business operations of many cooperatives. A number of state legislatures have considered legislation which mandates the return of selected member interests within a given time period.[82] In ad-

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Redemption Programs: Liability of Directors and Officers, in PLI AGRICULTURAL COOPERATIVES 1979; Smith, *Cooperatives Have Considerable Discretion Under Laws in Setting Redemption Policy*, 48 FARMER COOPERATIVES, June 1981, at 4; Wissman, *Federated Cooperatives Play Vital Role in Equity Redemption*, 47 FARMER COOPERATIVES, Feb. 1981, at 8.

78. H. R. REP. No. 413, 91st Cong., 1st Sess. 1 (1969).

79. GENERAL ACCOUNTING OFFICE, FAMILY FARMERS NEED COOPERATIVES — BUT SOME ISSUES NEED TO BE RESOLVED, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL (CED-79-106, 1979). This report found that the equity redemption programs of many of the surveyed cooperatives failed to systematically retire the retained equities of inactive patrons. The unfair cooperative equity redemption practices led to the following recommendation to the Secretary of Agriculture:

> We recommend that the Secretary direct the Cooperatives Unit to conduct, jointly with the Extension component of the Department's Science and Education Administration, a national campaign to motivate cooperatives to adopt voluntarily equity redemption programs that are fair to both current and former members. We recommend further that if cooperatives are not willing to adopt more equitable equity redemption programs voluntarily, the Secretary develop a legislative proposal to make it mandatory for cooperatives to
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> —pay interest or dividends on retained equities,
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> —retire retained equities within a certain time, or
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> —pay interest or dividends on retained equities and retire retained equities within a certain time.
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> The legislation should include a clause that cooperatives that do not comply with the requirements would lose their tax exemption status . . . .

Id.

80. Centner, *Agricultural Cooperatives: Retained Patronage Dividends and the Federal Securities Acts*, 7 N. CENT. J. AGRIC. ECON. 36 (1984). *See also infra* Part VII.

81. *See supra* note 78. In 1969 the Committee on Ways and Means of the House of Representatives proposed to alter the cooperative tax provisions of section 1388 of the IRC The requirement that 20 percent of patronage allocations must be paid to the patron in money or by qualified check was to be increased to 50 percent over a 10-year period. The suggested bill also contained a new condition that both patronage allocations and per-unit retains must be paid in money within a 15-year period in order to be treated as qualified. *Id.* at 167-69.

82. ALA. CODE § 2-10-58 (1975); ARIZ. REV. STAT. ANN. § 10-710 (1983); ARK. STAT. ANN. §

dition, a cooperative faces the threat of a legal challenge by dissatisfied holders of retained interests. Although courts have not been overly receptive to the arguments presented by former cooperative members seeking the return of their invested monies, the nature of equitable relief suggests that courts may be able to remedy the unfair nonredemption of these funds.

The retention by a cooperative of certain earnings that have been allocated to members to help finance the cooperative's business operations is a basic characteristic of cooperatives. Most cooperatives have structured their financial operations so that their member investments qualify under the special income tax provisions of Subchapter T of the Internal Revenue Code (IRC).[83] Member investments under the IRC fall into two major categories, written notices of allocation and per-unit retain certificates. Written notices of allocation include capital stock, revolving fund certificates, retain certificates, certificates of indebtedness, or other written notices which disclose to the recipient the stated dollar amount allocated by the cooperative and the portion that constitutes a patronage dividend.[84] Written notices of allocation may be qualified or nonqualified which affects the taxable deduction available to the cooperative.[85] A per-unit retain certificate means a written notice by the cooperative to the recipient disclosing the stated dollar amount of a

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77-910 (1981); CALIF. FOOD & AGRIC. CODE § 54122 (West 1984); COLO. REV. STAT. § 7-56-111 (1973); D.C. CODE ANN. § 29-1130 (1981); O.C.G.A. § 2-10-86 (1983); IDAHO CODE § 22-2610 (1947); ILL. ANN. STAT. ch. 32, § 449 (Smith-Hurd 1970); IOWA CODE § 499.33 (1983); KAN. STAT. ANN. § 17-1609 (1982); KY. REV. STAT. ANN. §§ 272.151, 272.420 (Baldwin 1981); LA. REV. STAT. ANN. § 3:78 (West 1973); MO. ANN. STAT. § 274.090 (Vernon 1959); MONT. CODE ANN. § 35-17-304 (1983); NEB. REV. STAT. § 21-1406 (1977); NEV. REV. STAT. §§ 81.230, 81.270 (1957); N.M. STAT. ANN. §§ 53-4-26, 53-4-30 (1983); N.C. GEN. STAT. § 54-136 (1982); OHIO REV. CODE ANN. § 1729.11 (Page 1978); OKLA. STAT. ANN. tit. 2, §§ 336, 361j (West 1973); R.I. GEN. LAWS § 7-7-9 (1969); S.C. CODE ANN. § 33-47-470 (1983); TENN. CODE ANN. §§ 43-16-114, 44-14-108 (1980); TEX. AGRIC. CODE ANN. tit. 4, § 52.086 (Vernon 1982); TEX. BUS. CORP. ACT. ANN. art. 1396-50.01, § 33 (Vernon 1980).

83. I.R.C. §§ 1381-88 (West 1983).

84. I.R.C. § 1388(b) (West 1983).

85. I.R.C. § 1382(b) (West 1983). To receive favorable tax treatment under section 1382(b), patronage dividends retained after the taxable year during which the patronage occurred must be paid in qualified written notices of allocation, meaning:

> (A) a written notice of allocation which may be redeemed in cash at its stated dollar amount at any time within a period beginning on the date such written notice of allocation is paid and ending not earlier than 90 days from such date, but only if the distributee receives written notice of the right of redemption at the time he receives such written notice of allocation; and
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> (B) a written notice of allocation which the distributee has consented, in the manner provided in paragraph (2), to take into account at its stated dollar amount as provided in section 1385(a).
>
> Such term does not include any written notice of allocation which is paid as part of a patronage dividend or as part of a payment described in section 1382(c)(2)(A), unless 20 percent or more of the amount of such patronage dividend, or such payment, is paid in money or by qualified check.

I.R.C. § 1388(c)(1) (West 1983).

per-unit retain allocation.[86] Per-unit retain certificates are also classified as qualified and nonqualified which affects the cooperative's tax deduction.[87] Patronage dividends and per-unit retain allocations retained by the cooperative are often jointly referred to as retained equities.

A member's investment of patronage dividends in a cooperative occurs pursuant to the provisions of the state cooperative statute and the cooperative's bylaws. The cooperative statutes contain a variety of provisions regarding the payment and retention of earnings. A frequent statutory provision requires the allocation of savings or earnings in proportion to the individual patron's business to the total business of the cooperative.[88] Some statutes mandate that earnings must be allocated to patrons and several require an apportionment on an annual basis.[89]

A cooperative's bylaws will also probably contain some mandatory provisions governing the return of cooperative earnings.[90] Many bylaws contain provisions enabling the board of directors to provide, at its discretion, for the return of earnings to members.[91] Pursuant to the applicable provisions, the board will set an amount to be refunded to patrons. The board may then, in order to avoid taxation at the firm level, provide that a percentage of each patron's earnings will be paid as a qualified written notice of allocation.[92] This percentage will probably be no more than eighty percent of the declared refund in order to qualify under Subchapter T, which requires at least twenty percent of such patronage dividend to be paid in cash or qualified check.[93] The qualified written notice of allocation discloses the stated dollar amount allocated to all recipients who have previously consented to take into account the stated dollar amount in their gross income.[94] The cooperative is thereby able to retain up to eighty percent of the amounts refunded to patrons without incurring income taxes on the retained amounts. Since the patronage dividends were paid in proportion to the individual patron's business with the cooperative, this investment is proportional to the patron's use of the cooperative.

Per-unit retain allocations are invested in the cooperative pursuant to the contract between the member and the cooperative. Allocations which the cooperative desires to retain after the end of the current taxable year may be paid by qualified per-unit retain certificates in order to qualify for special tax treatment under Subchapter T.[95] The distributees of the certifi-

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86. I.R.C. § 1388(g) (West 1983).
87. I.R.C. §§ 1382(b), 1388(h)-(i) (West 1983).
88. BAARDA, *supra* note 30, at 547-49.
89. *Id.* at 537-39.
90. *Id.* at 346-47; 537-39.
91. *Id.* at 346-47.
92. *Id.*
93. *See supra* note 85.
94. I.R.C. § 1385 (West 1983). The recipients may consent pursuant to I.R.C. § 1388(c)(2).
95. I.R.C. § 1388(h) (West 1983).

cate agree to take into account the dollar amount as personal income.[96] Under this procedure producers make an investment in their cooperative according to their use of the cooperative.

Patronage dividends and per-unit allocations retained by a cooperative as retained equities are paid to the holders of the written notices of allocation as provided in the bylaws or by the membership contract. The cooperative's bylaw provisions may prescribe a definitive equity redemption program, provide for the payment of equities at the discretion of the board of directors, or contain a combination of these provisions.[97] In addition, the state statute of incorporation may regulate the return of these equities.[98]

A study conducted by the Agricultural Cooperative Service indicated that less than one-third of the surveyed cooperatives had a systematic procedure for returning retained equities.[99] In the absence of a systematic equity redemption program, many cooperatives were retaining monies of former members for lengthy periods after the cessation of use of the cooperatives' services.[100] This creates an unfair and unequitable situation of inactive members being required to support a business organization which they no longer use.

A. *Equity Redemption Programs*

A majority of the cooperatives that have adopted a systematic equity redemption program favored a revolving fund plan whereby the allocated retained funds are systematically and chronologically paid in cash.[101] The cooperative establishes a given time period for the retention of members'

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96. I.R.C. § 1385 (West 1983).

97. This could be pursuant to a revolving plan, a base capital plan, or the retirement of a percentage of all outstanding equities. There may be statutory direction as to a redemption program. For example, the Iowa Code requires that allocations not paid in cash "be transferred to a revolving fund and credited to said members and subscribers. . . ." IOWA CODE § 499.30 (1983).

98. Some state statutes provide for the mandatory payment of certain membership interests of deceased or inactive members while allowing the cooperative's bylaws to grant directors discretion in the payment of other equities. For example:

> Each association under its bylaws may also provide . . . [i]n the case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money which shall be paid to him within one year after such expulsion or withdrawal . . . [and] the manner in which the remainder of the association's profits shall be prorated in the form of patronage dividends to its several stockholders or members. . . .

KAN. STAT. ANN. § 17-1609 (1982).

99. Brown & Volkin, *Equity Redemption Practices of Agricultural Cooperatives*, in FARMER COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, FCS RESEARCH REPORT 41 (1977).

100. *Id.* at 21-25.

101. *Id.* at 7.

funds, generally seven to fifteen years.[102] The retained equities are redeemed and the funds represented by the equities are paid to the members pursuant to the plan.[103] The oldest equities are paid first and all equities that accrued during the same fiscal year are treated alike.[104] An exception may be mandated by the state cooperative statute or the bylaws to require the early redemption of selected qualifying persons such as deceased or inactive members.[105]

The second major type of equity redemption plan is the base capital plan. Under this plan the cooperative establishes a base period, generally five to ten years, during which patrons are expected to help finance the cooperative according to their use. After establishing its capital needs for the coming fiscal year, the cooperative determines the amount of equity capital it desires to withhold from patronage dividends that arose from the past year's earnings. If the cooperative issues per-unit retain allocations, it would proceed in a similar manner to determine the amount of equity capital needed. The cooperative next computes both the total monetary volume[106] of patron business and each patron's monetary volume of business during the base period. The patron's volume divided by the total volume establishes a percentage that represents the patron's proportionate use of the cooperative's services during the base period. Each patron's percentage is then multiplied by the amount of needed equity which establishes a suggested patron share of equity that should be invested in the cooperative. This amount, when compared to the amount of equity that the individual patron has invested in the cooperative, discloses whether the patron is underinvested or overinvested in the cooperative. The cooperative uses a program or schedule to redeem more of the equities of the overinvested patrons and to retain more of the current year's equities of the underinvested patrons.

The third major plan for redeeming members' equities, often called a percentage of all equities plan, involves retiring a portion of all of the outstanding equities each year. To determine the amount to be redeemed, the cooperative first calculates the funds available for the redemption of allocated equities. This amount is divided by the total allocated equity and the resulting percentage is multiplied by each patron's equity. Because this percentage arrangement would never result in the complete redemption of a deceased or inactive member's equities, this plan often includes provisions for retirement in full, after a given period, of the accounts of deceased or

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102. *Id.*

103. *Id.*

104. *Id.*

105. *See supra* note 98.

106. A marketing cooperative may use the weight volume of the marketed crop rather than monetary volume.

inactive members.[107]

The three equity redemption plans advance cooperative principles because their primary objective is to provide a source of capital for cooperative operations. This capital assists the cooperative in developing new technology, in purchasing new equipment and property, and in expanding its business operations. The plans also provide for a return of earnings to each member that is proportionate to the amount of business the member has transacted with the cooperative. Thus members making greater use of the cooperative receive a greater share of the cooperative's net earnings and make a greater investment in the cooperative. In this manner, equity redemption plans allow the cooperative to accommodate a range of sizes and types of farmer members.

Each of these equity redemption plans establishes a system for the eventual return of a member's investment. The plan gives notice to patrons of their obligations and rights as members of the cooperative, and provides for the termination of the voluntary contractual agreement between the cooperative and the member. When a member no longer transacts business with the cooperative, the member makes no further investment. The member's accumulated investment in the cooperative is returned pursuant to the provisions of the equity redemption plan. This provides a fair and equitable business arrangement for the cooperative and its former members.

A cooperative that declines to adopt a systematic equity redemption program creates an unfair situation whereby nonmembers must invest in the cooperative. This investment is not related to a member's current use of the cooperative and is interest-free since no interest is generally paid on retained earnings. The investment thereby reduces the cooperative's need for other funds which decreases the cooperative's business expenses. Reduced expenses enable the cooperative to charge less for goods sold, pay more for crops purchased, or increase profits which may be returned to active members as patronage dividends.

On the other hand, members who hold written notices of allocation incur lost opportunity costs. Members do not have the retained funds to use in financing their farming operations and may have to borrow monies and incur interest expenses. In any case, the members lose the opportunity of investing these funds and receiving a return on such investment. In addition, monies allocated to members as retained equities under the provisions of Subchapter T of the IRC have been included in the members' taxable income and may have resulted in income taxes.

The lost opportunity costs of inactive members are not offset by any corresponding benefits for these members as in the case of active members.

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107. For example, the bylaws of Riceland Foods, which has adopted a base capital plan, allows the board of directors to establish special rules and priorities for the redemption of equities of members who withdraw or cease to be active members. Paragraph 46, Bylaws of Riceland Foods, Inc. *See also infra* note 115.

Although the cooperative's retention of the inactive members' monies was pursuant to a voluntary choice of these members to join the cooperative,[108] the nonredemption of the retained equities upon cessation of use or termination of membership may constitute an involuntary interest-free investment. This forced investment by inactive members unfairly and inequitably requires them to continue to support this business organization with their interest-free investment even though they may no longer have any interest in the cooperative's activities and even though their membership and voting rights may have been terminated.[109] Such a situation begs equitable relief.

B. *Judicial Pronouncements*

Courts from several states have considered various requests for legal and equitable relief by inactive members seeking the immediate return of monies retained by cooperatives. An analysis of cases concerning equity redemption supports a conclusion that courts have been very conservative in addressing this issue. Established legal principles such as obligation of contracts, noninterference with the business decisions of a board of directors, and preservation of the business enterprise have operated to emasculate equitable considerations which might otherwise have formed a basis for relief. These cases, however, disclose several important issues. There may be a question within a particular jurisdiction whether retained equities constitute debt or equity capital and whether there exists a right to a setoff. Relief for former cooperative members may be precluded by the cooperative purpose expressed in the cooperative's bylaws which the members had agreed to support when they joined the cooperative. Equitable relief may be available where the directors abused their discretion in not returning retained equities to inactive members if the plaintiffs meet their burden of proof and convince the trier of fact.

1. *Debt or Equity*

The categorization of members' retained equities as debt or equity capital is important because it affects the right of a member to a setoff for debts the member may have with the cooperative. In most cases, retained equities represent an investment of equity capital by reason of the provisions of the

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108. Either the cooperative's bylaws or the marketing contract between the cooperative and the member will probably allow the cooperative to retain member equities. The member presumably agreed to abide by the bylaws as a condition of membership.

109. In order to meet the requirements of the Capper-Volstead Act for an antitrust affirmative defense, no nonfarmers may be members of the cooperative. *See infra* notes 152-84 and accompanying text. Thus, the cooperative's articles of incorporation or bylaws may provide for the termination of membership and voting rights when the farmer ceases his or her farming operations. *See* Alexander v. National Farmers Organization, 687 F.2d 1173, 1185 (8th Cir. 1982).

cooperative's bylaws.[110]

A cooperative's bylaw provisions, enacted pursuant to the cooperative's enabling statute, generally allow the cooperative to pay dividends in cash or by allocating the funds to members, crediting their accounts, and retaining the capital for the cooperative.[111] Payment of these retained funds occurs pursuant to the bylaws.[112] Unless the bylaws provide that the member has an immediate right to the allocated retained funds, there is no outstanding obligation on behalf of the cooperative that is due and payable.[113] This may be explicitly stated in the bylaws[114] or the bylaws may state that payment of retained equities will be determined by the board of directors.[115] In the ab-

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110. Claassen v. Farmers Grain Cooperative, 208 Kan. 129, 131-32, 490 P.2d 376, 379 (1971); Evanenko v. Farmer's Union Elevator, 191 N.W.2d 258, 261 (N.D. 1971); Howard v. Eatonton Co-op. Feed Co., 226 Ga. 788, 791, 177 S.E.2d 658, 662 (1970); Schmeckpeper v. Panhandle Coop. Ass'n, 180 Neb. 352, 362-63, 143 N.W.2d 113, 120 (1966); Clarke County Coop. (AAL) v. Reed, 139 So. 2d 639, 641 (Miss. 1962). *See also* Lake Region Packing Ass'n v. Furze, 327 So. 2d 212, 216 (Fla. 1976).

111. IOWA CODE § 499.30 (1983). This provision illustrates the procedure. After certain earnings are used to provide for a reserve, added to surplus, placed in an educational fund, and used to pay fixed dividends, the remaining surplus must be allocated ratably to the account of each member in proportion to the member's business for the year. In addition:

> The directors shall determine, or the articles of incorporation or bylaws of the association shall specify, the percentage or the amount of said allocation that currently shall be paid in cash, provided that so long as there are unpaid deferred patronage dividends of deceased members for prior years the amount currently payable in cash shall not exceed twenty percent of said allocation. All said remaining allocation not so paid in cash shall be transferred to a revolving fund and credited to said members and subscribers. Such credits in the revolving fund are herein referred to as deferred patronage dividends.

Id.

112. The Iowa statute declares, "payment of deferred patronage dividends . . . shall be carried out to the extent and in the manner specified in the bylaws of the association." IOWA CODE § 499.33 (1983).

113. Section 499.33 of the Iowa Code states, "deferred patronage dividends credited to members shall constitute a charge on the revolving fund and future additions thereto, and on the corporate assets, subordinate to creditors and preferred stockholders then or thereafter existing." IOWA CODE § 499.33 (1983). This provision clearly provides that the retained equities are not a current debt.

114. For example, Agway Inc. provides that: "No person shall be entitled to any distribution of assets with respect of retained margins or patrons' equities prior to the dissolution of the corporation." Bylaw 3.8(b) of Agway Inc. (As amended July 1, 1981).

115. For example, Riceland Foods, Inc. provides:

> Annually the Board may: . . . (iii) establish limitations on and procedures for redemption of capital from members whose capital contributions are in excess of their capital commitment; (iv) establish special rules and priorities regarding redemptions from members who withdraw from the Association and cease to be active producers of farm commodities or estates of deceased members; (v) determine priorities for redemptions when the Association has insufficient funds available to redeem all capital eligible for redemption; and (vi) establish such other rules as the Board, in its sole discretion, determines are necessary to ensure fair treatment of its present and past members. Redemption of capital credited to the Permanent Capital Fund shall be at

sence of a current obligation to pay, the retained equities are not equivalent to a debt. Thus retained equities cannot be set off against a member's obligation to the cooperative.

2. *Bylaws are a Contract*

Retained equities are returned to members as provided by their marketing contract with the cooperative or pursuant to the bylaw provisions adopted by the cooperative under state law.[116] Many of the disputes between the cooperative and former members seeking the return of their retained equities involve the interpretation of the bylaws. This includes causes of action that the bylaws were not followed as well as the affirmative defense that the bylaws enable the cooperative to retain these equities.

Membership in a cooperative usually is accompanied by the member's agreement and acceptance of the cooperative's bylaws. The binding effect of the cooperative's bylaws on the members has led courts to find that the bylaws constitute a contract between the members and their cooperative.[117] Thus both the cooperative and its members are contractually bound to the provisions of the bylaws.

3. *Cooperative Purpose*

Many of the cooperative statutes recognize agriculture as being important to the economy of the state[118] and imply that cooperative organizations of farmer producers are to be encouraged under the guise of promoting general welfare.[119] The advancement and continuation of the cooperative as a business entity is of paramount importance[120] to enable the cooperative to

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the capital's face or par amount or at such lesser amount as may be agreed to by the Association and the holder thereof.

Paragraph 46, Bylaws of Riceland Foods, Inc.

116. The cooperative statute often requires the cooperative to adopt bylaws within a given period after incorporation. For example, the Illinois statute provides, "[e]ach association incorporated under this Act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this Act . . . ." ILL. ANN. STAT. ch. 32, § 449 (Smith-Hurd 1970). *See also* Sanchez v. Grain Growers Ass'n of California, 176 Cal. Rptr. 655, 656 (Ct. App. 1981).

117. Clarke County Coop. (AAL) v. Read, 139 So.2d 639, 642 (Miss. 1962); Sanchez, 176 Cal. Rptr. at 660; Lambert v. Fishermen's Dock Coop., 61 N.J. 596, 297 A.2d 566 (1972). *See also* Young v. Westark Production Credit Ass'n, 222 Ark. 55, 60, 257 S.W.2d 274, 277 (1953); Arkansas Cotton Growers Co-op. Ass'n v. Brown, 168 Ark. 504, 513, 270 S.W. 946, 950 (1925).

118. It is here recognized . . . that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops.

IND. CODE ANN. § 15-7-1-1(b) (Burns 1983).

119. *Id. See also* Claassen, 208 Kan. at 134, 490 P.2d at 381.

120. Claassen, 208 Kan. at 134, 490 P.2d at 381; Sanchez v. Grain Growers Ass'n of Cali-

furnish services for its members as producers and not as stockholders.[121] Thereby, producers are able to pool their efforts and unite for common benefit through the cooperative.[122]

This common effort necessitates funds. Most cooperative organizations provide for some of these funds through the investment of part of the members' earnings in the cooperative[123] which is then subject to the cooperative purpose. In order to protect the continued viability of the business enterprise, this member investment cannot be withdrawn at will.[124] The cooperative purpose thereby may be found to be superior to any inconvenience or unfairness that may result when members withdraw from the cooperative and cannot secure the immediate return of their retained equities. Thus, a court may find that individual interests of members or former members which oppose or diminish the ability of the cooperative to continue as a viable entity must give way to the cooperative purpose.[125]

The ability of a cooperative to continue to exist and to furnish services to its members is an important consideration that should be weighed by a court confronted with a cause of action by a former cooperative member for the return of retained equities. The cooperative purpose does not, however, reflect the total meaning of the membership contract between members and their cooperative. The membership contract includes the cooperative's articles of incorporation and bylaws and the members' interpretation or understanding of these instruments. A membership contract is subject to contractual and equitable remedies.

4. *Directors' Discretion*

Directors of corporate entities are afforded considerable discretion in handling the business affairs of their organizations. Courts are hesitant to interfere with business decisions made by directors within their sound discretion absent an allegation of illegality, unfairness or other special circumstances. Although the dutes of obedience, loyalty and care require directors to act in the best interest of the business organization, the business judgment rule shields them from liability for incorrect decisions in much the same manner as American tort law protects professionals from

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fornia, 126 Cal. App. 3d 676, 675, 179 Cal. Rptr. 459, 460 (Ct. App. 1981).

121. Lambert v. Fisherman's Dock Coop, 115 N.J. Super. 424, 432, 280 A.2d 193, 197 (1971), *modified*, 61 N.J. 596, 297 A.2d 566 (1972); B. Rosenberg & Sons, Inc. v. St. James Sugar Coop., 447 F.Supp. 1 (1976), *aff'd*, 565 F.2d 1213 (5th Cir. 1977).

122. Driscoll v. East-West Dairymen's Ass'n, 52 Cal. App. 2d 468, 473, 126 P.2d at 467, 469 (Dist. Ct. App. 1942).

123. *See* Schmeckpeper, 180 Neb. at 363, 143 N.W.2d at 119, Lake Region Packing Ass'n, 327 So. 2d at 214.

124. Lambert, 115 N.J. Super. at 433, 280 A.2d at 197. *See also* Sanchez, 126 Cal. App. 3d at at ___, 179 Cal. Rptr. at 460.

125. *Claassen, 208 Kan. at 134, 490 P.2d at 381. See also* Driscoll, 52 Cal. App. 2d at 473, 126 P.2d at 470.

malpractice.[126]

The duties and liabilities of cooperative directors are similar to those of their corporate counterparts.[127] Decisions by cooperative directors concerning the nonreturn of membership interests have not been disturbed absent a showing of an abuse of discretion or impropriety.[128]

Several courts have considered the question of whether the directors abused their discretion in their determination regarding the nonreturn of equity interests. In *Evanenko v. Farmers Union Elevator*[129] and *Furze v. Lake Region Packing Association*[130] the courts specifically found that no abuse of discretion was proven.

In *Claassen v. Farmers Grain Cooperative*[131] the Kansas Supreme Court declined to recognize any relief for the former cooperative members. The court noted that its judgment should not be substituted for the judgment of the board of directors and recognized the cooperative purpose to conclude that plaintiffs had not advanced any cause for relief.[132] This conclusion seems to ignore the court's earlier finding that the cooperative was strong financially, had the ability to pay, and had paid the outstanding patronage credits of other deceased members.[133] Given this judicial finding, it is unclear how the court was able to ignore the issue of an abuse of discretion in granting the defendant's motion for summary judgment.

A federal district court, however, in *In re Great Plains Royalty Corporation*,[134] concluded that the return of patronage credits to deceased natural persons while not returning credits to a dissolved or bankrupt corporation was discriminatory. Since the cooperative's bylaws allowed for the early retirement of patronage credits of deceased members, the cooperative was estopped from denying similar treatment to the estate of a corporation.[135] The Tennessee Supreme Court was also more willing to interfere with the policy of a cooperative's board of directors in *Shadow v. Volunteer Electric Coop-*

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126. *See* Sinclair Oil Co. v. Levien, 280 A.2d 717 (Del. 1971); Litwin v. Allen, 25 N.Y.S.2d 667 (1940).

127. Many of the cooperative statutes adopt the consistent provisions of the state's corporation laws. Such a statutory provision would operate to impose the duties and corresponding liabilities of corporate directors upon cooperative directors. *See* Sanchez, 123 Cal. App. 3d at 673, 176 Cal. Rptr. at 460.

128. Sanchez, 176 Cal. Rptr. at 659; Lake Region Packing, 327 So.2d at 215; Evanenko, 191 N.W.2d at 262. *See also* In re Great Plains Royalty Corp., 461 F.2d 1261, 1262-63 (8th Cir. 1973); Shadow v. Volunteer Electric Corp., 223 Tenn. 552, 448 S.W.2d 416 (1969).

129. 191 N.W.2d 258, 262 (N.D. 1971).

130. 327 So.2d 212, 215 (Fla. 1976).

131. 208 Kan. 129, 490 P.2d 376 (1971).

132. Claassen, 208 Kan. at 134, 490 P.2d at 381.

133. *Id.* at 378, 381.

134. 461 F.2d 1261, 1264. This involved a utility cooperative under an utility cooperative statute. *Id.*

135. *Id.* at 1265.

erative.[136] The court remanded the issue of the return of excess revenues to the trial court and the cooperative was ordered to submit a plan to the court for the distribution of excessive revenues.[137]

VI. The Antitrust Laws

The antitrust exceptions for qualifying cooperatives have enabled these organizations to engage in numerous business activities which would otherwise constitute a violation of our country's antitrust laws. Congress, and the legislatures of many states,[138] have granted cooperatives special treatment because of the unique characteristics of agriculture. The first major federal antitrust exemption for cooperatives was enacted in 1914 as section 6 of the Clayton Act.[139] Section 6 declared that the antitrust laws did not "forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit."[140] This provision was a significant exemption for cooperatives, but its failure to exempt stock cooperatives and to elucidate the permitted cooperative marketing or other activities that were exempted left many farmers dissatisfied with the Clayton Act exemption.[141] The uncertainty created by section 6 and the threat of treble damages under section 4 of the Clayton Act[142] led the major farm organizations to seek further legislation.[143] In 1922 these interests were successful in obtaining the passage of a broader cooperative exemption in the Capper-Volstead Act.[144] Rather than

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136. 223 Tenn. 552, 448 S.W.2d 416 (1969). This case also involved a utility cooperative.

137. 223 Tenn. at 560, 448 S.W.2d at 419.

138. Many of the state cooperative statutes contain provisions that partially exempt cooperatives formed thereunder from the state's antitrust laws:

> No association as defined in this Act engaged in any of the activities herein, shall be deemed to be a conspiracy or combination in unlawful restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

Ill. Ann. Stat. ch. 32, § 468 (Smith-Hurd 1970). *See also* Baarda, *supra* note 31, at 127-28, 710-15.

139. 15 U.S.C. §§ 12-17 (1982).

140. *Id.* at § 17.

141. Knapp, *Capper-Volstead Impact on Cooperative Structure*, in Farmer Cooperative Service, U.S. Dep't of Agriculture, FCS Information 97 (1975); Harl, *supra* note 53, at 137.04[1]; Centner, *Cooperative Monopolization and the Sherman Antitrust Act*, 36 The Cooperative Acct. 33 (1983).

142. 15 U.S.C. § 15 (1982).

143. The National Milk Producers Federation proposed at a meeting of the National Board of Farm Organizations that steps be taken to allow farmers to organize and operate cooperative associations without the threat of antitrust problems. Knapp, *supra* note 141, at 4.

144. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or other-

exempting cooperatives or the activities of cooperatives from antitrust prosecution, Capper-Volstead authorizes the formation of associations and collective actions.[145] This has been interpreted as meaning that organizations comprised of persons engaged in the production of agricultural products may engage in the legitimate objects[146] necessary to accomplish their assigned purpose of effective farmer representation without violating the federal antitrust laws.[147]

Cooperatives engaging in nonlegitimate objects, however, are not exempted by Capper-Volstead and may be prosecuted for violating the antitrust laws. Four sections of the federal antitrust legislation have formed the basis of numerous legal actions against cooperatives. Section 1 of the Sherman Act forbids restraints of trade.[148] Section 2 of the Sherman Act makes it illegal to monopolize, attempt to monopolize or conspire to monopolize trade[149] and section 3 forbids certain combinations and conspiracies.[150] The Robinson-Patman Anti-Discrimination Act makes it unlawful to discriminate in price between different purchasers.[151]

The judiciary has struggled to comprehend the legislative intent and meaning of the various legislative provisions in order to reconcile the permitted legitimate activities of cooperatives with the prohibitions of the federal antitrust laws. Cases concerning allegations that a cooperative violated a federal antitrust provision show two major issues. First, has the cooperative met Capper-Volstead's organizational requirements? Second, are the ac-

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wise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Capper-Volstead Act, Ch. 57, § 1, 42 Stat. 388 (1922) (current version at 7 U.S.C. § 291 (1982)).

145. Section 2 of Capper-Volstead also enables the Secretary of Agriculture to take action if an association is monopolizing or restraining trade so as to unduly enhance prices. 7 U.S.C. § 292 (1982).

146. Maryland & Va. Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 466 (1960).

147. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1043 (2d Cir. 1980), *cert. denied*, 454 F.2d 818 (1981).

148. 15 U.S.C. § 1 (1982).

149. 15 U.S.C. § 2 (1982).

150. 15 U.S.C. § 3 (1982).

151. 15 U.S.C. §§ 13, 13a, 13b, 21a (1982).

tions or activities of the cooperative within the "legitimate objects" protected by Capper-Volstead and by section 6 of the Clayton Act. These requirements are discussed below.

A. *Organizational Requirements*

Capper-Volstead contains five major organizational requirements that must be met in order for a cooperative to qualify for a valid affirmative defense against an antitrust allegation.[152] The Act requires that the cooperative must be comprised of persons engaged in the production of agricultural products; such persons may only act with others who qualify as agricultural producers within the meaning of the Act; members must either be limited to one vote or dividends on stock or membership capital must be limited to eight percent per annum; the cooperative may not deal with products of nonmembers in an amount greater in value than the products of its members; and the organization must be nonprofit.[153]

The key Capper-Volstead organizational requirement only allows "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" to act together within the scope of the Act.[154] Associations containing nonfarmers fail to meet this organizational requirement and thereby cannot claim exemption from the antitrust regulations under Capper-Volstead.[155] The Supreme Court initially recognized this requirement in *Case-Swayne Company, Inc. v. Sunkist Growers, Inc.*[156] The Court was then presented a more difficult question about this organizational requirement in *National Broiler Marketing Association v. United States.*[157]

In *NBMA* the federal government argued that the cooperative did not qualify under Capper-Volstead because some of its producer members were not farmers.[158] The Supreme Court reviewed the activities of the various members of this integrated poultry cooperative and found that some members employed independent contractors to tend to their chickens during the grow-out period from chicks to mature chickens.[159] The Court concluded that any members who did not own a breeder flock nor a hatchery and maintained no grow-out facility at which the member's flocks were raised

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152. Since Capper-Volstead does not exempt cooperatives or their activities from the antitrust laws, it is an affirmative defense which must be raised by the cooperative. Sufficient evidence must be presented to establish prima facie entitlement to the exemption. *See* Alexander v. National Farmers Org., 687 F.2d 1173, 1184 (8th Cir. 1982).

153. 7 U.S.C. § 291 (1982). *See supra* note 144.

154. *Id.*

155. *Id.*

156. 389 U.S. 384 (1967).

157. 436 U.S. 816 (1978).

158. *Id.* at 827-29.

159. *Id.* at 817-18.

was not a farmer.[160] The nonfarmer prohibition of *NBMA* establishes a strict guideline for this membership requirement.[161]

This organizational issue was recently considered by the Eighth Circuit Court of Appeals in *Alexander v. National Farmers Organization.*[162] The National Farmers Organization (NFO), a nonprofit, nonstock corporation,[163] created the NFO Trust to market milk for the mutual benefit of its members so that it could qualify under Capper-Volstead.[164] Membership was limited to persons engaged in actual production of agricultural products and only farmers sold milk through the NFO Trust.[165] NFO also adopted bylaws that provided for the cessation of membership upon the termination of farming by a member.[166]

NFO's membership billings, however, were sent to a number of persons who were not farmers[167] and its membership list included the names of individuals that were not members.[168] Although such persons could not be members pursuant to NFO's bylaws, this procedure raised the question of whether NFO's membership solicitation actions constituted a departure from the Capper-Volstead farmer membership requirement so that NFO did not qualify for the Capper-Volstead affirmative defense. The Eighth Circuit decided that the unusual facts failed to disqualify NFO from qualifying under Capper-Volstead.[169] The prohibition of "even one" nonmember suggested by *NBMA* was found to be inexorably connected to the prohibition of price-fixing by middlemen in cooperatives qualifying under Capper-Volstead.[170] The putative nonfarmer members of NFO were not middlemen and had not participated in any activities with the cooperative so there was no need to disqualify NFO from the Capper-Volstead affirmative defense.[171] The court then avoided the *NBMA* rule by noting that the issue of NFO's qualification under Capper-Volstead predated the Supreme Court's com-

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160. *Id.* at 827-29.

161. "[A] cooperative organization that includes [nonfarmers] — or even one of them — as members is not entitled to the limited protection of the Capper-Volstead Act." 436 U.S. at 828-29.

162. 687 F.2d 1173 (8th Cir. 1982).

163. *Id.* at 1184.

164. *Id.* at 1184-85. The NFO Trust was formed because NFO's bylaws prohibited the distribution of income to members. The prohibition of distribution of income meant that NFO did not operate for the mutual benefit of its members as required by Capper-Volstead. *Id.*

165. *Id.*

166. *Id.* at 1185.

167. *Id.* The stipulated record included letters from approximately 25 individuals indicating they never were or no longer were farmers but had received membership billings. *Id.*

168. In re Midwest Milk Monopolization Litigation, 510 F. Supp. 381, 425 (W.D. Mo. 1981), *aff'd in part, rev'd in part sub nom,* Alexander v. National Farmers Org., 687 F.2d 1173 (8th Cir. 1982).

169. 687 F.2d at 1186.

170. *Id.*

171. *Id.*

mand in *NBMA*.[172]

Another requirement of Capper-Volstead only allows farmer-producers or their associations to act together in performing the marketing activities implicit in the language of Capper-Volstead. The landmark case involving this issue was *United States v. Borden Company*[173] where the Supreme Court clearly noted that Capper-Volstead does not authorize combinations between agricultural producers and other persons.[174] Thus the Court found that the dairy cooperative could be prosecuted for violation of section 1 of the Sherman Antitrust Act.[175] The Supreme Court readdressed this issue in *Maryland and Virginia Milk Producers, Inc. v. United States*[176] when reviewing a lower court decree that had found a section 3 Sherman Act violation. The Supreme Court agreed with the lower court that the acquisition of a private competitor in order to restrain and suppress competition was not sanctioned by Capper-Volstead[177] and approved the judicially ordered divestment of the assets of a private dairy.[178]

These cases together with several federal court decisions indicate that the antitrust exemptions in section 6 of Clayton Act and the Capper-Volstead Act only apply to farmer producers and associations of such producers performing permissible activities among themselves.[179] Any action of an association of farmer-producers with a nonqualifying business entity or a nonfarmer is not exempted from the provisions of the antitrust laws. State antitrust laws may contain similar exceptions.[180]

Cooperatives desiring to qualify under Capper-Volstead either must limit each member to one vote or limit dividends on stock or membership capital to eight percent per annum. The one vote limitation is related to the cooperative principle that all members have an equal voice in the affairs of the cooperative regardless of their interest in the organization. Cooperatives organized under a state statute limiting cooperative members to one vote or having a one member — one vote limitation in their bylaws will meet this

172. *Id.* at 1187.

173. 308 U.S. 188 (1939).

174. *Id.* at 206.

175. *Id.*

176. 362 U.S. 458, 470-73 (1960).

177. *Id.* at 472.

178. *Id.* at 473.

179. Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973); Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F. Supp. 381 (W.D. Pa. 1966), *aff'd*, 388 F.2d 789 (3d Cir. 1967); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

180. *See* Consolidated Dairy Prod. Co. v. Bar-T-Ranch Dairy, Inc., 97 Wash.2d 167, 642 P.2d 1240 (1982); Golob & Sons, Inc. v. Schaake Packing Co., 93 Wash.2d 257, 609 P.2d 444 (1980).

requirement.[181]

Cooperatives that want to provide for weighted voting or that fail to limit members to one vote will need to limit dividends to eight percent in order to qualify under Capper-Volstead.[182] This requirement is related to the cooperative principle that associations only pay a limited return on invested capital. Cooperatives in some states will be required to meet this requirement since their cooperative statutes mandate such a limitation for cooperatives formed under their enabling provisions.[183] Capper-Volstead also precludes a cooperative from conducting more business with nonmembers than members and the organization cannot be organized to make a profit.[184]

B. *Legitimate Objects*

Capper-Volstead allows persons in associations that meet the Capper-Volstead organizational requirements to act together in collectively processing, preparing for market, handling, and marketing in interstate commerce their products.[185] Qualifying "associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."[186] This legislative prescription enables cooperatives to engage in certain marketing activities which might otherwise be violative of antitrust prohibitions. The scope of the excepted marketing activities, however, is not clear. Although the Supreme Court and various federal courts have grappled with this issue and their opinions provide some guidance, recent decisions concerning anticompetitive conduct show considerable uncertainty of the marketing activities sanctioned by Capper-Volstead.

Section 6 of the Clayton Act states that the antitrust laws do not forbid certain labor, agricultural or horticultural organizations from lawfully carrying out their "legitimate objects."[187] A district court in Massachusetts adopted this language of the Clayton Act for defining the activities, practices, and methods permissible for cooperatives and their members under Capper-Volstead.[188] The district court's transposition of the term "legitimate objects" from the Clayton Act to Capper-Volstead was followed by the

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181. *See supra* note 153 and accompanying text.

182. *Id.*

183. *See supra* note 47 and accompanying text.

184. This more than 50 percent business test is also present in Subsection T of the Internal Revenue Code. I.R.C. § 1382(b) (West 1983). A cooperative failing to meet the more than 50 percent test may thereby experience tax difficulties. *See* Conway County Farmers Ass'n, 588 F.2d 592 (8th Cir. 1978).

185. 7 U.S.C. § 291 (1982).

186. *Id.*

187. 15 U.S.C. § 17 (1982). The Supreme Court has stated that section 6 was included in the Clayton Act in order to remove all contentions that the antitrust laws forbade labor unions. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 450 (1920).

188. April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958).

Supreme Court in *Maryland and Virginia Milk Producers Association, Inc. v. United States.*[189] Thus, the Capper-Volstead activities of "collectively processing, preparing for market, handling and marketing" products and the authority to "make the necessary contracts and agreements" for marketing their products are known as the legitimate objects of Capper-Volstead.[190]

The legislative exceptions for cooperatives provided by Capper-Volstead and the Clayton Act were meant to enable farmers to have the same unified competitive advantage as was available to businessmen acting through corporations.[191] The legislation encouraged the joint marketing of farm products in order to improve the economic conditions for farmers.[192] Cooperatives were permitted to act together in setting policies and prices without violating section 1 of the Sherman Act,[193] to obtain monopoly power through natural growth, voluntary affiliation with other cooperatives and farmers without violating the section 2 monopolization proscription of the Sherman Act,[194] and to combine or conspire with farmers or other cooperatives without violating section 3 of the Sherman Act.[195] Simultaneously, however, farmers were to have the same responsibilities as businessmen,[196] and cooperatives the same responsibilities as other business entities.[197] The legitimate objects of cooperatives thereby include activities, practices or methods that assist farmers in the marketing of their produce except where there is some additional onerous or unlawful connotation, interest or goal. Impermissible activities of cooperatives as they relate to these antitrust provisions are discussed below.

1. *Restraints of Trade*

Actions which operate to restrain interstate commerce and trade are prohibited by section 1 of the Sherman Act.[198] Price fixing, boycotts, picketing, price discrimination, predatory practices, anticompetitive conduct, and

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189. 362 U.S. 458, 466 (1960).

190. A district court in Minnesota suggested that the section 6 exemptions of the Clayton Act might be broader than those in Capper-Volstead. Boise Cascade Int'l, Inc. v. Northern Minn. Pulpwood Producers Ass'n, 294 F. Supp. 1015, 1023 (D. Minn. 1968).

191. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), *cert. denied,* 454 U.S. 818 (1981).

192. Alexander v. National Farmers Org., 687 F.2d 1173 (8th Cir. 1982).

193. 15 U.S.C. § 1 (1982).

194. 15 U.S.C. § 2 (1982). *See, e.g.*, Fairdale Farms, 635 F.2d at 1045; Alexander, 687 F.2d at 1182.

195. 15 U.S.C. § 3 (1982). *See also* Maryland & Va. Milk Producers, 362 U.S. at 470-72.

196. Maryland & Va. Milk Producers, 362 U.S. at 466.

197. North Tex. Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), *cert. denied,* 382 U.S. 977 (1966).

198. 15 U.S.C. § 1 (1982).

conspiracies would be unlawful if they operated to restrain trade.[199] The Capper-Volstead affirmative defense, however, enables cooperatives to engage in some actions that operate to restrain trade because Capper-Volstead allows farmers and qualifying organizations of farmers to make the necessary contracts and agreements to effect their marketing purposes.[200] Thus farmers and qualified organizations of farmers may act together without incurring liability for a Sherman Act restraint of trade violation but may not act with nonqualifying entities in restraining trade.[201]

The scope of the Capper-Volstead affirmative defense regarding a restraint of trade was recently considered in *Green v. Associated Milk Producers, Inc.*[202] The cooperative in *Green* had acted with three different groups in activities that allegedly restrained trade. First, the cooperative and its employees acted together to terminate the services of a milk hauler.[203] The court found that this activity did not constitute a violation of the Sherman Act's restraint of trade provision because the employees were officers or agents of the cooperative.[204] Thus, the activity was performed by a single party so it was impossible to have a restraint of trade. The second group activity that was alleged to constitute an unlawful conspiracy in restraint of trade occurred when the cooperative met with its producer members.[205] The *Green* court found that the Capper-Volstead exemption applied and the cooperative and its producer members were to be considered a single entity.[206] Therefore, meetings of a cooperative with its members could not be a conspiracy in restraining trade. The third allegation concerned a meeting between the cooperative and independent milk haulers.[207] The court followed *United States v. Borden Company*[208] and found that the Capper-Volstead exemption did not apply. There was no antitrust violation, however, because there was no evidence of a conspiracy.[209]

The decisions in *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*[210] and *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*[211] support *Green.* Cooperatives may restrain trade by engaging in collective bargaining or other activi-

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199. *Id.*

200. April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 920 (D. Mass. 1958).

201. Maryland & Va. Milk Producers, 362 U.S. at 466; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).

202. 692 F.2d 1153 (8th Cir. 1982).

203. *Id.* at 1156.

204. *Id.* at 1156-57.

205. *Id.* at 1155.

206. *Id.* at 1157. The court's result is supported by *Sunkist Growers*, 370 U.S. at 27-29.

207. *Id.* at 1155.

208. 308 U.S. 188 (1939).

209. 692 F.2d at 1157.

210. 413 F. Supp. 984 (N.D. Cal. 1976), *cert. denied,* 439 U.S. 1090 (1979).

211. 497 F.2d 203 (9th Cir. 1974).

ties to collectively market products of farmer members because Capper-Volstead serves as an affirmative defense against antitrust prosecution.

2. *Price Fixing*

Price fixing by two or more persons that affects items sold in interstate commerce is generally a per se violation of section 1 of the Sherman Act.[212] Capper-Volstead, however, serves as an affirmative defense for qualifying cooperatives to an allegation of price fixing because it allows farmers and their cooperatives to make the necessary contracts and agreements to effect their marketing purposes.[213] The Supreme Court held that farmers could fix the prices at which their produce was sold in *Maryland and Virginia Milk Producers*.[214] The Court's subsequent decision in *Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Company*[215] expanded the judicial recognition of the Capper-Volstead exception to allow separate cooperatives to act together in carrying out their activities as though they were a single organization. This has been interpreted by the Second and Ninth Circuit Courts of Appeals as allowing associations of cooperatives to fix prices under the protection of the Capper-Volstead affirmative defense.[216]

Price fixing by a cooperative with a nonexempt entity is not sanctioned by Capper-Volstead as it fails to meet the organizational requirements mandated by Capper-Volstead. Several cooperatives have attempted to set prices with noncooperatives and have later learned that such conduct was not authorized by Capper-Volstead.[217]

3. *Boycotts*

A boycott that operates to restrain interstate commerce or attempts to monopolize local business by restraining interstate commerce is a direct violation of the Sherman Antitrust Act.[218] Boycotts are also not within the legitimate objects permitted by Capper-Volstead or section 6 of the Clayton Act.[219] In *Maryland and Virginia Milk Producers* the Supreme Court implied that a boycott by a cooperative constituted an anticompetitive activity

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212. April, 168 F. Supp. at 921; Fairdale Farms, 635 F.2d at 1039.

213. April, 168 F. Supp. 919.

214. 362 U.S. at 466.

215. 370 U.S. at 29.

216. Fairdale Farms, 635 F.2d 1037; Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974).

217. United States v. Borden Co., 308 U.S. 188 (1939); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d at 689-90.

218. United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966); Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F. Supp. at 385.

219. 15 U.S.C. § 17 (1983).

that could constitute a violation of the Sherman Act.[220] Several federal cases have found that boycotts by cooperatives and cooperative members may constitute an illegal restraint in trade under section 1 of the Sherman Act or a monopolization violation under section 2 of the Sherman Act. The Fifth Circuit in *North Texas Producers Association v. Metzger Dairies, Inc.*[221] noted the boycott activities of two cooperatives as not being within the legitimate objects of cooperatives authorized by Capper-Volstead. The court affirmed a judgment awarding damages of over one million dollars arising from a violation of the antitrust laws.[222] A federal district court in Pennsylvania agreed with *North Texas Producers* and found that the boycott activities of defendant cooperatives were not within the legitimate objects of Capper-Volstead.[223] The cooperatives' boycott activities were found to be violative of sections 1 and 2 of the Sherman Act.[224] More recently, the Eighth Circuit found in *Alexander v. National Farmers Organization*[225] that a boycott by a cooperative was not exempted from antitrust prosecution by Capper-Volstead.

These cases show that boycotts by cooperatives are illegal. For similar reasons, boycotts by cooperative members are also not within the Capper-Volstead exemption. Dissatisfied members of a pulpwood production association sought higher prices from their cooperative by attempting to dissuade others from entering contracts for the sale of wood to the cooperative.[226] The court found the members' activities constituted a boycott in violation of their existing contracts which was illegal regardless of the members qualifications under Capper-Volstead or section 6 of the Clayton Act.[227] Thus, the members were enjoined from continuing their boycott activities.[228]

4. *Picketing*

Cooperatives or their members have engaged in picketing activities in an attempt to advance their ideas, market position, or in support of another action of the cooperative such as a boycott.[229] Courts have concluded that picketing activities are predatory practices and are not within the legitimate objects of Capper-Volstead.[230] Therefore, the Capper-Volstead affirmative defense is not available to shield cooperatives or their members against anti-

220. 362 U.S. at 468.
221. 348 F.2d 189 (5th Cir. 1965).
222. *Id.* at 193, 196.
223. Otto Milk, 261 F. Supp. at 384.
224. *Id.* at 385.
225. 687 F.2d at 1187.
226. Boise Cascade Int'l, 294 F. Supp. at 1024.
227. *Id.*
228. *Id.* at 1025.
229. Otto Milk, 261 F. Supp. at 385; Boise Cascade Int'l, 294 F. Supp. at 1024.
230. *Id. See also* Fairdale Farms, 634 F.2d at 1044.

trust liability.

5. *Discriminatory Pricing*

Discrimination in price between different purchasers of similar commodities that are sold in interstate commerce to lessen competition or create a monopoly is prohibited by the Robinson-Patman Anti-Discrimination Act.[231] Section 4 of the Act, however, grants cooperatives a limited exemption whereby net earnings or surplus may be returned to members or producers even though such action may be discriminatory.[232] Otherwise, cooperatives are subject to the price discrimination prohibition.

Cooperatives have been prosecuted under the Robinson-Patman Act.[233] *In American Motor Specialities Company v. Federal Trade Commission*[234] the cooperative sought preferential price treatment. The court found that the section 4 exemption for cooperatives under the Robinson-Patman Act did not insulate the cooperative from prosecution for the illegal activity.[235] In *Bergjans Farm Dairy Company v. Sanitary Milk Producers*[236] the court found that the cooperative and the cooperative's general manager violated the Robinson-Patman Act.[237] The cooperative had charged different prices to more than two purchasers of milk of like grade and quality to lessen competition and the discriminatory prices were part of a pattern of attempted monopolization.[238]

Discriminatory pricing may also be a violation of the Sherman Act if it restrains or tends to monopolize trade.[239] Since the Capper-Volstead affirmative defense would be available to an allegation of a Sherman Act violation,[240] an action under the Robinson-Patman Act may be the preferred strategy. If such discriminatory pricing was found not to be within the legitimate objects of Capper-Volstead or section 6 of the Clayton Act, then judgment could be rendered against the cooperative for an antitrust violation.[241]

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231. 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13, 13a, 13b, 21a (1982)).

232. 15 U.S.C. § 13b (1982).

233. *See infra* notes 234 & 236. The recent Ninth Circuit case, Pacific Stationery & Printing Co. v. Northwest Wholesale Stationrs, Inc., 715 F.2d 1393 (9th Cir. 1983), *application for cert. pending*, raises the issue of whether the expulsion of a member constitutes an antitrust violation. *See also* Mid-South Distributors v. FTC, 287 F.2d 512, 516 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); Quality Bakers of Am. v. FTC, 114 F.2d 393, 400 (1st Cir. 1940).

234. 278 F.2d 225 (2d Cir. 1960).

235. *Id.* at 229.

236. 241 F. Supp. 476, *aff'd*, 368 F.2d 679 (8th Cir. 1966).

237. *Id.* at 486-88.

238. *Id.* at 488.

239. 15 U.S.C. § 2 (1982).

240. Robinson-Patman was enacted after Capper-Volstead and contained a limited exemption for cooperatives. This expresses an intent by Congress that the restrictions were to apply to cooperatives. *See* Pacific Stationery & Printing Co., 715 F.2d. 1393. *See also* HARL, *supra* note 53, at § 137.06[5].

241. Alexander, 687 F.2d at 1193. *See also* Knuth v. Erie-Crawford Dairy Coop. Ass'n,

Proper pleading of economic loss under section 4 of the Clayton Act could lead to an award of treble damages.[242]

6. *Predatory Practices and Anticompetitive Conduct*

The legitimate objects of Capper-Volstead have been interpreted by courts as not including predatory practices or anticompetitive conduct.[243] Unfortunately, the scope and meaning of these terms is far from clear. Conduct such as boycotts and picketing has been classified as being predatory and therefore not exempted by Capper-Volstead or section 6 of the Clayton Act. The Second Circuit in *Fairdale Farms* listed a roster of predatory practices that included picketing and harassment, boycotts, coerced cooperative membership and discriminatory pricing.[244] The Eighth Circuit found that predatory practices include threats to cut off supplies[245] and supply shorting accompanied by late deliveries.[246]

The general meaning of a predatory practice or anticompetitive conduct is that it lacks a legitimate business justification.[247] Capper-Volstead was meant to allow farmers to associate in organizations in order to "carry on like a business corporation. . . ."[248] Cooperatives might even attain a monopoly position through voluntary and natural growth without violating the Sherman Act.[249] However, any practice that stifles competition to the effect of restraining trade or monopolizing the market by unlawful means[250] is outside of the legitimate objects permitted by Capper-Volstead.

7. *Unlawful Anticompetitive Conduct*

Two recent federal circuit courts have suggested that conduct by a co-

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395 F.2d at 423-24, where the cooperative discriminated in prices through rebates for milk produced in Pennsylvania while not giving rebates on milk produced in other states. *See also* Fairdale Farms, Inc. v. Yankee Milk, Inc. 715 F.2d 30 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 711 (1984).

242. Knuth, 395 F.2d at 425.

243. Maryland & Va. Milk Producers, 362 U.S. at 467-68; Alexander, 687 F.2d at 1182, United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1982); Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608, 643 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983); April, 168 F. Supp. 919, 923; Cape Cod Food Products, Inc. v. National Cranberry Ass'n, 119 F. Supp. 900, 907 (D. Mass. 1954).

244. Fairdale Farms v. Yankee Milk, Inc., 634 F.2d at 1044.

245. Alexander, 687 F.2d at 1198-99.

246. *Id.* at 1196.

247. *Id.* at 1183; United States v. Dairymen, Inc., 660 F.2d at 194. *See also* Kinnett Dairies Inc. v. Dairymen, Inc., 512 F. Supp. at 642, *aff'd*, 715 F.2d 520 (11th Cir. 1983).

248. Maryland & Va. Milk Producers, 362 U.S. at 466.

249. Fairdale Farms, 364 F.2d at 1044.

250. Pacific Coast Agric. Export Ass'n, 526 F.2d at 1202; Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop., 413 F. Supp. 984 (N.D. Cal. 1976), *cert. denied*, 439 U.S. 1090 (1979).

operative or its members that is not predatory may violate the Sherman Act. The Sixth Circuit, in *United States v. Dairymen, Inc.*,[251] rejected the argument that the cooperative's conduct must be predatory before Capper-Volstead failed to exempt the conduct from antitrust prosecution.[252] The court found that anticompetitive practices which have a business justification are not automatically immune from prosecution under the Sherman Act if they are "undertaken with unlawful intent and in the desire to achieve an unlawful goal."[253] The district court was directed to determine whether there were less exclusionary methods by which the cooperative could achieve its legitimate goals than the full and committed supply contracts and exclusive hauling contracts.[254] *Dairymen* was approved by the Eighth Circuit in *Alexander v. National Farmers Organization.*[255] Overt conduct which has other justifications and is not predatory is not immunized from antitrust prosecution by Capper-Volstead where there is a clear unlawful intent to stifle or smother competition.[256] Nonpredatory anticompetitive conduct by a cooperative or its members may not be within the legitimate objects of Capper-Volstead and, therefore, may form the basis of an antitrust violation.

The Eleventh Circuit, however, has circumvented the unlawful anticompetitive conduct requirement adopted by the Sixth Circuit in *Dairymen* and approved by the Eighth Circuit in *Alexander*. In *Kinnett Dairies, Inc. v. Dairymen, Inc.*[257] the circuit court differentiated between predatory conduct and "the term 'predatory' in its broadest sense."[258] The court then concluded that the trial court did not err in finding that the cooperative's conduct was permissible under Capper-Volstead.[259] The semantic gyrations of the court are not convincing. As noted by the perspicacious dissent, Capper-Volstead was not meant to enable cooperatives to engage in competitive activities. Capper-Volstead intended cooperatives to have the same responsibilities as private business corporations except that they could engage in legitimate objects of mutual help without contravening the antitrust laws.[260]

VII. The Federal Securities Acts

Many agricultural cooperatives retain funds that have been allocated to members by issuing written notices of allocation and per-unit retain certificates. These written instruments evince member or patron equities that the

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251. 660 F.2d 192 (6th Cir. 1981).
252. *Id.* at 194.
253. *Id.* at 195.
254. *Id.*
255. 687 F.2d 1173, 1183 (8th Cir. 1982).
256. *Id.*
257. 715 F.2d 520 (11th Cir. 1983).
258. *Id.* at 521.
259. *Id.*
260. *Id.* at 521 (Morgan, J., dissenting).

cooperative is able to retain pursuant to its bylaws or the particular membership agreement between the cooperative and a patron. As previously noted, this patron investment is an important characteristic of cooperatives as it requires the persons using the cooperative to help finance its business operations. As an investment, the instruments representing patronage dividends and per-unit retain allocations, jointly called retained equities, are similar to other business investment arrangements that are governed by the federal Security Acts.[261] Recent case law developments holding limited partnership interests[262] and investment notes[263] to be within the definition of securities regulated by the federal Securities Acts raises a question of whether cooperatives should be concerned about potential liability or litigation under these Acts.[264]

A. *Purpose and Definition of a Security*

Congress sought to eliminate abuses associated with the sale of securities in the marketplace[265] by enacting the Securities Act of 1933 (1933 Act)[266] and the Securities Exchange Act of 1934 (1934 Act).[267] The 1933 Act operated to require a full and fair disclosure of relevant information concerning the issuer of the security by means of a prospectus.[268] The 1933 Act

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261. Centner, *Retained Equities of Agricultural Cooperatives and the Federal Securities Acts*, 31 U. KAN. L. REV. 245, 270-71 (1983); Centner, *supra* note 80.

262. SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980); Goodman v. Epstein, 582 F.2d 388, 409-09 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); Doran v. Petroleum Management Corp., 545 F.2d 893, 899 n.4 (5th Cir. 1977); McGregher Land Co. v. Meguiar, 521 F.2d 822, 824 (9th Cir. 1975); Stowell v. Ted S. Finkel Inv. Servs., Inc., 489 F. Supp. 1209, 1224 (S.D. Fla. 1980); Bartels v. Algonquin Properties, Ltd., 471 F. Supp. 1132, 1146-47 (D. Vt. 1979).

263. *See* Baurer v. Planning Group, Inc., 669 F.2d 770, 777-79 (D.C. Cir. 1981); Zabriskie v. Lewis, 507 F.2d 546, 551-52 (10th Cir. 1974); S.E.C. v. Continental Commodities Corp., 497 F.2d 516, 523-27 (5th Cir. 1974).

264. *See* HARL, *supra* note 53, at § 136.01[1]; R. Taylor, *Problem Areas in Application of Federal Securities Laws to Farmer Cooperatives*, and J. Weiss, *Background of Exemption for Securities of Agricultural Cooperatives under Federal Law and Comments on Present Status of Interpretation of These Exemptions*, in PROCEEDINGS OF THE THIRD NATIONAL SYMPOSIUM ON COOPERATIVES AND THE LAW, MADISON, WISC. (1976) (hereinafter Weiss I); Weiss, *Compliance by Cooperatives with the Securities Act of 1933 and Securities Exchange Act of 1934*, 20 THE COOPERATIVE ACCT. 2 (1967) (hereinafter Weiss II); Weiss, *Fact vs. Fiction in Regulation of Agricultural Cooperative Securities*, 31 THE COOPERATIVE ACCT. 12 (1978) (hereinafter Weiss III); Weiss, *So You Think You're Exempt From the Federal Securities Laws*, 28 THE COOPERATIVE ACCT. 2 (1975) (hereinafter Weiss IV).

265. S. 2693, 73d Cong., 2d Sess., 78 *Cong. Rec.* 2271 (1934).

266. 15 U.S.C. §§ 77a-77aa (1982); 15 U.S.C.A. § 77b(1) (1983).

267. 15 U.S.C. § 78a-78kk (1982); 15 U.S.C.A. § 78c(a)(10) (1983).

268. "The term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except [special enumerated communications]." 15 U.S.C. § 77b(10) (1982).

also required that nonexempt[269] securities be registered[270] and established causes of action to combat fraudulent practices.[271] The 1934 Act delineated continuing security registration requirements[272] and provided further causes of action to serve as the basis for suits attacking securities fraud.[273]The federal Securities Acts only apply to securities as defined by the Acts. The definition of security has been a source of controversy and, fifty years after the enactment of the 1933 Act, it is still being litigated.[274] The 1933 Act defined security in sufficiently broad language to include the numerous instruments that would be expected to be within the coverage of the Act.[275] The 1934 Act's definition of a security is slightly different,[276] but the Supreme Court has indicated that for most purposes the coverage is the same.[277]

The 1933 Act's definition of a security contains three different categories that could include instruments evidencing retained cooperative interests: a "certificate of interest or participation in any profit-sharing agreement," an "investment contract," and "any other interest or instrument

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269. *See* note 283 *infra*.

270. Section 5 requires the registration of a security before it can be offered for sale or transported in interstate commerce. 15 U.S.C. § 77e (1982). Section 6 provides for the registration. 15 U.S.C. § 77f (1982).

271. 15 U.S.C. §§ 771 and 77q (1982).

272. *Id.* § 781.

273. *Id.* §§ 78j(b) and 78o(c)(1)-(2).

274. *E.g.*, Marine Bank v. Weaver, 455 U.S. 551, 558 (1982) (a certificate of deposit was not a security for purposes of a section 10b(5) action).

275. 15 U.S.C.A. § 77b(1) (1983) states that

> [T]he term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights . . . or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

276. The 1934 Act defines a security as:

> The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificates of deposit, for a security . . . or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include [certain listed items].

15 U.S.C.A. § 78c(a)(10) (1983).

277. Marine Bank v. Weaver, 455 U.S. 551, 555-56 (1982); United Hous. Found., Inc. v. Forman, 421 U.S., 837, 847 n.12 (1975). *Accord* Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1063-64 (10th Cir. 1976), *cert. denied*, 431 U.S. 96 (1977); Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 666, 669-70 (10th Cir. 1972); S.E.C. v. International Mining Exch., Inc., 515 F. Supp. 1062, 1066-67 (D. Colo. 1981).

commonly known as a security."[278] It is unnecessary to place cooperative instruments for retained equities within any one of these three categories since each category includes all those interests or arrangements that are within its name or description.[279] The categories are not mutually exclusive. Cases suggest that the "investment contract" category is the most likely of the three categories to include a cooperative's retained equities.[280]

It also is not important what nomenclature a cooperative uses to describe its retained funds. If a cooperative's retained equities have the substance of a security, based upon the economic realities of the transaction, they are a security within the scope of the federal Securities Acts.[281]

B. *The Cooperative Exemptions*

Many agricultural cooperatives have not been too concerned with the scope of the federal Securities Acts because of the two exemptions for the securities of cooperative organizations included in these Acts. Recent judicial developments and changes in the structure and management of some of the larger agricultural cooperatives suggest that these exemptions are limited and do not completely exempt the securities of any agricultural cooperative from the scope of these Acts.[282] Although the Securities Acts reflect congressional intent to allow selected persons to sell securities without complying with all of the provisions of the Acts,[283] it is not clear that large agricultural cooperatives are within these favored classes of persons. Cooperative management and counsel need to be cognizant of the potential securities problem in order that they might direct the cooperative in taking appropriate remedial action.[284]

The limited exemption for securities of agricultural cooperatives in the 1933 Act is contained in section 3(a)(5)(B).[285] Securities issued by a farmers' organization that qualifies under section 521 of the Internal Revenue Code

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278. *See supra* note 275.

279. Tcherepnin v. Knight, 389 U.S. 332, 339 (1967); S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).

280. Forman, 421 U.S. at 852; Tcherepnin, 389 U.S. at 339; SEC v. W. J. Howey Co., 328 U.S. 293, 298-99 (1946); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 481-82 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973). *See also* Weiss III, *supra* note 264.

281. *See* United Hous. Found., Inc. v. Forman, 421 U.S. at 851-52.

282. *See* Notes and Recent Development, *supra* note 12.

283. This intent is recorded in the various security exemptions in sections 3 and 4 of the 1933 Act and section 12(g)(2) of the 1934 Act. The section 3 exemption includes securities of governmental units, banks supervised by a state or territorial commission, and persons organized as religious, educational, benevolent, fraternal, charitable, or reformatory purposes. 15 U.S.C. 77c (1982). Section 4 exempts transactions. 15 U.S.C. 77d (1982). Section 12(g)(2) of the 1934 Act corresponds to section 3 of the 1933 Act and exempts certain securities from selected provisions of the 1934 Act. 15 U.S.C. 781(g)(2) (1982).

284. *See* Centner, *supra* notes 80 and 261.

285. 15 U.S.C. § 77c(a)(5)(B) (1982).

are exempted for the provisions of the 1933 Act.[286] This enables section 521 cooperatives to issue securities without filing a registration statement with the Securities Exchange Commission (SEC)[287] and the officers and directors of these cooperatives do not incur liability under section 11(a) of the Act.[288] Section 521 cooperatives may incur liability under section 12(2) by making an untrue statement of a material fact, by omitting to state a material fact, or by engaging in a fraudulent practice in the sale or issuance of a security.[289]

The limited exemption for securities of agricultural cooperatives under the 1934 Act is delineated in section 12(g)(2)(E).[290] This provision provides that the securities of cooperative associations as defined by the Agricultural Marketing Act of 1929[291] are not subject to the registration requirements of subsection 12(g). This exemption thereby exempts the securities of qualifying cooperatives from the periodic reporting requirements,[292] proxy regulations,[293] and insider trading provisions[294] of the 1934 Act. The remaining provisions of the 1934 Act, including the antifraud provisions of section 10(b),[295] apply to the exempted securities.

The meaning of these exemptions for cooperatives is not clear. The presence of the exemptions indicate that Congress felt cooperatives could offer or sell securities. The inclusion of the 1933 Act cooperative exemption in section 3 rather than the transactional immunity of section 4 shows an intent to only exempt securities of selected cooperatives from some of the provisions of the Act.[296] The applicability of the antifraud provisions, which constitute a likely basis for a legal challenge against cooperatives, to the securities of all cooperatives cause even the selected cooperatives delineated in each of the two exemptions to be subject to liability if they offer or issue securities in violation of sections 12(2) and 17 of the 1933 Act or section 10(b) of the 1934 Act.[297]

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286. I.R.C. § 521 (West 1983).

287. The Securities Exchange Commission was established by section 4 of the Securities Exchange Act of 1934. 15 U.S.C. 78d (1982).

288. Section 11(a) concerns a defective registration statement. 15 U.S.C. § 77k(a) (1983).

289. *Id.* § 771(2).

290. *Id.* § 781(g)(2)(E).

291. 12 U.S.C. § 1141j (1982).

292. 15 U.S.C. § 78m (1982).

293. *Id.* § 78n.

294. *Id.* § 78p.

295. *Id.* § 78j(b).

296. *See supra* note 283.

297. American Grain Ass'n v. Canfield, Burch and Mancuso, 530 F. Supp. 1339, 1345-46 (W.D. La. 1982); B. Rosenberg & Sons, Inc. v. St. James Sugar Coop., 447 F. Supp. 1, 4 (E.D. La. 1976) *aff'd mem.*, 565 F.2d 1213 (5th Cir. 1978). *See also* Weiss IV, *supra* note 264.

C. *Legal Action Under the Securities Acts*

1. *Possible Causes of Action*

Dissatisfied cooperative patrons holding written notices of allocation or per-unit retain certificates could initiate an action against their cooperative under any one of four major provisions of the Securities Acts. Since a claim that these patron interests are securities has a plausible foundation[298] and has not been foreclosed by a prior Supreme Court decision, there is little doubt that there would be federal jurisdiction.[299]

a. *Sections 5 and 6 of the 1933 Act.* The failure of a cooperative to register its securities pursuant to section 6 of the 1933 Act[300] would likely constitute a violation of section 5 of the Act[301] unless the cooperative was a section 521 cooperative. Under section 12(1) of the 1933 Act,[302] a patron holding an unpaid written notice of allocation or per-unit retain certificate could sue for the immediate return of the monies evidenced by the instrument. The patron's burden of proof would be to show that the cooperative had issued a security without registering it and used the mails or other instrumentalities of interstate commerce to effect delivery.[303] Judicial relief could include an injunction precluding the cooperative from issuing further securities unless there was compliance with the 1933 Act's registration requirements.[304]

b. *Section 12(2) of the 1933 Act.* Any cooperative which disseminates information that contains an untrue statement of a material fact or omits to state a material fact in an offering or sale of a security could incur liability under section 12(2) of the 1933 Act.[305] It may be argued that the failure of a cooperative to disclose to patrons the absence of a systematic equity re-

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298. *See, e.g.*, Mid-American Dairymen, Inc., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,110 (Feb. 2, 1977); United Suppliers, Inc., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,147 (Mar. 14, 1977).

299. A cause of action by a dissatisfied holder of a retained equity of a cooperative alleging federal jurisdiction under the Securities Acts is a question of law which must be decided after the court has assumed jurisdiction. *See* Bell v. Hood, 327 U.S. 678, 682 (1946). A question of whether an arrangement or interest is a security should not be dismissed for lack of federal subject matter jurisdiction unless the federal claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." *Id.* at 682-83. *See also* Meason v. Bank of Miami, 652 F.2d 542 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982). Because a claim that a retained equity is a security has a plausible foundation and has not been foreclosed by a prior Supreme Court decision, a court would be able to find federal subject matter jurisdiction. *See* Williamson v. Tucker, 645 F.2d 404, 416 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) (citing Bell v. Health-Mor, Inc., 529 F.2d 342, 344 (5th Cir. 1977)).

300. 15 U.S.C. § 77f (1982).

301. *Id.* § 77e(a).

302. *Id.* § 771(1).

303. *Id.* § 77e(a).

304. Centner, *supra* note 261, at 250.

305. 15 U.S.C. § 771(2) (1982).

demption program or the failure to fully appraise patrons of its equity redemption procedures constitutes an omission of a material fact.[306] A patron bringing a suit under this section could ask for the immediate return of funds retained by the cooperative and for interest for the periods these funds were retained by the cooperative.[307]

c. *Section 17 of the 1933 Act.* A course of business that operates as a fraud or deceit upon the purchaser of a security violates the fraud provision of the 1933 Act.[308] A cooperative patron could allege that the failure of a cooperative to allocate patronage dividends or fully disclose the discretionary power of the board of directors to allocate patronage dividends or redeem withheld equities constitutes fraud or deceit.[309] The SEC or possibly a private person[310] could institute an action under section 17 to enjoin such practices and damages could be awarded.[311]

d. *Section 10(b) and Rule 10b-5 of the 1934 Act.* A patron could initiate action arguing that the failure of the cooperative to provide for the orderly redemption of the equities of inactive members constitutes a manipulative or deceptive device or contrivance in contravention of Rule 10b-5.[312] A violation of this Rule could lead to injunctive relief or an award of damages which would probably be limited to the return of the retained equities.[313]

2. *Liklihood of Judicial Relief*

An analysis of case law concerning the meaning of the Securities Acts shows a judicial willingness to analyze the definitional issue. The expansive judicial interpretation given to the definition of security by certain state and federal courts,[314] including the definition under state securities laws,[315] has

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306. HARL, *supra* note 53, at § 136.02[4]; Centner, *supra* note 261, at 250-51.

307. *Id.*

308. 15 U.S.C. § 771(2) (1982).

309. Centner, *supra* note 261, at 251. *See also* Harl, *supra* note 53, at § 136.02[4].

310. It is unclear whether there is a private right of action under section 17 of the 1933 Act. The Supreme Court declined to rule on this issue in International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 557 n.9 (1979). One recent federal district court followed what is called the majority rule of the circuit courts in holding that section 17 does include a private right of action. Ohio v. Crofters, 525 F. Supp. 1133 (S.D. Ohio 1981). *See also* Kirshner v. United States, 603 F.2d 234 (2d Cir. 1978), *cert. denied,* 442 U.S. 909, and *cert. denied,* 444 U.S. 995 (1979).

311. *See* Ohio v. Crofters, 525 F. Supp. at 1140-41. *See also* Weiss IV, *supra* note 264, at 9.

312. 15 U.S.C. § 78j (1982).

313. Centner, *supra* note 261, at 251. *See also* Harl, *supra* note 53, at 136.02[4]; Weiss IV, *supra* note 264, at 9.

314. Forman v. Community Servs., Inc., 500 F.2d 1246 (2d Cir. 1974), *rev'd,* 421 U.S. 837 (1975). *See, e.g.,* S.E.C. v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974); S.E.C. v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973), *cert. denied,* 414 U.S. 821 (1973).

315. Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 361 P.2d 906, 13 Cal. Rptr. 186

been checked by the Supreme Court. The recent Court decisions in *United Housing Foundation, Inc. v. Forman,*[316] *International Brotherhood of Teamsters v. Daniel*[317] and *Marine Bank v. Weaver*[318] distinguished cooperative stock, a noncontributory-compulsory pension plan, and a certificate of deposit from a security, respectively.[319] The interests under consideration were not found to be analogous to what is commonly known as a security and did not need the protection of the Securities Acts;[320] the judicial decisions do not, however, support a conclusion that various patron funds retained by a cooperative are not within the Securities Acts' definition of a security.

Litigation concerning the definition of a security discloses six different interests or arrangements that lend support to an argument that written notices of allocation or per-unit retain certificates are securities: (1) personal consumption or use as considered in *United Housing Foundation, Inc. v. Forman,*[321] (2) the management and control issue considered in the partnership cases,[322] (3) tax ramnifications,[323] (4) commercial versus investment notes,[324] (5) the managerial decision-making power present in franchises,[325] and (6) the pooling of members' produce.[326]

D. *Responding to the Problem*

Cooperatives and their directors cannot afford to remain ignorant about the requirements of the Securities Acts. Cooperatives need to analyze the risks involved with noncompliance and the burden and expense of compliance. Directors should realize that they may be violating their duty of obedience[327] or their duty of care[328] if they fail to reasonably consider the cooper-

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(1961); State Comm'r of Securities v. Hawaii Market Center, Inc., 52 Hawaii 642, 485 P.2d 105 (1971); Pratt v. Kross, 276 Or. 483, 555 P.2d 765 (1976); Black v. Corporation Div., 54 Or. App. 432, 634 P.2d 1383 (1981); Heady v. Consumer Business Systems, 5 Or. App. 294, 482 P.2d 549 (1971), *cert. denied,* 406 U.S. 974 (1972).

316. 421 U.S. 837 (1975).

317. 439 U.S. 551 (1979).

318. 455 U.S. 551 (1982).

319. Weaver, 455 U.S. at 558-59; Daniel, 439 U.S. at 560-63; Forman, 421 U.S. at 840.

320. Weaver, 455 U.S. at 559-60; Daniel, 439 U.S. at 569-70; Forman, 421 U.S. at 859-60.

321. *See* Centner, *supra* note 261, at 268-69.

322. *Id.* at 270-71.

323. *Id.* at 271.

324. *Id.* at 272-73.

325. *Id.* at 273-74.

326. *Id.* at 274-75.

327. The duties of cooperative directors are dependent upon the laws of the state under which the cooperative is incorporated. These duties may be the same as the duties of corporate directors by reason of common law or a provision in the cooperative statute which provides that the consistent provisions of the state's corporation laws apply to cooperatives. The duty of obedience requires cooperative directors to comply with the provisions of applicable local, state and federal laws. The failure of directors to have their cooperatives comply with the Securities

ative's responsibilities under the Securities Acts. Accordingly, directors should attempt to analyze the problem and identify ways in which their cooperative might reduce the risks or potential of liability under the Securities Acts.

For most cooperatives the cost of compliance with the registration and reporting requirements of the Securities Acts for their written notices of allocation and per-unit retain certificates would be prohibitive. A 1976 congressional study disclosed an average cost of compliance with the 1933 Act's registration provisions of $105.2 thousand.[329] Complying with the periodic reporting requirements of the 1934 Act was estimated at $31.8 thousand.[330] Obviously these costs varied with the size of the business organization, but it may be surmised that such expenses are beyond the means of a majority of American cooperatives.

Cost considerations may form the major basis for a cooperative's decision not to register its written notices of allocation or per-unit retain certificates with the SEC. This decision should not, however, preclude the board of directors from considering the expected costs of nonregistration and possible actions that the cooperative might take to further lessen its risks.[331] The major expected costs from nonregistration would be associated with litigation. Judicial relief could include an order for the immediate return of patron funds held by the cooperative or an injunction precluding the cooperative from issuing written notices of allocation or per-unit retain certificates unless a registration statement was filed with the SEC. Either type of relief could seriously effect the operations of the cooperative. An order for the immediate return of patron refunds would probably prompt other patrons to file suit for the same relief, resulting in the depletion of funds required for the cooperative's business activities. Litigation expenses and the judicial interference with the cooperative's ability to retain patron funds could cause severe financial problems for the cooperative, leading to its demise.[332]

Judicial decisions indicate that the definitional issue of whether written

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Acts may constitute a breach of this duty. *See* HARL, *supra* note 53, at § 131.05[1].

328. A director's duty of care is also dependent upon state law. *See supra* note 327. This duty requires directors to act carefully in fulfilling their management responsibilities and directing the affairs of the cooperative. Under the "prudent man" standard of care applicable in some states, directors must use that degree of care which ordinarily prudent men would exercise under similar circumstances in like positions. Under this standard, a director's duty to attend to business may be breached by inaction, neglect of business, or failure to perform if an ordinarily prudent director under similar circumstances and a like position would have taken action. The failure of directors to consider the applicability of the Securities Acts may thereby constitute a breach of their duty of care. *Id.*

329. S. PHILLIPS & J. ZECHER, THE SEC AND THE PUBLIC INTEREST (1981).

330. *Id.*

331. *See* Centner, *supra* note 80.

332. *Id.*

notices of allocation or per-unit retain certificates are within the scope of the federal Securities Acts will depend upon the facts of the particular case. A legal challenge against a cooperative presenting this issue would probably involve judicial scrutiny of the economic realities of the instruments,[333] their characteristics,[334] and the patrons' need of the protection of the Securities Acts.[335]

The most likely justification for a finding that holders of retained equities need the protection of the Securities Acts is that the cooperative has no systematic equity redemption program and has not provided for the orderly or timely redemption of interests of deceased, retired or inactive patrons.[336] Such a program would provide notice to patrons that they have an investment responsibility which arises from the purchase of supplies or the sale of produce. The systematic return of retained interests would remedy the unfair situation of requiring former patrons to help finance the cooperative for present members.

A second justification that could be used by a court to find retained equities to be a security is the presence of promotional efforts to attract patron investors.[337] Cases concerning notes, partnership interests and other arrangements indicate that courts place considerable emphasis on the promotional efforts used to attract investors.[338] Few cooperatives use the heavy-handed promotional activities that have been relied upon by courts in finding other interests to be securities. Cooperatives should, however, use care in promising, through written materials or annual reports, specific profits or patronage dividends. Other factors that a court might consider in its analysis of whether a cooperative's retained equities are securities include: the ability of members to contribute to the management of the cooperative, promises made to the members and nonmembers, the amount of discretion in paying retained equities, the length of time before the equities are paid, the amount of information disclosed to the members concerning the operations of the cooperative, the value of retained equities compared to the assets of the business, and the existence of adequate governmental regulation.[339]

Cooperatives issuing written notices of allocation or per-unit retain cer-

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333. *See* United Hous. Found., Inc., v. Forman, 421 U.S. at 848-49.

334. *Id.* at 851.

335. Marine Bank v. Weaver, 455 U.S. 551, 559 (1982).

336. *See* Part IV *supra*. *See also* Centner, *supra* note 80.

337. Rapp, *The Role of Promotional Characteristics in Determining the Existence of a Security*, 9 SEC. REG. L. J. 26 (1981); Centner, *supra* note 261, at 275-76.

338. *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 556; S.E.C. v. W.J. Howey Co., 328 U.S. 293, 296 (1946); Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1039 (10th Cir. 1980); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 476 (5th Cir. 1974); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 478-79 (9th Cir. 1973), *cert. denied*, 414 U.S. 821 (1973); SEC v. Int'l Mining Exchange, Inc., 515 F. Supp. 1062, 1068 (D. Colo. 1981).

339. Centner, *supra* note 261.

tificates should analyze the factors which might be used by a court to justify a conclusion that its retained equities are securities. The cooperative can then structure its management policies, its promotional activities, its redemption programs, and the types of investments, if any, required of its members to avoid similarities with other interests that courts have previously held to be securities. With a minimum of expense and minor changes a particular cooperative may be able to structure its operations and activities to markedly reduce the likelihood of future litigation.[340]

Assuming that a major need for the protection of the Securities Acts is the failure of cooperatives to redeem retained equities of deceased, retired or inactive patrons, state legislatures may remedy this situation through a state statutory provision mandating a time period for the return of these interests. Many states already have provisions which regulate the return of some or all of the interests of former members of cooperatives.[341] A few of the more strict statutes require a cooperative to redeem the interests of former members within a given time period.[342] Some statutes only require that monies for the receipt of any crop must be paid within a given time frame.[343] Other provisions only preclude any unreasonable abuse of discretion in failing to return the interests of expelled members[344] and thereby fail to abate the patrons' need for the protection of the Securities Acts.

VIII. Concluding Remarks

Legislators have had difficulty in prescribing legislative guidelines and controls governing cooperatives because of the unique features of this form of business. Differences in the size and management characteristics of cooperatives have presented additional obstacles. These distinctions should not, however, preclude the adoption of a workable set of legislative guidelines for this form of business.

Legislation governing cooperatives markedly affects their business activities and has recently attracted increased attention by a number of authors.[345] Although the antitrust laws, federal Securities Acts, and the subject

340. Centner, *supra* note 80.

341. *See* note 82 *supra*.

342. "In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within 1 year after such expulsion or withdrawal." Mont. Code Ann. § 35-17-304 (1983).

343. "Upon the death, withdrawal or expulsion of a member, the board of directors of the association shall, within one year, cause to be paid to such member or his estate one hundred percent (100%) of all amounts due him for any and all raw products which have been delivered by him to the association. . . ." N.C. Gen. Stat. § 54-136 (1982).

344. "The by-laws may contain . . . the time and manner in which a member's interest or shares may be redeemed by the association. . . ." Ind. Code Ann. § 15-7-1-9(j) (Burns 1983).

345. *See* Baarda, *supra* note 31; Centner, *supra* notes 24, 80, 141 & 261; Comments, *supra* note 12; Harl, *supra* note 53; Note, *supra* note 12; Recent Development, *supra* note 12;

of equity redemption evince problems with existing legislative provisions, perhaps the greatest challenge lies emasculated by the ninety-four diverse state statutes governing the formation and operation of cooperatives. A majority of these statutory provisions were enacted in the 1920's and 1930's in a business world that was quite different from the conditions that exist today. The success of legislative revisions in other areas such as the Model Business Corporation Act and Uniform Commercial Code suggests that cooperatives should strive for the development of a clear, consistent and concise model cooperative statute governing the organization and activities of agricultural cooperatives. The statutory provisions should adhere to the principles of cooperation yet provide flexibility for the management of all sizes of cooperatives. Provisions should also clearly prescribe the members' obligation to help finance the business activities of the cooperative and delineate guidelines for the return of retained equities.

Large business organizations that meet the definitional requirements of a cooperative should be governed by cooperative law and entitled to the various exceptions and exemptions provided by law. This does not mean, however, that the legislative exceptions for cooperatives have to be interpreted as uniformly exempting both small and large cooperatives from the antitrust laws or the Securities Acts. Size variation may disclose a need for the safeguards or protections of these laws.[346] Thereby, a court could use a cooperative's large size to justify a finding that its anticompetitive conduct is not immunized by Capper-Volstead from the antitrust laws or that the Securities Acts apply since the cooperative does not provide for the systematic redemption of the equities of former members. Cooperatives, as recipients of special legislative relief, need to continue to demonstrate that they need, deserve and are worthy of their favored status.

Weiss, *supra* note 262. *See also* note 77.

346. The Supreme Court, in *Marine Bank v. Weaver*, noted that there was no need for the protection of the Securities Acts and so found that a certificate of deposit was not a security. 455 U.S. at 457-59.