



Am. H.B. 288

125th General Assembly
(As Passed by the House)

Reps. Faber, McGregor, Seitz, Willamowski, Latta, Gibbs, Aslanides, Carmichael, Distel, Domenick, Driehaus, C. Evans, Niehaus, Perry, Reinhard, Schlichter, Seaver, Setzer, Walcher, Widener, Book, Barrett, Beatty, Brown, Buehrer, Callender, Carano, Chandler, Clancy, Collier, Daniels, DeBose, D. Evans, Flowers, Gilb, Grendell, Hagan, Hartnett, Harwood, Hollister, Hoops, Hughes, Jolivette, Kearns, Olman, Raussen, Schmidt, Schneider, G. Smith, J. Stewart, Williams, Yates

BILL SUMMARY

The bill makes various changes in the law governing cooperatives, which generally may be described as nonprofit corporations that often are organized so that their members, who control the cooperatives, may benefit from economies of scale by banding together. The changes are summarized below.

Please note that the term "association" is used to refer to a cooperative organized under Ohio law, "foreign association" refers to a cooperative organized under the laws of another state, the District of Columbia, or the United States, and "cooperative," unless otherwise indicated, refers to both cooperatives organized under Ohio law and cooperatives organized under those other laws (sec. 1729.01(C), (F), and (H)).

Expansion of applicability of statutes to foreign associations

(secs. 1729.01(G), (H), (I), (L), (M), and (O), 1729.18, 1729.35, 1729.36(C)(3), 1729.69(A)(1), and 1729.85)

- Generally through replacement of the term "association" with "cooperative," expands certain statutory provisions that currently govern cooperatives organized under Ohio law to also include cooperatives that are organized under the laws of another state, the District of Columbia, or the United States, including the definitions of "member," "membership stock," and "patronage stock" and the provisions governing the minimum

number of members that a cooperative organized under Ohio law can have, the merger or consolidation of cooperatives organized under Ohio law with other cooperatives or other entities, unfair marketing practices in which a handler bargaining with a marketing cooperative is prohibited from engaging, and the exemption of membership stock and patronage stock from Ohio law governing securities.

Indemnification of person acting on behalf of an association

(secs. 1729.01(N), 1729.031(A) to (G), and 1729.23(D))

- Allows an association to indemnify or agree to indemnify any person that was or is a party, or is threatened to be made a party, to any threatened, pending, or completed civil, criminal, administrative, or investigative action, suit, or proceeding, *other than an action by or in the right of the association itself*, because the person is or was acting in certain capacities on behalf of the association (hereafter, "first type of indemnification").¹
- Qualifies the first type of indemnification on the person having acted "in good faith" and "in a manner the person reasonably believed to be in or not opposed to the best interests of the association," when a *noncriminal* action or proceeding is involved, and on the person having similarly acted plus having had no reasonable cause to believe the conduct was unlawful, when a *criminal* action or proceeding is involved.
- Limits the first type of indemnification to expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the person in connection with the action, suit, or proceeding.
- Also allows an association to indemnify or agree to indemnify any person that was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit *by or in the right of the association itself to procure a judgment in the association's favor*,

¹ *The capacities are (a) service as a director, officer, employee, agent, or volunteer of the association itself or (b) service at the request of the association as a trustee, director, officer, employee, member, manager, agent, or volunteer of another association, entity, partnership, joint venture, trust, or other enterprise.*

because the person is or was acting in certain capacities on behalf of the association (hereafter, "second type of indemnification").²

- Generally qualifies the second type of indemnification on the person having acted "in good faith" and "in a manner the person reasonably believed to be in or not opposed to the best interests of the association," but further qualifies the indemnification when the person is found liable for negligence or misconduct in the performance of a duty to the association.
- Limits the second type of indemnification to expenses, including attorney's fees, actually and reasonably incurred by the person in connection with the defense or settlement of the action or suit.
- Establishes certain restrictions upon the making, and prescribes the procedures for making, the first and second types of indemnification.
- Applies to the first and second types of indemnification current law's test for determining "what is reasonably believed to be in or not opposed to the best interests" of an association.³ The test currently relates to the manner in which a member of an association's board of directors must perform his or her duties.⁴
- Expands the matters that a director of an association may consider in determining "what is reasonably believed to be in or not opposed to the best interests" of the association to include the interests of the members as patrons of the association. This expansion of current law's test also applies, then, to the first and second types of indemnification under the bill.

² See Footnote 1 for those capacities.

³ The test requires a director to consider the association's purposes and permits a director to also consider (a) the interests of the association's employees, suppliers, creditors, and customers, (b) the state's and nation's economy, (c) community and societal matters, and (d) the association's long-term and short-term interests.

⁴ A director must perform duties in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the association, and with the care that an ordinarily prudent person in a like position would use under similar circumstances (sec. 1729.23(A)).

- Defines a "patron" as a person with which a cooperative has made an enforceable agreement to allocate and distribute a per unit "retain," patronage dividend, or patronage refund with respect to business conducted by the cooperative with or for the person.⁵

Insurance procurements

(sec. 1729.031(H))

- Authorizes an association to purchase and maintain insurance or furnish similar protection on behalf of persons serving in specified capacities on behalf of the association.⁶ The insurance or similar protection would be against liability asserted against and incurred by the person when so serving--whether or not the association could make the first or second types of indemnification authorized by the bill.

Principal place of business

Authorization of out-of-state principal place of business

(secs. 1729.07(A)(3), 1729.47, 1729.55(F)(3), 1729.58(H), 1729.59(B), and 1729.61(A) and (D))

- Specifies that the principal place of business of an association need not be located within Ohio.
- Specifies that the court of common pleas in the Ohio county in which an association's statutory agent resides is the appropriate venue for certain actions involving an association that does not have its principal place of business in this state.

Elimination of term "principal office"

(secs. 1729.55(F)(3), 1729.56, 1729.58(H), 1729.59(A), and 1729.61(A) and (D))

- Replaces the term "principal office" with "principal place of business" in several provisions of current law in which "principal place of business" and "principal office" are used interchangeably.

⁵ *It is possible that the word "retain" should be "retainer."*

⁶ *See Footnote 1 for those capacities.*

Clarification that associations are corporations

(secs. 1729.01(C), (G), and (H), 1729.02(B), 1729.04(B), 1729.06, 1729.11, 1729.36, 1729.38(C), and 1729.42)

- Eliminates the definition of "corporation," and clarifies that associations are corporations, that the law governing cooperatives and not the law that generally governs nonprofit corporations must govern associations, that certain references in the law governing cooperatives to corporations do not apply to associations, and that certain forms required to be used under the law governing cooperatives must be prescribed by the Secretary of State specifically for the administration of that law.

Documents governing associations

Restatement of articles of incorporation

(sec. 1729.08)

- With respect to current law that authorizes the board of directors of an association to adopt a restatement of its articles of incorporation that includes previously approved amendments, specifies that the restatement may be adopted without a member vote if it merely includes those amendments.

Bylaws

(sec. 1729.16)

- Eliminates current law specifying that, after initial bylaws are adopted by an association, bylaws may be adopted and amended only by the members of the association unless the members adopt a bylaw that permits the board of directors to make and amend them.
- Instead specifies that, after the initial bylaws are adopted, bylaws may be adopted and amended only by the members unless the articles of incorporation or bylaws provide that the board of directors, by a two-thirds vote of the entire board, may adopt or amend the bylaws or any specified bylaw.
- Prohibits any bylaw adopted or amended by the board of directors from conflicting with the association's articles of incorporation or the law governing cooperatives.

Certificate of merger or consolidation

(sec. 1729.38(A))

- Provides that a certificate of merger or consolidation, which must be filed with the Secretary of State when an association is a party to an agreement of merger or consolidation, may be signed by a representative of each constituent association or entity rather than solely by an authorized officer of each constituent association or entity as under current law.

Certificate of dissolution

(sec. 1729.56)

- Clarifies that if an association's certificate of dissolution is filed by the members of the association, it is the responsibility of those members to cause public notice of the voluntary dissolution to be published in a newspaper.

Authority of association

(secs. 1729.01(N) and 1729.03)

- Authorizes an association to establish, secure, own, and develop service marks and other intellectual property in addition to securing, owning, and developing patents, trademarks, and copyrights as authorized under current law.
- Replaces current law authorizing an association to issue capital stock and certificates representing equity interests or indebtedness with a provision authorizing an association to issue capital stock and other equity interests and to issue certificates for them.
- Authorizes an association to act as the agent or representative of any patrons in any activities authorized by the law governing cooperatives.
- Makes changes in provisions governing the forfeiture of unclaimed stock or other equity interests for which the owner cannot be found after a period of three years.

Board of directors

(secs. 1729.22 and 1729.28)

- Clarifies that current law requiring the remaining directors to fill a vacancy on a board of directors that occurs other than by expiration of term does not apply if the association's bylaws provide for a different means of filling the vacancy, as may be the case when directors are elected by the members of the association in a district or other grouping.
- Makes a clarification in current law that governs the removal of a director who was elected under bylaws providing for the election of directors by the association's members in a district or other grouping.

Vice chairpersons

(sec. 1729.26)

- Specifies that the officers of an association may include, among others, one or more vice chairpersons of the board of directors who are elected by the board.

Meetings

(secs. 1729.07(A)(6), 1729.16(A), and 1729.19)

- Replaces references to the members of an association who are to serve as directors until the first *annual* meeting with references to members who are to serve as directors until the first *member* meeting.
- Eliminates a requirement that actions taken without a meeting by the members or affected stockholders of an association be in writing and signed by a specified percentage of those members or affected stockholders who would be entitled to vote on the action at a meeting for that purpose.

Winding up of voluntarily dissolved association's affairs

(sec. 1729.58)

- For an association that is dissolved voluntarily, establishes the order in which the directors or an authorized liquidator must apply the assets of the association in the course of winding up its affairs.

- Adds that such a liquidator may be appointed rather than employed.

Names

(sec. 1729.04)

- Modifies the list of criteria, only one of which must be satisfied by a corporation or other person wishing to do business in Ohio using the word "cooperative" or "co-op" as a part of its business name, by revising one of those criteria to require the corporation or other person to be organized under, rather than to have complied with, the law governing cooperatives.
- Also authorizes a state or federally chartered credit union to do business in Ohio with "cooperative" or "co-op" as part of its name.

Definition of "producer"

(sec. 1729.01(R))

- Modifies the definition of "producer" to include a lessor of real or personal property used for production of agricultural products for the market that receives as rent part of the agricultural product, rather than as under current law a lessor of land who receives such rent.

Municipal power agencies

(secs. 1729.02(C) and 3734.058 (not in the bill))

- Clarifies that a municipal power agency is not an association for the purposes of the law governing cooperatives, and, through a cross-reference to current law, defines "municipal power agency" as any Ohio nonprofit corporation, the members of which are municipal corporations that own and operate electric utility systems, that sells electricity to its members for resale.

Technical changes

(secs. 1729.46 and 1729.49 and various other sections)

- Makes corrective and other technical changes.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	09-25-03	p. 1087
Reported, H. Agriculture & Natural Resources	12-10-03	p. 1275
Passed House (97-0)	01-06-04	pp. 1348-1349

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