Approved April 1, 1991
Date

MINUTES OF THE HOUSE COMMITTEE ON AGRICULTURE.

The meeting was called to order by Representative Lee Hamm at
Chairperson

9:05 a.m./~~p.m.~~ on Friday, March 22, 1991 in room 423-S of the Capitol.

All members were present except: Representative Wisdom, excused
Representative Freeman, excused
Representative Gatlin, excused
Representative Heinemann and Representative Jennison

Committee staff present:
Raney Gilliland, Legislative Research
Jill Wolters, Revisor of Statutes Office
Pat Brunton, Committee Secretary

Conferees appearing before the committee: Gina Bowman-Morrill, Manager of Government Relations, Farmland Industries, Inc., Kansas City, Missouri
John Hulsing, farmer and Co op member, Baileyville, Kansas
Ivan W. Wyatt, President, Kansas Farmers Union
Frank Feldhausen, farmer/stockman and Secretary-Treasurer, Marshall County Farmers Union, Bremen, Kansas
Roger Ring, farmer and President, Marshall County Farmers Union
Paul Shelby, Assistant Judicial Administrator, Office of Judicial Administration

Chairman Hamm continued hearings on SB 73 - Kansas Cooperative Marketing Act.

Gina Bowman-Morrill, Farmland Industries, Inc., testified in support of the changes to the Kansas Cooperative Marketing Act. She stated that for some, the status quo is adequate to sustain their way of life. For others, change can be a great opportunity. Passage of SB 73 will allow both types within the cooperative community to have that freedom of choice. (Attachment 1).

John Hulsing, Baileyville, testified in opposition to SB 73. Mr. Hulsing stated his main concerns are doing away with the one member one vote, having non-members on the board of directors and the changing of dividends to stock. Maybe corporate stock. (Attachment 2).

Ivan Wyatt, Kansas Farmers Union, testified in opposition to SB 73. He further stated that because these changes are major and would have major impact on many rural communities and constituents he would suggest this bill not be passed at this time and be scheduled for an interim study. (Attachment 3).

Frank Feldhausen of Bremen, Kansas, testified in opposition to SB 73. He stated farmer members and directors work to keep their cooperatives strong because they depend on their accumulated patronage for retirement income. This is one reason he's not supporting this bill. (Attachment 4).

Roger Ring, President of Marshall County Farmers Union, testified in opposition to SB 73. He stated this bill allows a shift in control away from the Cooperative members. He supports the need for strong member control. (Attachment 5).

Paul Shelby, Office of Judicial Administration, appeared before the committee to offer technical changes to SB 73. He stated the bill

regulates cooperatives in most of the aspects of marketing, organization, mergers and dissolution. It is in this latter regulation of merger and dissolution that the proposed bill can seriously disrupt the operations of a district court. Therefore, he recommends that this bill be amended to follow current notice procedures as the procedures were set out in 1990 House Bill 3021. Mr. Shelby's amendments begin at page 24, line 32. He also offers an amendment to lines 2 through 5, page 26, to clarify the manner in which interest is to be awarded, primarily by directing attention to the state statute which controls interest on judgments. (Attachment 6).

A lengthy question and answer period followed the testimonies.

Chairman Hamm closed hearings on SB 73.

The Chairman appointed a sub-committee to work on SB 279 - veterinarians; prohibiting disclosure of certain information which consists of Representative Minor as Chairman with members Representative White and Representative Bryant.

The meeting adjourned at 10:00 a.m. The next meeting of the House Agriculture Committee will be Monday, March 25, 1991 at 9:00 a.m. in room 423-S, State Capitol.

GUEST LIST

COMMITTEE: HOUSE AGRICULTURE

DATE: March 22, 1991

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Paul Shelby	Topeka	OJA
Gina Boeman-Morris	KCMO	FARMLAND
Terry D. Bertholf	Hutchinson	Ks Co-op Council
Joe Lieber	Topeka	Ks Co-op Council
Diane Turner	"	Ks Co-op Council
Curtis A. Loub	Wichita	AMPI - Atty.
Joe Rickabaugh	Topeka	Ks Livestock Assoc.
Mike Jensen	Manhattan	Ks Pork Producers
Warren R. Wolf	Topeka	Self
Nancy E Kantola	Topeka	CNFO
Roy G. Nichols	Corning -	KFU
Jack Staats	Junction City	KFU
Opal Hansen	Abilene	K.F.U.
Leroy Karl	"	" oppose
John Hulsing	Barleyville	Kans. F.U.
Roger Ring	Blue Rapids	K.F.U.
Frank Tellhansen	Bremen Ks	K.F.U.

TESTIMONY BY FARMLAND INDUSTRIES ON SB 73
BEFORE THE HOUSE AGRICULTURE COMMITTEE
MARCH 21, 1991

Mr. Chairman and members of the committee, I am Gina Bowman-Morrill, Manager of Government Relations for Farmland Industries, Inc. Farmland, a regional farm supply cooperative, headquartered in Kansas City, provides fertilizer & agricultural chemical products, feed & animal health products and petroleum products to our 2,200 member cooperatives who serve approximately 200,000 farm families within a 19 state territory. Farmland also cooperatively owns with over 40,000 hog producers, Farmland Foods, our pork processing subsidiary. Farmland is a federated cooperative, which is a cooperative beginning with ownership and control of the local cooperative by farmers/ranchers and then the ownership and control of the regional cooperative (Farmland) by the local cooperatives.

Specifically, in Kansas we serve and are owned by over 180 local cooperatives. We also operate several manufacturing facilities in Kansas for the purpose of supplying our members with agricultural inputs. Farmland is a member of the Kansas Cooperative Council and is incorporated under the Kansas Cooperative Marketing Act.

I think it is important to acknowledge that differing opinions do exist about the legislation being considered before us today. I also want to point out that some of the statements that have been circulated around this capitol and elsewhere are not factual. These fallacies have caused the cooperative community who supports SB 73 great concern.

D0315gbm.wpd

Hs. Ag.
3-22-91
Attachment 1

I will point out these fallacies along with the facts as seen by Farmland.

Rumor 1: The proposed changes to the Cooperative Marketing Act is Farmland's method of circumventing the current corporate farm statute.

Fact: Both acts address separate subjects. The activities in the swine industry that we are coordinating through our membership are working very well under the current law. Therefore, we are not trying to circumvent the corporate farm law.

Rumor 2: Farmland with these such activities is in violation of the Capper-Volstead Act. Also, these proposed changes to the Cooperative Marketing Act, if passed, would cause local cooperatives to be in violation of Capper-Volstead.

Fact: The Capper-Volstead Act addresses only those cooperatives that are marketing cooperatives. Farmland is a farm supply cooperative and does not fall under Capper-Volstead guidelines. Marketing cooperatives, which is the category that many local cooperatives belong, are required, in order to comply with Capper-Volstead, to do one of two things: either conduct business on a one member/one vote basis OR return 8% interest on common or preferred stock.

Rumor 3: Farmland's primary concern is the bottom line.

Fact: Farmland is concerned with the bottom line as in any successful business. However, we see Farmland's profitability as profitability for our member-owners.

Rumor 4: Farmland, with these proposed changes, will be able to take over the state and threaten the livelihood of farmers/ranchers.

Fact: As a federated cooperative system that would be unacceptable and impossible.

The Farmland cooperative system has seen many changes in the last 5 years and undoubtedly, many of these changes were tough to accept. But at Farmland, those changes meant survival. Our members' support for these changes have made our cooperative system stronger and more responsive to farmers and ranchers who own Farmland.

For some, the status quo is adequate to sustain their way of life. For others, change can be a great opportunity. Passage of SB 73 will allow both types within the cooperative community to have that freedom of choice. For this reason, please support the changes to the Kansas Cooperative Marketing Act.

D0315gbm.wpd

Mr. Chairman and members of the Committee:

I am John Hulsing, farmer and Co-op member from Baileyville, Ks. The present Cooperative Marketing Act has been a guide by which the local coops put Farmland Industries in the position it is in today. Through some misguided ventures, the leadership of Farmland has had to revert back to the local Co-ops for help after mistakes were made.

Now the Kansas Coop Council has brought forth lists of changes in the Kansas Marketing Act without fully explaining their intent. I have researched these proposals and have found that the major changes have come from Project Tomorrow. Project Tomorrow was brought forth after James Rainey became President of Farmland Industries.

My main concerns are: doing away with the one member one vote, having non-members on the board of directors and the changing of dividends to stock. Maybe Corporate stock.

Since Farmland has, through Project Tomorrow, signed local Cooperatives for commitments to purchases of such inputs as feed, fuel, fertilizer from Farmland, will these changes be optional or mandatory for our local Co-ops. How many years will it be before corporate stock invades and controls Farmland?

The Kansas Co-op Council says these changes are optional, not mandatory, but who will stop them from being mandatory if the law permits them.

I submit that without the three changes being ~~stuck~~ STRUCK from the proposal that the whole set of changes be rewritten and submitted at a later date.

Hs. Ag.
3-22-91
Attachment 2

Statement
of
Ivan W. Wyatt, President
Kansas Farmers Union
before
The House Committee on Agriculture
on
SB-73 (Concerning Kansas Cooperative Marketing Act)
on
March 22, 1991

Mr. Chairman, Members of the Committee:

I am Ivan Wyatt, President of the Kansas Farmers Union. The Kansas Farmers Union members have been supporters of the CO-OP movement from the beginning of farm CO-OPs in Kansas, and many other states throughout the midwest.

The Kansas Farmers Union may be the only organization that takes the story of the CO-OPs out to the country as day camps for our younger members and youth. The Farmers Union teaches the history and accomplishments of the CO-OPs, and also the need of the farmers to support the CO-OPs in part because they provide competition in the purchases of input needs and the sale of agriculture production.

If you were to study the history of CO-OPs in Kansas, you would find in most every case, it was a local farmers union that formed that local CO-OP. A few months ago I received a call from the Healy Kansas CO-OP in Lane County. The manager said they were looking for the charter of the Healy CO-OP when they found the charter of the Healy Local Farmers Union and wondered what the connection was. The records indicated the Healy Local Farmers Union was chartered, then several months later the members formed that local CO-OP. There were many hundreds of CO-OPs across the state, and thousands throughout the midwest, that were formed in much the same manner.

The original purpose of the Capper-Volstead Act was to allow groups of individuals to band together so as to give them a better bargaining position when either purchasing goods or making sales of produce. These CO-OPs allowed their members who used this structure to distribute the profits back to the CO-OP member who used the CO-OPs, and exempted those CO-OPs from anti-trust regulations, for these special exemptions the CO-OPs were to operate under a democratic process, providing members equal voting rights. The profits were allocated back to those member on a patronage basis of which the member paid the taxes. Usually part of the payments were in cash and the remainder retained to enlarge the facilities or make other capital investments.

The bottom line purpose was to afford individuals the opportunity to band together to provide themselves a basis to assure themselves of service, such as the electric CO-OP, or a competitive market for their production.

To give you an example of that exploitation I speak of, let me share with you, a situation I vaguely recall, but remember the story my 88 year old father told me of years ago.

I do recall when the farmers would harvest their wheat either with the early combine or threshing machines. At that time there were no elevators for farmers to haul grain to. Farmers either hauled their grain to a rail siding with a wagon and team, or a model A truck, then scoop the grain into a box car with scoop shovels. The only commercial purchasers of grain were buyers representing grain companies who would come into the fields usually in the same car and bid on the farmers grain. The process usually was, each buyer would bid the same price and then they would flip a coin to see which buyer got the grain.

Needless to say, the producers' options were very limited. They accepted the bid, or took their grain to a bin, if they had one, scoop it in, later scoop it out, haul it many more miles and then scoop it off again.

Farmers of the community soon realized they were being ripped off, so they began to jointly order a box car from the railroad, weigh their wagons and trucks on the scales at the local Farmers Union store which was used to weigh coal, etc., scoop the grain in the box car and then send it directly to the Kansas City market.

Later, these farmers would purchase a powered grain blower to blow the grain in the box cars, and later yet build a ramp so the grain would slide out of the truck instead of having to shovel it. In probably the late 40's, more farmers banded together to build a concrete type elevator at Florence some 12 miles away which became the CO-OP elevator. That elevator has now merged with some 8 or 9 other CO-OPs under the Farmers Grain CO-OP at Walton.

Needless to say, in the 20's and early 30's, the very thought of giving farmers as consumers or producers an equal footing against the combined powers of big business in a cooperative structure based on democratic principals was unthinkable.

It is ironic that now we see a proposal like SB-73. A piece of legislation that will set forth the first steps to erode away the democratic process of CO-OPs, and allow big, perhaps multi-national corporations to slip under the CO-OP gate. disguising themselves as CO-OPs to again take advantage

or abuse, if you will, the purpose and intent of the original Capper-Volstead CO-OP Marketing Law.

The basic difference between CO-OPs and corporations is very clear. In a CO-OP the profits of the business the member does with the CO-OP is either returned in cash or retained to build or expand that community business. In a corporation the individual doing business does not receive a return of the profit of the business he or she does with the corporations, those profits go to a stockholders who may reside hundreds of miles from that rural town. So let's not forget that when we speak of saving our rural communities, and rural economic development.

That is the real issue of SB-73. Who shall share in the profits of the CO-OPs, and who shall control the CO-OPs.

That is why there is two sides to this issue.

One is the CO-OP Council, Farmland side. The other is the Farmers Union, and CO-OP members side.

The CO-OP Council is very open in their intent. They follow the line of Farmland President Rainey who has set out to change the present structure of CO-OPs to a corporate structure. the Council also admits that Farmland attorneys assisted in preparing the proposed changes in Senate Bill 73. They also openly admit the intent of their proposed changes is to increase the control of the Kansas CO-OPs (association) by stockholders. They also admit the intent of their proposed changes is so higher dividends can be paid to the stockholders.

The purpose of this bill is to fulfill those objectives.

This is where we differ on SB-73. The intent of Capper-Volstead was so individual farmer members could band together to build and operate marketing and supply CO-OPs that they control in a democratic fashion and share in the allocations of profits on a patronage basis.

In the CO-OP Council - Farmland proposal they fail to point out that is what they want to change.

No. 1 When you increase stockholder control you must diminish the control of the CO-OP by its' members.

No. 2 With increased control by the stockholders they can then begin to decrease the allocations of profits based on patronage to the member, and instead transfer those profits and ownership to the stockholder. Under Senate Bill 73 a stockholder may be a trust, other CO-OPs, non-members or corporations. Under stockholder control stockholders can form other entities, CO-OPs or corporations and to transfer

capital assets from the parent CO-OP to a new entity, restricting that board to only one member of the parent CO-OP.

Once CO-OPs eliminate the one member one vote and begin to distribute to stockholders CO-OP profits in excess of 8% they are in violation of federal tax laws and regulation.

Once it becomes evident corporations are using CO-OP laws to build stockholder controlled corporations, new federal laws can be expected shortly clamping down tightly on all CO-OPs, because of the changes being proposed in SB-73.

It is obvious that Farmland leadership believes it should separate itself from membership control and input, by going to a corporate structure of stock ownership. So as to require local member CO-OPs to buy products from Farmland, rather than from a source that may be more economically beneficial to the producer (KC Star 2-26-91)

If that is to be Farmland policy that is their business. However I don't believe the Kansas Legislature should be setting state policy to assist them in future domination of local member owned CO-OPs.

Mr. Rainey has been credited with saying he started the CO-OPs thinking about making a profit.

Surely Mr. Rainey does not think all those CO-OP elevators and service centers across Kansas just sprung up over-night like mushrooms.

Those facilities, if he does not understand, were built with the retained earnings or profits if you will of thousands of CO-OP members over the years. That is the core issue here - shall we keep present law where the member owns and controls the CO-OP - or do we change the law where CO-OPs become captives of a corporation where the profits instead of being returned as patronage to the members is carried off by stockholders, who may be trusts, corporations, other CO-OPs, or non-members.

Mr. Rainely's apparent lack of understanding of CO-OPs may be what caused him at a meeting of CO-OP members to respond to questions rather angerly, "what's wrong with you people you act like you own this business".

I would point out Farmland isn't the only large regional CO-OP. There are numerous others who don't believe in the corporate structure of CO-OPs and corporate stockholder control. These other CO-OPs have shown more success and profits than Farmland over the years. There must be a value of member control.

As I see it the responsibility of the Legislature is to represent the interest and protect assets of the people in their district.

Farmland and the Council have been educating their board and much of the management of local CO-OPs to their way of thinking for quite some time. However in visiting with some of those managers many are cautions in their endorsement and support of SB-73.

Most members of these CO-OPs have heard very little if any of this proposal.

Consequently they the members because of this lack of information cannot really debate of discuss the issue.

The information I have provided you of Mr. Velde's interpretation of SB-73 is much different from what has been presented you by the CO-OP Council.

I don't think anyone has in a factual manner disputed his evaluation of SB-73. This difference in interpretation of the bill illustrates the complexity of this bill, if for no other reason because of how the proposed changes effect different people.

The proponents of Senate Bill 73 admit the changes being proposed probably will not be used immediately. If this is true then where is the need to rush into the passage of SB-73. Because these changes are major and would have major impact on many rural communities and constituents I would suggest this bill not be passed at this time and be scheduled for an interim study.

Hopefully this would provide time for those who will be most effected, the local CO-OP members to become better informed of the major changes being proposed in SB-73.

Thank You

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February 4, 1991

Mr. Ivan Wyatt, President
Kansas Farmers Union
P.O. Box 1064
McPherson, KS 67460

Dear Ivan:

Enclosed you will find several items relative to the legislation that we recently spoke of. I have attempted to provide you with a variety of tools that you can use in your upcoming testimony on the legislation.

I have never had the opportunity to work for you in developing this kind of material so I encourage you to modify the contents in such a way as to make it comfortable for your style of presentation.

Among the items enclosed you will find:

1. A report laid out in a side by side column format with the left column being a simple statement of what the section of the act seeks to accomplish, with the corresponding column containing some points to discuss on the section.

2. There is a copy of Section 1 of the Capper-Volstead Act which I thought might be useful.

3. There is a paper on the topic of what is a cooperative, with some points germane to the legislation.

4. There is a paper on the topic of Antitrust and the contents of the Capper-Volstead Act.

5. There is a paper dealing with some general observations on the business trends that may be useful.

6. There is a copy of a memo done by the Congressional Research Service in May of 1990 regarding Farmland Industries vertical integration.

7. Finally, there is a narrative paper on the main points of the legislation.

My understanding is that your upcoming testimony is just the first stage of consideration for this legislation, if you feel that additional assistance can be provided I would welcome the opportunity to work with you on this project.

I would appreciate hearing from you if you find this material helpful for your testimony.

Sincerely,

GAFFANEY & VELDE LAW FIRM, LTD.

David G. Velde

DV/PL

SIDE BY SIDE COMPARISON

OF THE SECTIONS AND THE COMMENTS

1. Section 1603 is changed to allow a cooperative to have the power to form a subsidiary, without the current requirement that the creation include members of the existing cooperative.	1. While the comments to the act refers to subsidiary cooperatives in fact the act does not specify that the subsidiary must be a cooperative. It would appear from the language of the act that a corporate subsidiary could already come into existence. Further the change makes it easier for the parent cooperative to form the subsidiary by removing the requirement for the joining in the subsidiary of at least four other members of the original cooperative.

2. Sections 1064 and 1605 provide for increased latitude as to the type of business activity of the cooperative, as well as interests in other entities including those not related to the activity of the cooperative In particular the changes to section 1605 greatly expands the statement of purposes for the cooperative.

2. These changes would greatly extend the investment and thus risk position of the equity of the cooperative by allowing investments in other corporations and any lawful business activity. Existing language limits investments in activities that are related to the business of the cooperative. The question would of course arise as to why the cooperative would wish to take an equity position in an unrelated business. Unless perhaps there is a belief that this would allow access to the capital base of the cooperative for some other purpose.

Advocates of this change also cite that the existing language brings into question what in fact would be considered activities incidental to the cooperative function. However the only persons with standing to raise this issue would be the members themselves which would seems to be satisfactory.

3.	Section 1606 is changed to allow for a stockholder of a nonstock association to be represented by an officer or some other agent.	3.	This is apparently changed to allow for a trustee to act for a trust which would now be eligible for membership as a result of earlier changes. Of greater interest is the apparent problem with speaking of a stockholder having certain power within a nonstock cooperative.
4.	Section 1607 changes would allow a cooperative to be incorporated in Kansas however it would not have to do the bulk of its business there.	4.	This change could be used to allow cooperative to use Kansas law if it felt that Kansas law was more favorable to its goals that the state where it intends to operate. This would be similar to the use of Delaware for many general business corporations. It would further extend the difficulty of local farmer control over statutory provisions because we would now have to look to another state for necessary changes.

5. Section 1608 would change the requirements for changes in the organic documents of the cooperative. Specifically, it would allow for a new class of voters called voting stockholders in addition to members.

5. The change here is significant because it allows a group called voting stockholders to be able to change the by-laws and/or articles of incorporation. The result of this action allows a significant shift in the power away from the cooperatives members.

Virtually every authority on the issue of by-laws and articles of incorporation strongly supports the need for strong member control over this issue, to change and dilute this power is very serious for the organization. This is the ultimate power of the member over the cooperative.

6. Section 1609 would be changed to reduce the quorum requirements and to allow for a greater rate of return on stock.	6. The first issue here is similar to number 5 above because of the reduction in quorum required. The change in interest rate has two problems. First it seems to be inconsistent with Section 1 of the Capper-Volstead Act (7 USCS Sec. 291) which limits return to 8%, unless there is one member one vote limitations on member voting power. Second, it is argued that this change is needed in order to pay a competitive rate on invested capital. However, a cooperative does not function on the basis of investor returns(See What is a Cooperative?) If capital is needed by a business, whether a cooperative or a general corporation it can be raised by investment in stock(equity) or by association borrowing(debt). In either case there is to be a cost of funds to be paid, either a dividend or interest on debt. However, debt does not change the control of the cooperative, stock does.
7. Section 1610 changes does not seem to be significant.	7. N/A

8. Section 1611 will change the definition of who can vote for directors and who is eligible to be a director.

8. The significance of this change is that in addition to members of the cooperative voting for the directors now a cooperative could have stockholders also voting for the directors.

Further, it would no longer be necessary to only elect directors from the membership base of the cooperative, directors could be non-members.

The argument in support of this change is that a cooperative could then attract "outside talent" to become part of the board of directors. While the process of attracting "talent" for the management of the affairs of the cooperative is vital, there is a much more prudent means to use. If the cooperative hires the expertise that it needs, either as staff or better yet as a professional consultant you can hold that person accountable professionally for errors in judgement. If a director makes a mistake in his recommendation of policy development, he would not be accountable under the "best judgement rule" which is the standard of accountability for directors. However a professional consultant has far greater accountability, and there would be no change in the reliance upon the farmers members for the board.

9. Section 1612 changes would allow for persons not elected by the membership to assume officer status in the cooperative.

9. This is of similar concern to item 8 above. It further expands beyond the control of the members who shall have leadership/officer status in the cooperative.

10. Section 1613 changes would effect both the percentage of stock ownership within one person and would also significantly change the distribution of cooperative equity.

10. The change here is consistent with the earlier change being offered whereby the number of person needed to form a cooperative is reduced. Therefore the same issues are present here as before on this point.

The second change in this section however is perhaps the most important of all.

It would allow for the transfer of stock to a much broader spectrum of persons, in essence to anyone who is eligible to be a member of the cooperative. This would allow the accumulation of stock in non-farmer hands. This concentration is contrary to basic coop concepts.

Further, voting rights will no allow the voting of equity value versus the traditional one member on vote concept. One must ask why anyone would want such a situation to exist? What value is there to have such power? The answer may well appear in the rest of the changes to this section.

This section further allows for a greater payout of the reserve capital of the cooperative. Could it be that with the removal of the statutory limit on equity distribution, that a corporate raider could find the assets of a cooperative a worthy target of a take over attempt. For the purpose to tapping into the capital reserves and investing them in unrelated corporate investments. Note that this bill would also allow for non-related investments if adopted as presented.
The 50% statutory rule would be eliminated under the proposed change--why?

11. Section 1614 would change the procedure for the removal of a director, shifting power away from farmer members to stockholder.

11. The change here would allow the a majority of the voting stock to remove a director rather that a majority of the members(under 1 member, 1 vote rule). If a cooperative were an equity voting cooperative, then a relatively small group of high equity stockholders could remove "uncooperative" directors. Perhaps those directors who would oppose outside investment of cooperative assets.

12. Section 1615 changes do not seem important.

12. N/A

13. Section 1616 changes reflect the opportunity to change the rate of return on stock.	13. Same issue as in item #9.
14. Section 1617a changes the provisions with respect to interests owned by the cooperative in other activities.	14. Just as described earlier these changes would allow for outside investments. Further the stricken language from the old law provided an even greater safeguard as to the scope of the allowable investments and should be kept.
15. Sections 1618-1621 continue the same theme of changes described else where herein.	15. N/A
16. Section 1622 would be a repealer of the penalty provision for spreading false reports about the condition of the cooperative.	16. It would seem odd that we would not want to keep this provision. Only those persons who are convicted of violating this section face any problem.
17. Sections 1623-1628 contain no real changes.	17. N/A
18. Section 1629 if adopted would make it harder for the board to increase the capital reserves of the cooperative by requiring a 2/3 vote of the board versus the current majority.	18. The only reasonable purpose for this provision is to make it easier for a minority of the board to limit the capital reserves of the cooperative thereby leaving more money available for distribution and/or outside investment.

19. Sections 1630-1635 do not appear to have any important provisions. 19. N/A

20. The balance of the legislation consists of new language which thus deals with a number of items not dealt with in the existing statutes. The following will simply be a section by section discussion of what the new statutory language would provide.

SECTION 17-1637

Subdivision (a) of this section allows for the merger or consolidation of two or more domestic(meaning in the state of Kansas) cooperatives and/or corporations. The result of which can be a new cooperative or general business corporation or one of the merging or consolidating cooperatives or corporations could survive. The important feature is that the cooperative could wind up being fully absorbed into a general business corporation with no remaining cooperative features.

Subdivision (b) of this section provides what the merger/consolidation agreement must contain at a minimum. However nothing is contained in the proposed statute which would require disclosure of any executive compensation agreements(i.e. golden parachutes, special stock options, etc).

Subdivision (c) establishes the member/stockholder approval process and contains several important features:

1. The member/stockholder meeting can be called with as 20 days notice. This does not seems to allow very much time for consideration and debate among the voters.
2. The vote necessary for adoption is 2/3, however it must be remembered that equity voting will again have a very significant effect here.

Subdivision (d) further provides that if the members/stockholders agree to the merger or consolidation the boards of directors of the entities may still approve a change in the agreement, this agreement will still be operative even though it was not part of the original agreement as approved by the voters of the entities. There are certain limitations as to the subsequent agreement, however there is still a tremendous number of issues that could be changed after approval. Subdivision (e) is of no great significance.

Subdivision (f) is another very powerful tool to deny cooperative members a voice in the affairs of their cooperative. It provides that if a cooperative is going to merge with another entity(cooperative or corporation) if the result is the survival of the cooperative there is no need for

a vote of the membership on the proposed merger. While there are minimal exceptions the basic rule will be that the board can, without seeking approval of the members, use the reserve capital of the cooperative to fund a merger with another entity!

SECTION 17-1638

The provisions of this section are in essence the same as the previous section, except that it allows for mergers and consolidations to occur between domestic(Kansas) and foreign(another state) cooperatives and corporations.

SECTION 17-1639

This section requires that certain fees etc. be paid before finalization of the merger or consolidation.

SECTIONS 17-1640 & 17-1641

These two sections are procedural issues which are required by the adoption of the previous sections for mergers and consolidations.

SECTION 17-1642

This section provides for a very cumbersome process for a member to seek the refund of his/her interests in the cooperative in the event that he/she does not want to be a part of the new entity. Clearly the procedural requirements here are designed to make it very difficult for a person to get his/her money out of the cooperative. A brief review of the provisions reveals how hard this would be, clearly the intention is to retain as much of the equity as possible rather than allow a person to withdraw.

Finally, attention is drawn to the last few lines of the bill as proposed which seems to indicate that several sections of the underlying statute are to be repealed, it would seem that this must be some error in drafting, if not it does not make any sense.

B:\wp51\coop2

CAPPER-VOLSTAD ACT

SECTION 1.

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

An 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.

WHAT IS A COOPERATIVE?

For those of us in agriculture the question of what is a cooperative is like asking to define farming itself. We all know what is meant but it takes some reflection to really state and define a cooperative. Most of us use them and appreciate the fact that they are there as a resource in our communities, but we don't very often stop to think about their truly unique characteristics.

The United States Department of Agriculture in its publication entitled, *Cooperative Principles and Statutes*, identifies three concepts regarding cooperative operations that I think are useful to our base of understanding.

First it states that, the basic purpose of a cooperative is to render economic benefits to its members. I think that we would all agree that this is fundamental to cooperative purposes. (Note however that it does not say a return on investment, but rather it speaks of economic benefit to its members.)

Second it provides that, cooperatives are organized around the mutual interests of members. This concept is of vital importance

benefit of those who do business with it and not for the purpose of making a profit for the organization.

This does not mean that I view a cooperative as being somehow a second class participant in commerce. In fact as a patron member I expect and demand that my cooperative constantly insure that it:

-takes those steps necessary to incorporate all applicable technological developments in the furtherance of the cooperative's activities

- takes those steps necessary to develop and maintain a strong fiscal base to support current and future business activity for the cooperative

-prices its products and services to insure the adequate return to the cooperative to maintain the cooperatives fiscal integrity

It is also of vital importance to understand that a cooperatives purpose is, as stated earlier, the economic betterment of its members, as opposed to simply a return on invested capital. The significance of this concept focuses on the cooperatives role as an extension of the members own farm business. Frequently the cooperative is

to understanding cooperatives. It does not envision that any segment of the cooperatives membership is of greater importance or significance than the overall good of all patron members.

Finally the publication reveals that, cooperatives are essentially nonprofit enterprises in the sense that they are not organized to make monetary gains for cooperatives as legal entities or for their members as investors, but primarily for all patrons as users of their services. It seems to me that this concept in particular speaks to the very substance of the issues being presented in this proposed legislation. (Even our own Kansas statute in section 17-1603 refers to cooperatives as non-profit.)

While it is true that cooperatives use the concept of dividends to its members and patrons, it is important to understand that when used in the context of cooperative business activity the word dividend has a unique and special meaning. The profit incentive is the driving force of commerce and I agree it must be. However the real question here is for whom does the profit incentive apply.

In a cooperative association the concept of profit, as used in the normal terms of commerce is inappropriate, because profit is the wage of the entrepreneur or businessman, and in a cooperative there is no entrepreneur. A cooperative is run for the

faced with the question of whether to continue a particular service or product which in and of itself is not a financially successful venture. The need to continue the service however relates to the needs of the members of the cooperative and the management plan most often adopted is to in essence subsidize this service component from other business activities of the cooperative.

While a cooperative cannot continue to carry unproductive product and service lines to such an extent as to bring financial ruin to the whole operation, the cooperative is far more willing to "go the extra mile" than investor/profit driven businesses are prepared to assume. Considering this reality in the context of the dwindling business presence in many rural areas this commitment to member service is of increasing importance.

It is important to understand as well that a member's interest in the cooperative does reflect his or her economic participation and "investment" in the cooperative. While a member is limited to one vote, the member's economic return, as measured in the traditional sense, does reflect the level of use of the cooperatives products and services-the more you buy the more you earn. So there already exists a means of reward for the member/producer who has heavily used the cooperative.

SO WHAT IS THE ANSWER TO THE QUESTION OF

WHAT IS A COOPERATIVE? COOPERATIVES EXIST TO PROVIDE MUTUAL ECONOMIC BENEFIT FOR THE MEMBER OWNERS-AS AN EXTENSION OF THEIR OWN BUSINESS ACTIVITY-AND NOT AS A TRADITIONAL-FOR PROFIT, INVESTMENT ORIENTED BUSINESS CONCERN.

WHAT ABOUT ANTI-TRUST AND CAPPER-VOLSTEAD

It is interesting to note the history of the cooperative movement, because the ability of farmers to form a business relationship called a cooperative is really an exception to the anti-trust laws. Specifically, the Capper-Volstead act provides that farmers may form cooperatives and work together and that such arrangements will not be a violation of the anti-trust laws.

This act was enacted to clarify and extend the exception from the operation of the antitrust laws which is granted to agricultural cooperatives in the Clayton Act (15 USCS Section 17), and the principal questions involving the construction and application of this statute have related to the extent of the exemption granted under the statute, and the type of agricultural cooperatives which will qualify under the requirements found in the statute.

While most of us in agriculture find it difficult to imagine our farm business life without our cooperatives, we must understand and remember that there does exist significant and perhaps growing number of

federal legislators who would severely limit if not remove our ability to function cooperatively.

Some would suggest that this concern is ill founded and the day will never come when such a challenge would mature into a real threat. However, it might do us well to consider what is the reason for the criticism that they are surfacing against us.

In its most simplistic form the argument they forward is that too many cooperatives are moving far beyond what activities were envisioned when the authorization was passed. If we look to some of the examples of business concerns that have commenced operations under the benefits of a cooperative it is clear that the scope of activities clearly goes beyond an association of traditional farmers trying to meet certain economies of scale. Particularly in certain limited specialty crop areas the cooperatives have acquired major market power and concentration. While I as a producer welcome the power acquired by these producers for there benefit, I am concerned that if in fact we are talking about business entities using our cooperative vehicle to accomplish this result I resent the risk is posses to the cooperative way of doing business.

The challenge is not to the power acquired by traditional family farmers as we commonly think of and deal with in Kansas, but rather the unwelcome presence of

corporate farmers leveraging the benefits of cooperative structures.

This act would now add yet a new dimension to the scope of activity by a cooperative, in a manner never before envisioned for cooperatives.

No one would have contemplated using the economic resources of a cooperative to become investor owning stockholders in other corporate structures; no one would have thought of the out right consolidation and or merger of our entities into the private corporate world.

It can be said that the world is changing and that we need to have the tools to operate in this new world. I question the basis for this attitude because it thrusts cooperatives into a new arena for which we have no real purpose.

I must also call into serious question how the provisions of this proposal can be sustained in light of the provisions of the federal law. Capper-Volstead in section 1 requires that a cooperative must either limit the return to 8% on dividends on stock or membership capital or it must only allow 1 vote per member of the cooperative. This legislation would change both of these features

THE TIMES WE LIVE IN

It has been amazing to observe the speed with which the 1980's have changed the landscape of economic structure within the United States. We have seen the rapid deterioration of our financial institutions, the horrendous costs imposed upon all of us in the bail out of the failed savings and loan industry and we are beginning to see greater concerns on the solvency and reliability of the Federal Deposit Insurance Corporation. Over this same period of time we have seen a rapid growth in the frequency of mergers and consolidations. We have seen the issuance of billions of dollars of junk bonds to fund these acquisitions and now realize that the term used "junk bonds" is in fact accurate. People will be loosing their savings and have jeopardized their futures on these investments.

One of the initiatives in support of this proposed legislation is to allow cooperatives to remain "modern" and to be able to function in today's economy. It seems to me we need to question whether or not that its an economy for which we really want to expose the resources and capital reserves of our cooperatives. The mergers and acquisitions

that we have observed and for the most part, in my opinion, not resulted in true economic gain increased employment opportunities and an enhancement of our economic climate and to allow our cooperatives to be exposed to this kind of a marketplace seems to me illfated and of no real value to our farmer members.

References have been made to the fact that these statutes have been in place for many, many years and it is time to change them, they are out of date and no longer in touch with the reality of today. Well, we have a lot of laws that have been around many years and are functioning very well, whether it be the Constitution of the United States or it be the Ten Commandments, these things have been with us for many years and continue to serve us well. Change for change sake has no relevancy in legitimate governmental decision making process.

I think we also sometimes suffer in agriculture from a sense that we are not trendy enough and that we are not keeping pace with the events of the world and changes that are occurring around us. We are sometimes anxious to prove to ourselves and others that we are a contemporary. To be a contemporary in our world of the economic reality of the 80's to change our organizational structures to allow us that risk of exposure for which there is no real gain makes no sense whatsoever.

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May 4, 1990

TO : Honorable Jim Slattery
Attention: Roger Claasen

FROM : American Law Division

SUBJECT : The Capper-Volstead Act: Contracting Practices of An Agricultural Cooperative

This memorandum is furnished in response to your request concerning the Capper-Volstead Act which provides an anti-trust exemption for agricultural associations that conform to the requirements of the Act. Specifically, the memorandum sets forth relevant provisions of the Capper-Volstead Act (the Act), summarizes apparent hog contracting practices of Farmland Industries, an agricultural cooperative[1], and discusses whether Farmland's contracting activities appear to be in violation of the Act.[2]

The Capper-Volstead Act

The Capper-Volstead Act[3] provides an anti-trust exemption for agricultural cooperative associations formed by persons "engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers". The Act permits these named persons to act together collectively. Associations may be formed, as corporations, or otherwise, may be with or without capital stock, and may collectively process, prepare for market, handle, and market in interstate or foreign commerce, the agricultural

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[1] A "cooperative association of producers" is defined in 7 U.S.C. §2.

[2] Although the issue is beyond the scope of this memorandum, it is noted that state law concerning agricultural corporations and associations may be relevant to Farmland's practices as well.

[3] 7 U.S.C. §§291, 292.

3-31

products of the persons so engaged. 7 U.S.C. §291. This statutory exemption may protect associations from liability under antitrust laws.[4]

Agricultural associations may have marketing agencies in common and their members may make necessary contracts and agreements to effect the purposes of the association. The Act exempts agricultural marketing cooperatives from the antitrust laws if it is operated for the mutual benefit of the members, if no member is entitled to more than one vote on account of the amount of capital contributed or the amount of stock owned, or if the association does not pay dividends on stock or membership capital in excess of 8% per year. As an additional requirement, the association is not permitted to deal in the products of nonmembers to an amount greater than the amount that is handled by it for members. 7 U.S.C. §291.

Monopolization or restraint of trade and acts which unduly enhance prices of any agricultural product are expressly prohibited under the Capper-Volstead Act. 7 U.S.C. §292 provides that if the Secretary of Agriculture believes that any association monopolizes or restrains trade in interstate or foreign commerce to an extent that the price of any agricultural product is unduly enhanced, the Secretary is authorized to serve a complaint on the association and proceed under the statute's enforcement provisions. The Secretary may order the association to cease and desist in this regard.[5] Moreover, noncompliance may lead to liability under antitrust laws.

Farmland Industries, Inc.

Farmland Industries is a large agricultural cooperative involved in pork production, is based in Kansas City and serves the Midwest. The question in this memorandum is whether some of Farmland's activities are prohibited under the Capper-Volstead Act to the extent that its activities would threaten its antitrust exemption under the Act. Issues which might be raised concern Farmland's "vertical integration" organization for pork production, its hog contracting practices, and whether the association is dealing in nonmember products in an amount not permitted under the Act.

Vertical integration describes an association's involvement in a number of distinct stages of production, that is, production control at various levels: supplying inputs, monitoring and controlling production, marketing finished products and, in some cases, brand-labeling the final product. This type of large scale organization could involve the association in pork production from start to finish. This organization style may raise concerns if the association

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[4] See 15 U.S.C. §§1 *et seq.*

[5] Specific statutory provisions and regulations for enforcement and for administrative proceedings are set forth at 7 U.S.C. §292 and 7 C.F.R. §§1.160 *et seq.*, respectively.

enters into production contracts with nonqualified members in a manner which would threaten its exempt status under the Act.

Two types of contracts or agreements may raise concerns: (1) Farmland's contracts to place feeder pigs with local cooperatives in Iowa and Kansas for feeding to market weight and (2) contracts with producers to produce quality feeder pigs for use in "its finishing program". Under this second type of contract, Farmland might purchase feeder pigs from member producers, retain ownership throughout the feeding period, contract with a local co-op who then contracts with a local member who agrees to manage the pigs for a fee.

A threshold issue is that in order for this type of association to be entitled to the protection of the Act and as a consequence, avoid liability under the antitrust laws, it must be shown that all of its members are qualified to act collectively as "farmers" under the statute. It is not enough that some of the members qualify. This determination is made based on the definition of "farmer" in 7 U.S.C. §291 as well as the purpose of the statute. If it is concluded that a member/s is not a "farmer" as that term is used in the Act, then the association may lose its exempt status and may face liability under relevant antitrust laws.

The Supreme Court addressed this qualified member issue under the Capper-Volstead Act in *National Broiler Marketing Ass'n v. United States.*[6] In this case, the U.S. brought an action against an agricultural cooperative association, the members of which were integrated producers of broiler chickens. The association [NBMA] had organized to perform various marketing and purchasing functions on behalf of its members. The government asserted that the co-op violated the federal antitrust laws and that it was not sheltered from liability under the Capper-Volstead Act. The Supreme Court held that because not all members of the co-op were "farmers" within the meaning of the Act, the association was not entitled to protection from the antitrust laws afforded by Capper-Volstead.

The Court noted that the cooperative was involved in various "integrated" stages of production: the placement, raising, and breeding of breeder flocks to produce eggs to be hatched as broiler chickens; the hatching and placement of the chicks; the raising of the chicks for a period; the catching, cooping, and hauling of the "grown-out" broiler chickens to processing facilities; and the operation of facilities to process and prepare the broilers for market.[7] The Court further stated that:

> The broiler industry has become highly efficient and departmentalized ... and stages of production that in the past might all have been performed by one enterprise may now be split and divided among several, each with

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[6] 436 U.S. 816 (1978).

[7] 436 U.S., at 820-21.

> a highly specialized function. No longer are eggs necessarily hatched where they are laid, and chicks are not necessarily raised where they are hatched ... Often the chicks placed with an independent grower have been hatched in the member's hatchery from eggs produced by the member's breeder flock .... The member then places its chicks with the independent grower for the grow-out period.[8]

Notwithstanding these realities of modern agriculture production[9], the Court held that all members of the association must be qualified in order for the association to enjoy the exemption from antitrust laws under the Capper-Volstead Act and held that some NBMA members did not own or control a hatchery or breeder flock, or did not own a grow out facility. These members were not considered to be "farmers" as that term is used in the Act. Therefore, the association with these nonqualified members was not entitled to the protection of the Capper-Volstead Act.

For the purposes of this memorandum, Farmland's integrated production style appears to be similar to that which is prevalent in the modern chicken business.[10] Farmland's contracts which might provide for the feeding and management of hogs by cooperatives which may or may not be members of Farmland's association raises concerns under the statute and applicable case law. Even if the persons with whom Farmland is contracting are members, it is not clear whether they are qualified members or "farmers" within the

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[8] 436 U.S., at 821-22.

[9] Justice Brennan's concurring opinion in *NBMA* reflected concerns raised by Farmland in attached materials. See "Farmland Industries, Inc. White Paper Position on Contract Feeding By Cooperatives, April 1, 1989." Justice Brennan agreed with the Court's opinion but added that at the time the Capper-Volstead Act was enacted, farming was not a vertically integrated industry. The model at that time was a relatively large number of small, economic farming units. Nonetheless, Congress intended to exclude from the Act's protection, persons who were not farmers within the meaning of the Act, including some who bore risks in the business of agriculture. Justice Brennan cited the American Farm Bureau Federation's position when it stated that extending the exemption to vertical integrators would "stand the Act on its head".

> However desirable the integrated broiler production system may be, and however needful of the exemption, judges should not readjust the conflicting interests of growers and integrators; it is for Congress to address the problem of readjusting the power balance between them.

436 U.S., at 738-745.

[10] Reference is made to the attached materials which offered limited descriptions of Farmland Industries, Inc.

meaning of the Act. This determination is critical since the association could face losing its exempt status under the Act and thus be subject to liability under antitrust laws.

Based on the limited amount of information provided, it cannot be concluded in this memorandum whether or not all members of Farmland's association are qualified to act collectively under the Act and whether the association is complying with relevant provisions of the statute. Nonetheless, it can be stated that in order for an integrated association like Farmland to continue its exempt status under the Act, its members involved in its integrated production must be "farmers" within the meaning of the Act.

Diane T. Duffy

Diane T. Duffy
Legislative Attorney
American Law Division

WHAT IS THIS ALL ABOUT REALLY?

It appears to me that when you complete a review of all of the various provisions of the proposed changes to Kansas Cooperative law the thrust of these changes relate almost exclusively to questions of control and money.

It is argued that these changes are required in order to allow our cooperatives to function in the new reality of the American economy. It is my contention, however, that the real purpose here is to radically change both the base of power and control within the cooperatives as well as a desire to access the capital position of the cooperatives that have been formed by the farmers of the state.

A cooperative does not and should not represent a prospective blue chip stock investment opportunity. The purpose and function of the cooperative is fundamentally different than the traditional stock investment opportunities available in this country.

The shifting of control opportunities from the member patrons of a cooperative to an

equity based voting system vests significant control in a relatively small number of people, some of whom may not be of a type and character similar to the balance of the membership of the cooperative. What possible value could there be to farmers to allow such a circumstance to exist. The reality is that it represents a degradation in farmers control of their cooperative and control is fundamental to the ongoing integrity of an organization to fulfill its purpose.

I must acknowledge that I am skeptical that in fact there exists an interest to access capital reserves existing within many of our cooperatives. The changes proposed in this legislation would alter the formulas, for example, of when monies may be made available from the capital reserves of the organization. The changes being proposed in Section 17-1613 directly relate to the questions of asset preservation and the fiscal integrity of cooperatives.

Perhaps the question that is most troublesome to me is when we look at the pressures that have occurred in this country and the changes that have occurred in the business structures with the mergers and acquisitions that have been undertaken, are we really allowing now for the opportunity for outside interests to access the capital reserves of our cooperatives to merge them and acquire them to non-cooperative business entities drain off the capital reserves that are available, leverage those reserves to other asset

acquisitions and deplete that capital reserve.

And even if its stated that such a proposition is absurd or of no real creditability I still ask what value is there in these changes even if the risk of my concern is small.

3-22-91

My name is Frank Feldhausen of Bremen, Ks. I am a farmer - stockman, and Secretary-Treasurer of the Marshall County Farmers Union.

I feel that Coops were started by farmers years ago and built up by their loyal business. Many also gave of their time to serve on the local Co-op's Board of Directors. To go to a corporate structure would begin to transfer ownership, profits and power from the farmer members to non member stockholders and corporate board members. They would be more concerned about making a profit for themselves, rather than allocating profits back to the member co-ops and farmer patrons.

Farmer members and directors work to keep their cooperatives strong because they depend on their accumulated patronage for retirement income.

This is one reason I'm not supporting Senate Bill 73. Thank you.

Hs. AG.
3-22-91
ATTACHMENT 4

From: Ruth Ring, Farmer, President of Marshall Co. Farmers Union.

S.B. -73

I oppose this Bill as a farmer, coop member, and member of a family, who helped start a Farmers Union Coop in our community several years ago.

This bill is not good for hard working people across this State.

A Cooperative is a business owned by the people who use its services. A Cooperatives purpose is the economic betterment of its members.

This Bill allows a shift in control away from the Cooperative members. I support the need for strong member control.

S.B.-73 is a violation of Federal law. Copper-Volstead Act, in Section (1), requires a Cooperative to either limit the return to 8% on dividends on stock or membership capital, or it must only allow 1 vote per member.

This bill would allow a Cooperative, to become a Corporation.

A Corporation is an organization that can own propesty as if it were a person. However, the propesty belongs to the organization, not to the individual people who form it.

To allow our Cooperatives to be exposed to this kind of legislation is illfated and of no real value to its farmer members.

As a leader in my Community, [redacted] I oppose S.B.-73

THANK YOU.

HS. AG.
3-22-91
ATTACHMENT 5

Senate Bill No. 73
House Agriculture Committee
March 21, 1991

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman:

I appreciate the opportunity to appear before you today to testify on 1990 Senate Bill 73, an act concerning cooperative marketing.

This bill regulates cooperatives in most of the aspects of marketing, organization, mergers and dissolution. It is in this latter regulation of merger and dissolution that the proposed bill can seriously disrupt the operations of a district court.

Beginning at page 23 of the printed version of the bill as amended by the Senate Committee of the Whole, section 36, *et seq.*, sets out a procedure to insure that members and stockholders of cooperatives which are merged or consolidated are treated fairly. At line 13, page 24, parties in interest are given a right to have the value of their shares determined by disinterested appraisers.

The process is to begin by petitioning the district court (lines 22 through 24). It is at this point that this bill departs from standard court procedure as statutorily authorized by the legislature (see 1990 House Bill 3021, pertinent section now found at K.S.A. 1990 Supp. 60-303) by having the clerk of the court notify stockholders and others by certified mail and by publication of the hearing to be held on the petition.

1990 House Bill 3021 expressly deleted and repealed provisions for service of notice by clerks by certified mail. One consequence of this enactment is that district court county operating budgets do not provide for postage for certified mail notice of hearings. Later in the bill [subsection (g) lines 39 through 43, page 25 and lines 1 through 5, page 26] provision is made to recover court costs including assigning the postage costs to the surviving organization; however, this is *after* costs have been incurred by the district court.

To illustrate the effect on a smaller court, consider Coffey County, population 8,404. There could easily be half the population which qualifies for notice, and at $2.50 per notice and 2.1 average family members per family, 2,000 notices to mail at a postage cost ($2.50 per notice) of about $5,000.

Hs. Ag.
3-22-91
ATTACHMENT 6

Annual budget for this county amounts to about $54,000, so that this one mailing would consume 9% of the annual budget. This means that other essential services provided by this budget would suffer, for example, providing counsel to juveniles and to indigents, juries, education and travel for court employees, etc. The reimbursement of court costs even though it may come in the same fiscal year would go to the County General Fund, rather than the district court county operating budget which is a line item of the County General Fund.

For the foregoing reasons, it seems apparent that this bill could severely and adversely impact medium to small size district courts. I am therefore recommending that this bill be amended to follow current notice procedures as the procedures were set out in 1990 House Bill 3021. My amendments are shown on the enclosed bill markup beginning at page 24, line 32. I have also taken the liberty of offering an amendment to lines 2 through 5, page 26, to clarify the manner in which interest is to be awarded, primarily by directing attention to the state statute which controls interest on judgments.

Your favorable consideration of these recommendations will make our administrative judges and clerks of the court more comfortable with the prospect of living within district court county operating budgets that have already be cut to the bone. Thank you for your attention.

stituents, and the title to any real estate vested by deed or otherwise, under the laws of this state, in any of such constituents, shall not revert or be in any way impaired by reason of this act. All rights of creditors and all liens upon this property of any of such constituents shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituents shall attach to such surviving or resulting association or corporation, and may be enforced against the association or corporation to the same extent as if such debts, liabilities and duties had been incurred or contracted by the association or corporation.

New Sec. 34. When two or more associations or corporations are merged or consolidated, the association or corporation surviving or resulting from the merger or consolidation may issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with the association's or corporation's capital stock to provide for all the payments the association or corporation will be required to make, or obligations it will be required to assume, in order to effect the merger or consolidation. For the purpose of securing the payment of any such bonds and obligations, it shall be lawful for the surviving or resulting association or corporation to mortgage the association's or corporation's corporate franchise, rights, privileges and property, real, personal or mixed. The surviving or resulting association or corporation may issue certificated or uncertificated shares of the association's or corporation's capital stock and other securities to the members of the constituent associations or corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of merger or consolidation in order to effect such merger or consolidation in the manner and on the terms specified in the agreement.

New Sec. 35. Any action or proceeding, whether civil, criminal or administrative, pending by or against any association or corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the association or corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

New Sec. 36. (a) The association or corporation surviving or resulting from any merger or consolidation, within 10 days after the effective date of the merger or consolidation, shall notify each member or stockholder of any association or corporation of this state so merging or consolidating who objected thereto in writing and whose shares either were not entitled to vote or were not voted in favor of the merger or consolidation, and who filed such written objection

with the association or corporation before the taking of the vote on the merger or consolidation, that the merger or consolidation has become effective. If any such member or stockholder, within 20 days after the date of mailing of the notice, shall demand in writing, from the association or corporation surviving or resulting from the merger or consolidation, payment of the value of the member's or stockholder's interest, the surviving or resulting association or corporation shall pay to the member or stockholder, within 30 days after the expiration of the period of 20 days, the value of the member's or stockholder's interest on the effective date of the merger or consolidation, exclusive of any element of value arising from the expectation or accomplishment of the merger or consolidation.

(b) If during a period of 30 days following the period of 20 days provided for in subsection (a), the association and any such member or stockholder fail to agree upon the value of such member's or stockholder's interest, any such member or stockholder, or the association or corporation surviving or resulting from the merger or consolidation, may demand a determination of the value of the member's or stockholder's interest by an appraiser or appraisers to be appointed by the district court, by filing a petition with the court within four months after the expiration of the thirty-day period.

(c) Upon the filing of any such petition by a member or stockholder, service of a copy shall be made upon the surviving association or corporation, which shall file with the clerk of the district court, within 10 days after such service, a duly verified list containing the names and addresses of all members or stockholders who have demanded payment for such member's or stockholder's interest and with whom agreements as to the value of such member's or stockholder's interest have not been reached by the association or corporation. If the petition is filed by the surviving association or corporation, the petition shall be accompanied by such duly verified list. The ~~clerk of the district court~~ shall give notice of the time and place fixed for the hearing of such petition ~~by certified mail to the surviving association or corporation and~~ to the members or stockholders shown upon the list at the addresses therein stated and notice shall also be given by publishing a notice at least once, at least one week before the day of the hearing, in a newspaper of general circulation in the county in which the district court is located. The court may direct such additional publication of notice as the court deems advisable. The forms of the notices by mail and by publication shall be approved by the court.

surviving association or corporation

pursuant to K.S.A. 1990 Supp. 60-303 (b), as amended,

(d) After the hearing on the petition the court shall determine the members or stockholders who have complied with the provisions

6-4

of this section and become entitled to the valuation of and payment for such member's or stockholder's interest, and shall appoint an appraiser or appraisers to determine such value. The appraiser or appraisers may examine any of the books and records of the associations or corporations the stock of which such appraiser or appraisers is charged with the duty of valuing, and following an investigation, the appraiser or appraisers shall make a determination of the value of the member's or stockholder's interest. The appraiser or appraisers shall also afford a reasonable opportunity to the parties interested to submit to the appraiser or appraisers pertinent evidence on the value of the member's or stockholder's interest. The appraiser or appraisers, also, shall have the powers and authority conferred upon masters by K.S.A. 60-253, and amendments thereto.

(e) The appraiser or appraisers shall determine the value of the stock of the members or stockholders adjudged by the district court to be entitled to payment therefor and shall file a report respecting such value in the office of the clerk of the district court, and notice of the filing of such report shall be given ~~by the clerk of the district court~~ to the parties in interest. Such report shall be subject to exceptions to be heard before the court both upon the law and facts. The court by decree shall determine the value of the stock of the members or stockholders entitled to payment and shall direct the payment of such value, together with interest, if any, to the members or stockholders entitled by the surviving or resulting corporation. Upon payment of the judgment by the surviving or resulting corporation, the clerk of the district court shall surrender to the surviving association or corporation the certificates of shares of stock held by the clerk pursuant to subsection (f). The decree may be enforced as other judgments of the district court may be enforced, whether such surviving or resulting association be an association of this state or of any other state.

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(f) At the time of appointing the appraiser or appraisers, the court shall require the members or stockholders who hold certificated shares and who demanded payment for the shares to submit the certificates of stock to the clerk of the court, to be held by the clerk pending the appraisal proceedings. If any member or stockholder fails to comply with such direction, the court shall dismiss the proceedings as to such member or stockholder.

(g) The cost of any such appraisal, including reasonable fees and expenses of the appraiser or appraisers, but exclusive of fees of counsel or of experts retained by any party, shall be determined by the court and taxed upon the parties to such appraisal or any of them as appears to be equitable, except that the cost of giving the

notice by publication and by certified mail shall be paid by the surviving association or corporation. ~~The court, on application of any party in interest, shall determine the amount of interest, if any,~~ to be paid upon the value of the stock of the members or stockholders entitled thereto.

Past judgment interest, if any, shall be in accordance with K.S.A. 16-204,

(h) Any member or stockholder who has demanded payment of the member's or stockholder's interest as herein provided shall not thereafter be entitled to vote such member's or stockholder's stock for any purpose or be entitled to the payment of dividends or other distribution on such stock, except dividends or other distributions payable to members or stockholders of record at a date which is prior to the effective date of the merger or consolidation, unless the appointment of an appraiser or appraisers shall not be applied for within the time herein provided, or the proceeding be dismissed as to such member or stockholder, or unless such member or stockholder with the written approval of the surviving association or corporation shall deliver to the association or corporation a written withdrawal of the member's or stockholder's objections to and an acceptance of the merger or consolidation, in any of which cases the right of such member or stockholder to payment for the member's or stockholder's interest shall cease.

(i) The shares of the surviving or resulting association or corporation into which the shares of such objecting members or stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting association or corporation.

(j) This subsection shall not be applicable to the members, stockholders or other holders of equity securities of the surviving association or corporation in any merger where the active members of the surviving association or corporation continue to be eligible to be members of the surviving association or corporation after the merger and the agreement of merger does not amend the articles of incorporation, and shall not apply to the members, stockholders or other holders of equity securities of the constituent association or corporation not surviving the merger in any merger where the active members of such constituent association or corporation are eligible to become members of the surviving association or corporation on the same terms and conditions as other similarly classified members of the surviving association or corporation.

Sec. 37. K.S.A. 17-1601, 17-1602, 17-1603, 17-1604, 17-1605, 17-1606, 17-1607, 17-1608, 17-1609, 17-1610, 17-1611, 17-1612, 17-1613, 17-1614, 17-1615, 17-1616, 17-1617a, 17-1618, 17-1619, 17-1621, ~~17-1622,~~ 17-1623, 17-1626, 17-1627, 17-1628, 17-1629, 17-1630, 17-

1631, 17-1633, 17-1634, 17-1635 and 17-1636 are hereby repealed.

Sec. 38. This act shall take effect and be in force from and after its publication in the Kansas register.

6-7