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Incorporating Consumer Cooperatives in Missouri

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Consumer cooperatives must overcome high hurdles to incorporate in Missouri. In fact, some may not be able to incorporate as cooperatives under existing statutes. Efforts to change the statutes have been unsuccessful in the past two years. The Missouri Association of Consumer Cooperatives, a trade association of consumer cooperatives, will continue to promote changes in laws in the General Assembly that will facilitate incorporation.

The situation is unfortunate because every business enterprise that involves a group of people should be incorporated. Incorporation limits individual liability to the amount invested in the business and provides the organization perpetual life. The purpose of this publication is to explain the situation as it existed in 1982 and the options available to the many groups trying to form consumer cooperatives.

Existing Statutes

The root of the problem is that the existing statutes were written to facilitate agricultural cooperatives. This situation reflects the fact that there was interest only in agricultural cooperatives at the time the laws were passed.

Chapter 357, Missouri Statutes, authorizes incorporation "for the purpose of conducting any agricultural or merchantile business." The law defines agriculture broadly to include "buying, selling, manufacturing, storage, transportation or other handling or dealing in or with, by associations of agriculturalists, of agricultural, dairy, or similar products." The elaboration of merchantile is as follows: "purchasing of or selling—groceries, provisions and all other items of merchandise." Court cases have contributed little to defining *merchantile* but the courts did rule that an electric cooperative association was not a merchantile business.

This statute requires an organization to follow the essential cooperative principles. It was passed in 1922 and is similar to laws passed in most states

at that time. The law has many desirable features; but requires capital stock. The stock provisions are practical and consistent with cooperative principles; *but* most cooperatives, and particularly consumer cooperative groups, philosophically object to capital stock. This feature plus an unclear definition of merchantile are the major problems with the statute.

Chapter 274, Missouri Statutes, is labeled "The Non-Profit Cooperative Marketing Law." It differs from Chapter 357 by being restricted to agricultural producers and does not provide for capital stock. The law requires compliance with all accepted cooperative principles. It is not available, however, to consumer cooperatives.

Chapter 355, Missouri Statutes, is the general not-for-profit code for Missouri. The non-profit concept leads some people interested in cooperatives to look to Chapter 355 to incorporate. Section 355.025 specifically prohibits incorporation under the chapter of an "organization created for or engaged in business activity for profit or on the cooperative plan, provision for the incorporation of which is made by any of the incorporation laws of this state." A cooperative that cannot incorporate under any other chapter must also have as its *primary* purpose one of those listed in Chapter 355.025, which includes purposes such as charitable, educational and trade associations.

In addition to this prohibition for cooperatives there is a problem relating to the distribution of assets upon dissolution. Section 355.230(4) prohibits a distribution of assets that "will result in diversion of such assets from not-for-profit purposes as authorized in this chapter, to the pecuniary gain or profit of any person, organization, or corporation." Rather assets shall be delivered to another similar not-for-profit corporation or to the state. Section 355.015(9) defines a non-profit as "a corporation no part of the income or property of which is distributable to its members, directors or officers."

Most successful cooperatives will accumulate equity. For some types, such as housing, a major

purpose is accumulating equity for the members. The severe restrictions imposed by Chapter 355 make it undesirable for cooperatives except for those providing public services such as education and recreation.

Chapter 351, Missouri Statutes, is the General and Business Corporation code. It authorizes corporations for *profit*. Successful cooperatives intend to and do make a "profit" for members. It is true that the cooperative as an entity does not make a profit. This ambivalence may result in questions by the Secretary of State and others about a cooperative that attempts to use this chapter for incorporation.

If a group interested in a cooperative attempts to use Chapters 355 or 351, the word cooperative cannot be used. Also the statute requires stock and provides no guidance about cooperative principles. In many other respects the chapter is similar to Chapter 357.

The Options

The brief review of present statutes indicates that options for incorporation by consumer cooperatives are limited. Chapter 357 can be used for merchantile organizations. The accepted definition of merchantile is buying and selling goods. The term does not ordinarily include services and housing. Since the word merchantile is added to the end of a long sentence defining agriculture, it was likely intended that the interpretation be restricted to agriculture broadly defined. Groceries are mentioned specifically so no questions should be raised about food cooperatives. Such organizations are part of the agricultural industry.

If a cooperative will not fit under Chapter 357, the only option is trying Chapter 351. If the chapter is used, the cooperative principles and procedures should be incorporated in the by-laws. A cooperative that used Chapter 351 will have to convince the Internal Revenue Service that it is operating as a cooperative and hence is entitled to file taxes under the rules specified for cooperative corporations.

Both Chapters 357 and 351 require capital stock. The requirement should not in itself prove to be a serious obstacle. The statutes do not specify a number of shares, a par value or the distribution between common and preferred stock. Chapter 357 does limit ownership per share holder to not over 10 percent of the aggregate par value of all shares of stock. The chapter calls for one vote per stockholder regardless of the number of shares owned. Similar restrictions can be included in a Chapter 351 corporation. In fact, the by-laws can be even more restrictive than the statutes, even to limiting ownership to one share per member. Also the by-laws can specify that stock can be sold only to the corporation and at no more than par value. The requirement of capital stock can be beneficial to a cooperative. All types of business firms need capital and must have some evidence of ownership. Capital stock will accomplish both ends.

While the concept of stock is not a serious barrier, the fact that Chapter 409 requires all securities to be registered is a major obstacle for small and poorly financed corporations. There is an exemption for agricultural cooperatives but the exemption is clearly limited to cooperatives that qualify as agricultural. Section 409.402(10) exempts an issuer who will have no more than 15 transactions with the conditions spelled out in the paragraph. Most cooperatives will want more than 15 shareholders. It is also possible that the stock issued by a cooperative would not be classified as a security if it does not pay capital dividends, cannot be sold except back to the corporation, cannot be sold at a profit, and can be owned only by patrons of the corporation.

Caution

The purpose of this publication is to alert people interested in forming a cooperative that problems will likely be encountered both in incorporating and in issuing securities. *It is necessary that competent legal counsel be secured by any group planning to incorporate a cooperative.*

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