

BY DAVID GURNICK

# COOPERATIVE CONDITIONS

## CALIFORNIA LAW ALLOWS FOR FLEXIBLE APPLICATION OF THE OPERATIVE PRINCIPLES OF COOPERATIVES

IN 1982 the California Legislature enacted the Consumer Cooperative Corporation law, which provides a framework for establishing and operating entities as cooperatives.<sup>1</sup> In 2003, the legislature passed the Medical Marijuana Program Act (MMPA),<sup>2</sup> establishing a defense to criminal prosecution for qualified patients and their designated primary caregivers, who associate “collectively or cooperatively to cultivate marijuana for medical purposes.”<sup>3</sup> Some prosecutors have prosecuted marijuana sellers in California, and some cities have claimed that dispensaries are nuisances. Defendants have asserted that they operated as cooperatives within the coverage of the MMPA. As a result, in recent years, the court of appeal has addressed questions about what elements make an enterprise a cooperative.<sup>4</sup>

Cooperatives are enterprises in which individuals or businesses organize to furnish themselves services that the members need.<sup>5</sup> They seek to provide services more efficiently and at lower cost compared to paying third parties or to each member’s performing the service individually. Unlike corporations, in cooperatives ownership and control are equal among members. Cooperatives operate according to the democratic principle of “one member, one vote.” Unlike business corporations, cooperatives do not seek to generate profit but rather seek to save money for their members. Similarly, members do not seek or obtain increased capital value but rather cost savings and efficiency.<sup>6</sup> In contrast to stock in a corporation, membership in a cooperative is not a saleable commodity.<sup>7</sup>

California cooperatives can trace their

history to 1844, when a group of cotton mill weavers in England organized, calling themselves the Rochdale Society.<sup>8</sup> They adopted several principles that have been the basis of most cooperatives. These included open membership; one member, one vote; cash-only trading at market prices; patronage refunds proportional to each member’s use of the cooperative’s services; and limited return of interest on contributed capital.<sup>9</sup>

These principles allow for flexibility. The court of appeal has stated that “the presence or absence of one single quality or charac-

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teristic should not be viewed as a ‘litmus test’ for determining whether an organization operates mutually or cooperatively.”<sup>10</sup> It has been noted that “no one plan of organization is to be labeled as truly co-operative to the exclusion of others.”<sup>11</sup> While cooperatives exist to do business with or for their members, “experience has demonstrated...that doing business for nonmembers is usually deemed essential to the success of a cooperative.”<sup>12</sup>

Cooperatives exist in many endeavors. Growers of fruits and vegetables, dairy farmers, and producers of all kinds form cooperatives. Sunkist, Land O’Lakes, Sun-Maid, and Blue Diamond are examples of agricultural cooperatives.<sup>13</sup> Each is owned by the companies or farmers who use the organization’s services. In rural areas, businesses form cooperatives to generate power and provide themselves water. In California, the Anza Electric Cooperative and the Plumas-Sierra Rural Electric Cooperative are examples. More than 3,000 water utility cooperatives are owned by and provide water to various consumers.<sup>14</sup>

Financial institutions, often with “mutual” in their names, also may be structured as cooperatives.<sup>15</sup> Housing cooperatives provide students a place to live during college. In the retail world, REI is a member-owned cooperative. According to REI, “what began as a group of 23 mountain climbing buddies is now the nation’s largest consumer cooperative.”<sup>16</sup> Best Western Hotels, Straw Hat Pizza, ACE Hardware, and True Value Hardware are also cooperatives.<sup>17</sup>

The tax court has divided cooperatives into two classifications: consumer and producer.<sup>18</sup> Consumer cooperatives operate to benefit members as individual consumers. A retail store such as REI, where members purchase goods for their own use, is an example. Producer cooperatives, in turn, benefit members by processing or marketing what they produce. A consumer cooperative may be formed “to engage in any lawful act or activity for which a corporation may be organized.”<sup>19</sup> No limitations are stated on the valid purposes of corporations except that they be organized and conduct business primarily for their members’ mutual benefit and not to make a profit.<sup>20</sup> This is a broad grant of authority that can include nearly any activity designed to benefit the entity’s members rather than the entity itself.

As the examples above illustrate, dispensing marijuana for medicinal purposes is far from the only reason to form a cooperative. Recent decisions concern cooperatives formed by mushroom farmers “to improve their position in the market for raw fresh mushrooms,”<sup>21</sup> school districts to provide themselves insurance,<sup>22</sup> school districts to provide themselves bus services for students,<sup>23</sup>

and boat dealers to obtain “better product pricing by leveraging the group’s buying power.”<sup>24</sup> The potential purposes and functions of cooperatives are countless.<sup>25</sup> Participating in a cooperative is voluntary, and resignation is possible.<sup>26</sup> A member need not be subject to excessive entanglement, although some cooperatives require long-term or other substantive commitments from members and potentially lengthy notice before a resignation takes effect.<sup>27</sup>

An entity may be a cooperative whether it is incorporated<sup>28</sup> or unincorporated.<sup>29</sup> California law recognizes unincorporated associations as entities.<sup>30</sup> There is no prohibition against a cooperative’s being organized as a limited liability company<sup>31</sup> or other structure. There are good reasons to use a corporate form for a cooperative. Corporations are a long-established format for doing business.<sup>32</sup> The limited liability company format is newer but also respected as an entity.<sup>33</sup>

When members conduct their activities jointly, a risk of joint liability arises. One or more participants may fail to meet their financial obligations, or some participants may engage in illegal activity. This makes limiting individual liability an important consideration. In the absence of a corporate entity or LLC status, members face greater risk of being subjected to a claim of personal liability arising from the organization’s endeavors.<sup>34</sup> Corporate status reduces this risk.

Corporate or LLC status has the advantage of readily binding members to enforceable obligations. Members are bound to abide by the entity’s bylaws, which are considered to be an agreement among the members.<sup>35</sup> A cooperative’s bylaws may contain provisions that can be found in a joint venture or association agreement. Individuals often feel less apprehension at joining an organization than entering a contract. The board of directors and members can have authority to alter the bylaws. Modifications thus occur more easily than in the case of a contract, which may require the approval of all parties.

Status as an entity facilitates clear division of rights and responsibilities among members, patrons, and different classes within these groups. Corporate or LLC status clarifies lines of authority and internal rights among members as well as relations to third persons. Memberships with different rights and restrictions are possible.<sup>36</sup> Voting rights of members permitted to vote must be equal,<sup>37</sup> but voting may be organized by subgroups within an organization.<sup>38</sup>

Shares and other forms of membership can have transfer restrictions, preventing holders from conveying their interest to others whose businesses or other attributes are not compatible with the cooperative.<sup>39</sup> Under the

Consumer Cooperative Corporation law, membership is not transferable unless the cooperative’s articles or bylaws permit it.<sup>40</sup> Restrictions may require a holder to stay engaged in a specified activity, remain in a line of business, or meet some other qualification in order to maintain a membership and enjoy rights in the entity.<sup>41</sup>

The need to comply with state securities laws can sometimes deter forming a corporation or LLC. However, California’s qualification requirements exempt the shares or memberships in a cooperative corporation if the investment does not exceed \$300.<sup>42</sup> Normally, memberships in a cooperative entity will also be exempt from registration requirements of the federal securities laws.<sup>43</sup>

## Taxes

Cooperatives are not established to generate profit for themselves.<sup>44</sup> Still, earnings may result, and the entity may realize net income. Cooperatives are subject to income taxation under subchapter T of the Internal Revenue Code.<sup>45</sup> Subject to certain requirements, an entity can deduct patronage dividends and allocations from its taxable income.<sup>46</sup> Patronage dividends must be based on the value or quantity of business that the entity does with the patron and the entity’s net earnings from business with all patrons. The cooperative must also have a pre-existing obligation to pay the dividends.<sup>47</sup>

A cooperative corporation’s taxable income does not include patronage dividends to the extent they are paid in money or certain other forms.<sup>48</sup> Other forms include “qualified written notices of allocation” that state the dollar amount credited to the patron’s account.<sup>49</sup> At least a fifth of these dividends must be paid in cash, the notice must be redeemable, and the patron must consent to include the noncash allocation.<sup>50</sup> These payments qualify for treatment as patronage distributions only if paid within eight-and-one-half months after the close of the taxable year.<sup>51</sup> Patronage dividends that are deductible to the entity are taxable to recipients and must be included in their gross income.<sup>52</sup> Thus, patronage dividends, including the amounts attributable to qualified notices of allocation and “per unit retain allocations,” must be included in the gross income of patrons in the tax year when these amounts are received.

Cooperative corporations are also subject to California tax law, but they enjoy a deduction for income from business conducted with members.<sup>53</sup> The California Revenue and Taxation Code provides that all income of organizations operating on a cooperative or mutual basis that results or arises from business activities for or with members is deductible in computing taxable income.

Similarly, income generated from activities conducted on a nonprofit basis with non-members is also deductible.<sup>54</sup>

These provisions are based on the theory that a cooperative's earnings are not profits but savings that result for patrons because of their pooled efforts.<sup>55</sup> Though normally distributed as patronage dividends, these amount to no more than a downward adjustment in the price of the cooperative's products or services, or an upward adjustment of prices received for products marketed for patrons.

The Revenue and Taxation Code permits this deduction regardless of whether the income is distributed or accumulated.<sup>56</sup> However, other deductions normally allocable to income become nondeductible when allocable to income that is deductible as a patronage dividend.<sup>57</sup> This is true regardless of whether the cooperative elects to claim the deduction for patronage dividends.<sup>58</sup>

### Antitrust Considerations

The Sherman Act prohibits combinations or agreements that restrain trade.<sup>59</sup> The Clayton Act and Robinson-Patman Act prohibit price discrimination.<sup>60</sup> The Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce.<sup>61</sup> Antitrust laws apply to cooperatives substantially the same way as these laws apply to trade associations.<sup>62</sup> Business cooperation does not conflict with preserving competition, and antitrust policy allows leeway for cooperative business activities.

Cooperative industrial research, market surveys, mutual insurance, joint advertising, joint representation before government, and a variety of other joint activities can occur without violating antitrust laws. Federal courts have upheld cooperative advertising programs<sup>63</sup> and group purchasing agreements involving cooperatives.<sup>64</sup> These activities are valid means to reduce costs.

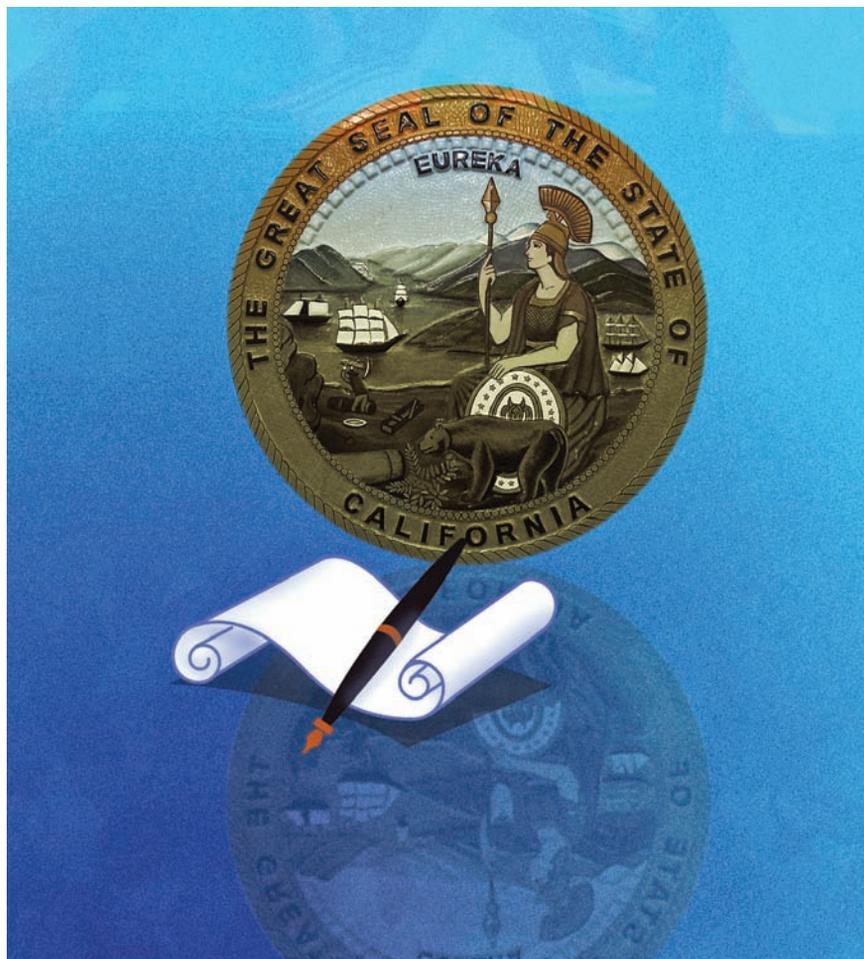
Congressional policy also acknowledges cooperatives. The Robinson-Patman Act, for example, exempts cooperatives from the Clayton Act's price discrimination provisions.<sup>65</sup> Cooperatives are thus able "to seek through cooperative endeavor the economies and savings of mass operations."<sup>66</sup> They are safeguarded against charges "based on their distribution of earnings or surplus among their members on a patronage basis."<sup>67</sup> Business cooperation also has limits. For example, retail price fixing is illegal.<sup>68</sup> It can also be illegal for a cooperative to require members to deal exclusively with the cooperative, whether buying products or services or engaging in distribution.

A line of California decisions concludes that California's Cartwright Act was "pat-

terned after the Sherman Act and both statutes have their roots in the common law."<sup>69</sup> Courts held that federal decisions interpreting the Sherman Act were applicable to problems arising under the Cartwright Act.<sup>70</sup> More recent judicial analysis, however, has determined that the California act was not specifically patterned after the federal antitrust

approval of proposed articles, bylaws, and other documents from members, and the organization must approve its incorporation in accordance with its rules and procedures.<sup>76</sup>

California allows one or more persons to form a cooperative corporation.<sup>77</sup> The incorporator need not be a natural person but can



law.<sup>71</sup> Yet "since the Cartwright Act and the federal Sherman Act share similar language and objectives," California courts still look to decisions under federal law for guidance.<sup>72</sup> California law may, however, be more favorable to cooperatives than federal law. The Business and Professions Code provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."<sup>73</sup>

### How Cooperatives Are Organized

Cooperatives are formed by some form of charter or organizational agreement. A consumer cooperative corporation may use articles of incorporation.<sup>74</sup> Organizations that do not incorporate can employ some form of charter.<sup>75</sup> If an unincorporated association incorporates under the consumer cooperative corporations law, principals must obtain

be any association, company, corporation, estate, partnership, or government agency.<sup>78</sup> The law allows existing unincorporated associations to change their status to become a cooperative corporation upon the organization's due authorization.<sup>79</sup>

A cooperative corporation's articles of incorporation must contain its name, which must 1) not be misleading, 2) include the word "cooperative," and 3) include some word indicating the entity's corporate status.<sup>80</sup> The articles must also describe its voting rights and rules for determining voting rights if they will be unequal among members.<sup>81</sup>

Some other provisions are optional but can only have effect if stated in the articles.<sup>82</sup> These include provisions limiting the "duration" of the cooperative, or distributing its remaining assets to charity after its debts are paid.<sup>83</sup> The code permits the articles to identify initial directors, provide for transfer of membership, allow members to establish an admission price, or make any

provision for managing the entity that is consistent with law.<sup>84</sup>

The corporation comes into existence when the secretary of state files the articles.<sup>85</sup> To operate, however, the organizers must adopt bylaws, elect directors (if not named in the articles), and take actions needed for any corporation to start business. These include appointing officers, opening a bank account, and complying with any local licensing requirements. The incorporators have authority to take some of these actions, and the initial directors normally have authority to complete the rest.<sup>86</sup>

Provisions setting the number or range of number of directors must be in the bylaws unless stated in the articles of incorporation.<sup>87</sup> Alternate directors are allowed, but the bylaws must state the manner and times of their election and the conditions of their service in place of a regular director.<sup>88</sup> The code permits any other provision that does not conflict with law or the articles of incorporation, to be included in the bylaws with regard to the management of the entity's activities and conduct of its affairs.<sup>89</sup> Some examples, which are expressly authorized, include provisions on the call, notice, and conduct of directors and committee meetings; elections and voting; director qualifications; director compensation; committees and their composition; compensation, tenure, and duties of officers; reports and financial statements; dues; membership fees; assessments and transfer fees; patronage distributions; eligibility for, status of, and suspension or expulsion from membership; and related matters.<sup>90</sup>

Directors do not have to be members of the corporation. Sometimes it is useful to include nonmembers on a board, especially nonmembers who have particular knowledge or experience that may benefit the organization. Some organizations divide their boards or set aside some board positions for representatives from geographic areas, or other classifications into which memberships are divided. For example, in a cooperative that performs services for members who grow, produce, or manufacture products, some board positions might be set aside for different categories of members. This assures that interests of members in each relevant group or classification are represented on the board. The cooperative corporation law facilitates this objective by expressly allowing voting based on geographic grouping or other organizational units.<sup>91</sup> While proxy and cumulative voting are prohibited,<sup>92</sup> the bylaws may provide for delegate voting.<sup>93</sup>

Organizers may seek to recruit members to capitalize the corporation and participate in its cooperative activities. The articles or

bylaws can provide any restrictions on who may become members and delineate required contributions or services from members.<sup>94</sup> Organizers or the board of directors may capitalize the corporation by issuing memberships in exchange for no consideration or consideration they deem appropriate.<sup>95</sup> In this manner, the organization may obtain initial capital.

Different classes of members may pay different consideration in exchange for different kinds of interests in the entity.<sup>96</sup> Voting power may vary, patronage rights may differ, or dividends might be provided for different classes of stock.<sup>97</sup> Any differences in rights of classes of members must appear in the articles of incorporation or bylaws.<sup>98</sup> Memberships may be issued for a definite period of time to expire at the end of that period.<sup>99</sup>

The solicitation and issuance of shares or memberships for consideration up to \$300 each can be exempt from the qualification requirements of California's corporate securities law.<sup>100</sup> The SEC has frequently indicated that solicitation and issuance of shares or memberships qualify for exemptions from registration under the federal securities laws as well.<sup>101</sup> Antifraud law still applies.<sup>102</sup>

The cooperative corporation may issue shares of stock or membership certificates.<sup>103</sup> For purposes of the cooperative corporation law, the terms "share" and "membership certificate" are synonymous and interchangeable.<sup>104</sup> However characterized, the instrument serves to evidence a proprietary interest in the corporation. If membership certificates are not used, some receipt or writing memorializing the purchase of a membership must be given to each person who purchases a membership.<sup>105</sup>

Before issuing a membership, the corporation must disclose in writing to the prospective shareholder or member the following information: 1) that the corporation is a cooperative corporation, 2) whether its articles of incorporation and bylaws will be furnished free on written request and the address where such request should be made, 3) a statement of transfer restrictions, 4) a description of the corporation's ability to levy dues, assessments, membership or transfer fees, 5) the amount and nature of services that the member must contribute to the corporation, 6) whether the corporation may redeem the membership and whether this may occur at the corporation or member's option, and 7) a statement describing any inequality in voting power.<sup>106</sup>

A member is free to resign at any time, although the articles of incorporation or bylaws may require reasonable notice before the resignation takes effect.<sup>107</sup> By resigning promptly after an assessment, a member can avoid liability for it; however, resignation

does not relieve the member from any liability already incurred.<sup>108</sup>

A membership may be terminated or suspended by the corporation or a member expelled if this action is done fairly, reasonably, and in good faith.<sup>109</sup> The Corporations Code provides nonexclusive safe-harbor procedures for these actions.<sup>110</sup> The articles of incorporation or bylaws may also provide that memberships are redeemable, in whole or in part, or on occurrence of certain events or payment of consideration.<sup>111</sup>

Voting rights are especially significant in a cooperative since it is by vote that members select the directors who make decisions for the entity. While a historic core principle of cooperatives is one member, one vote, the Corporations Code requires that each member have at least one vote<sup>112</sup> and that the "voting power of members having voting rights shall be equal."<sup>113</sup> Thus voting rights may be distributed unequally based on patronage or the number of persons affiliated with a member that is itself a cooperative.<sup>114</sup>

Members or shareholders of cooperative corporations are those who can vote to elect directors or who hold proprietary interests in the corporation.<sup>115</sup> Patrons are those who purchase goods or services or whose products or services are handled, processed, or marketed by the cooperative.<sup>116</sup> Individuals may have either or both relationships with the corporation.

Typically, members participate in the cooperative in order to be patrons. Hence, the purpose of a cooperative, as stated in the code, is to "conduct its business primarily for the mutual benefit of its members as patrons of the corporation."<sup>117</sup> While members may form and operate the cooperative, it is the patrons who conduct business with and benefit from the entity and who are entitled to receive its distributions, based on the volume or value of business they do with the corporation.<sup>118</sup>

Individuals or independent businesses that organize as cooperatives can provide themselves with a variety of benefits and services more economically than they could otherwise. While recent cases involving medical marijuana have made cooperatives the subject of court scrutiny, California cooperatives have demonstrated their practicality as alternatives to more traditional corporate structures. ■

<sup>1</sup> CORP. CODE §§12200 *et seq.*

<sup>2</sup> HEALTH & SAFETY CODE §§11362.7 *et seq.*

<sup>3</sup> HEALTH & SAFETY CODE §11362.775.

<sup>4</sup> *See, e.g.,* People v. Colvin, 203 Cal. App. 4th 1029 (2012); People ex rel City of Dana Point v. Holistic Health, 213 Cal. App. 4th 1016, 1020-21 (2013); People ex rel. city of Dana Point v. Beach Cities Collective, 2012 WL 1067903 (2012) (unpublished); City of Lake Forest v. Evergreen Holistic Collective, 138

- Cal. Rptr. 2d 332 (2012), *review granted and further consideration deferred*, 140 Cal. Rptr. 3d 795 (2012); *Traudt v. City of Dana Point*, 131 Cal. Rptr. 3d 887 (2011), *review granted*, 136 Cal. Rptr. 3d 666 (2012), *review dismissed*, 139 Cal. Rptr. 3d 1 (2012). *See also* Parloff, *Yes We Cannabis*, FORTUNE 67, 69 (Apr. 8, 2013).
- <sup>5</sup> *See, e.g.*, *Puget Sound Plywood, Inc. v. Comm’r*, 44 T.C. 305, 306 n.1 (1965); *Denton County Elec. Co-Op v. Hackett*, 368 S.W. 2d 765, 777 (2012).
- <sup>6</sup> *See, e.g.*, *Puget Sound Plywood, 44 T.C. 305, 306 n.1 (1965)*; *Denton County Elec. Co-Op, 368 S.W. 2d at 777*; *see also* CORP. CODE §12201.
- <sup>7</sup> CORP. CODE §12410(a)(1).
- <sup>8</sup> *See* *Bowles v. Inland Empire Dairy Ass’n*, 53 F. Supp. 210, 216 (D. D.C. 1943) (Rochdale principles); *Puget Sound Plywood, 44 T.C. at 306 n.1*.
- <sup>9</sup> *Puget Sound Plywood, 44 T.C. at 307*.
- <sup>10</sup> *California State Auto. Ass’n v. Franchise Tax Bd.*, 191 Cal. App. 3d 1253, 1258 (1987).
- <sup>11</sup> *Frost v. Corporation Comm’n*, 278 U.S. 515, 546 (1929) (Brandeis, J. dissenting) (quoted in *Farmers Co-op. Co. v. Birmingham*, 86 F. Supp. 201, 210 (N.D. Iowa 1949)); *Ford-Iroquois FS, Inc. v. C.I.R.*, 74 T.C. 1213, 1223 n.3 (1981).
- <sup>12</sup> *Frost, 278 U.S. at 545* (Brandeis, J. dissenting) (quoted in *Farmers Co-op. Co.*, 86 F. Supp. at 208; *see also* *Conway County Farmers Ass’n v. United States*, 588 F. 2d 592 (8th Cir. 1978); *United States v. Agway*, 696 F. 2d 1367 (Fed. Cir. 1982); *Corp. Code §12410(a)(1)*; *Denton County Elec. Co-Op v. Hackett*, 368 S.W. 2d 765, 777.
- <sup>13</sup> *See, e.g.*, *Van Groll v. Land O’Lakes, Inc.* 310 F. 3d 566, 567 (7th Cir. 2002); *United States v. Sun-Diamond Growers of Cal.*, 138 F. 3d 961, 963 (D.C. Cir. 1988); *Stratton v. Glacier Ins. Admin’rs, Inc.*, 2007 WL 274423 (E.D. Cal. 2007).
- <sup>14</sup> *See* <http://reic.uwcc.wisc.edu/water>.
- <sup>15</sup> *See, e.g.*, *La Caisse Populaire Ste. Marie v. United States*, 563 F. 2d 505, 509 (1st Cir. 1977); *see also* *First City Bank v. National Credit Union Admin.*, 111 F. 3d 433, 435 (6th Cir. 1997).
- <sup>16</sup> *See* <http://www.rei.com/about-rei.html>.
- <sup>17</sup> *See, e.g.*, *TruServ Corp. v. Flegles, Inc.*, 419 F. 3d 584, 587 (7th Cir. 2005); *Best Western Int’l Inc. v. HJ Motel, Inc.* 2010 WL 1781001 (D. Az. 2010); *Ace Hardware Corp. v. Advanced Caregivers, LLC* 2012 WL 5197942 (N.D. Ill. 2012); *Straw Hat Rests., Inc.*, 2010 Franchise Disclosure Document at 3, *available at* <http://www.corp.ca.gov>.
- <sup>18</sup> *Puget Sound Plywood, Inc. v. Comm’r*, 44 T.C. 305, 306 (1965).
- <sup>19</sup> CORP. CODE §12310(b).
- <sup>20</sup> CORP. CODE §12201.
- <sup>21</sup> *In Re Mushroom Direct Purchaser Antitrust Litig.*, 655 F. 3d 158, 161 (3rd Cir. 2011).
- <sup>22</sup> *Illinois Sch. Dist. Agency v. Pacific Ins. Co.*, 571 F. 3d 611, 613 (7th Cir. 2009).
- <sup>23</sup> *Nowak v. Transportation Joint Agreement of Cmty. Consol. School Dist. No. 47*, 255 Fed. Appx. 85, 86 (7th Cir. 2011).
- <sup>24</sup> *Manion v. Nagin*, 392 F. 3d 294, 296 (8th Cir. 2004).
- <sup>25</sup> *See, e.g.*, *Johnson v. Bethel Public Schs.*, 2011 WL 4007329 (W.D. Wash. 2011); *In Re Central Illinois Energy Co-op*, 2011 WL 3882274 (Bankr. C.D. Ill. 2011) (cooperative formed to construct, own, and operate a grain handling facility); *Papa Johns Int’l v. Spectacular Pizza, Inc.*, 2005 WL 3132337 (D. Ky 2005); *Abassi v. Welke*, 118 Cal. App. 4th 1353, 1355 (physicians).
- <sup>26</sup> CORP. CODE §12430(a); *but see* CORP. CODE §12430(b).
- <sup>27</sup> *See, e.g.*, *Scheenstra v. California Dairies, Inc.*, 213 Cal. App. 4th 370, 380 (2013); *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass’n, Inc.*, 692 N.E. 2d 905, 914 (Ind. App. 1998).
- <sup>28</sup> *See* CORP. CODE §§12200 *et seq.*
- <sup>29</sup> *See, e.g.*, *Pacific Merchant Shipping Ass’n v. Aubry*, 918 F. 2d 1409, 1413 (9th Cir. 1990); *Knutson Towboat Co. v. Oregon Board of Maritime Pilots*, 885 P. 2d 746, 748 (Or. App. 1994); *Safeco Ins. v. Hartford Ins.*, 238 Cal. App. 2d 77, 78 (1965).
- <sup>30</sup> CORP. CODE §§18200-18420.
- <sup>31</sup> *See, e.g.*, *In Re Mushroom Direct Purchaser Antitrust Litig.*, 2008 WL 583906, at \*1 (E.D. Pa. 2008).
- <sup>32</sup> *See generally* Samuel Williston, *History of the Law of Business Corporations before 1800*, 2 HARV. L. REV. 3 105, 106-110 (1888).
- <sup>33</sup> *Water, Waste & Land, Inc. v. Lanham*, 955 P. 2d 997, 1000 (Col. 1998).
- <sup>34</sup> *Steuer v. Phelps*, 41 Cal. App. 3d 468 (1974); *White v. Cox*, 17 Cal. App. 3d 824, 827 (1971). CORP. CODE §§12440, 17101, 18260.
- <sup>35</sup> *See, e.g.*, *De Bonii Corp. v. Del Norte Water Co.*, 200 Cal. App. 4th 1163, 1170 (2011).
- <sup>36</sup> CORP. CODE §§12313(c)(3), 12420.
- <sup>37</sup> CORP. CODE §12404. Cooperatives whose members are other cooperatives may permit unequal voting based on number of members, their patronage, or both. CORP. CODE §12314.
- <sup>38</sup> CORP. CODE §12333.
- <sup>39</sup> CORP. CODE §12410(b). *See also* CORP. CODE §12401(b)(3) (requirement to notify a prospective member of transfer restrictions).
- <sup>40</sup> CORP. CODE §12410(a)(1).
- <sup>41</sup> *See* CORP. CODE §12331(d).
- <sup>42</sup> CORP. CODE §25100(r).
- <sup>43</sup> The SEC has issued numerous no-action letters supporting the proposition that membership interests in the form of stocks or shares in cooperative ventures are not securities. *See, e.g.*, *Minn-Dak Farmers Co-operative* (Sept. 24, 2012); *Global Development Co-operative* (Oct. 19, 2011); *Employers Ins. Co. of Nev.* (Dec. 2, 2004); *Maine Mut. Fire Ins. Co.* (Nov. 15, 2001); *First Nonprofit Mut. Ins. Co.* (Oct. 24, 2001); *NBF Acquisition, Inc.* (Apr. 1, 1997); *Peer Marketing Assoc.* (Feb. 3, 1993); *Community Mercantile, Inc.* (Apr. 21, 1992); *Idealease, Inc.* (Sept. 15, 1988). *See also* Kathryn J. Sedo, *The Application of Securities Laws to Cooperatives: A Call for Equal Treatment of Nonagricultural Cooperatives*, 46 DRAKE L. REV. 259, 272 (1997).
- <sup>44</sup> CORP. CODE §12201.
- <sup>45</sup> I.R.C. §§1381-88.
- <sup>46</sup> I.R.C. §1382(b).
- <sup>47</sup> I.R.C. §1388(a); 26 C.F.R. §1.1388-1.
- <sup>48</sup> I.R.C. §1382(b).
- <sup>49</sup> *Id.*; I.R.C. §1388(c).
- <sup>50</sup> *Id.*
- <sup>51</sup> I.R.C. §1388(d).
- <sup>52</sup> I.R.C. §1385.
- <sup>53</sup> REV. & TAX. CODE §§24403, 22404, 24405, 22406.
- <sup>54</sup> *See* *California State Auto Ass’n v. Franchise Tax Bd.*, 191 Cal. App. 3d 1253, 1260 (1987) (not exempt from taxation but deductible).
- <sup>55</sup> *Id.* at 1260.
- <sup>56</sup> REV. & TAX. CODE §§24405, 24406; *California State Automobile Ass’n*, 191 Cal. App. 3d at 1260.
- <sup>57</sup> REV. & TAX. CODE §24425.
- <sup>58</sup> *Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal. App. 3d 95, 100-101 (1972).
- <sup>59</sup> 15 U.S.C. §1.
- <sup>60</sup> 15 U.S.C. §13(a).
- <sup>61</sup> 15 U.S.C. §45.
- <sup>62</sup> *See, e.g.*, *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 942 F. Supp. 905, 917 (S.D. N.Y. 1996).
- <sup>63</sup> *See, e.g.*, *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F. 3d 752, 757 (5th Cir. 2001) (A cooperative advertising program did not harm competition and therefore did not violate the Sherman Antitrust Act).
- <sup>64</sup> *See, e.g.*, *Langston Corp. v. Standard Register Co.*, 553 F. Supp. 632, 639 (D. Ga 1982).
- <sup>65</sup> 15 U.S.C. §13(b).
- <sup>66</sup> *Mid-South Distribs. v. F.T.C.*, 287 F. 2d 512, 516 (5th Cir. 1961).
- <sup>67</sup> *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing*, 472 U.S. 284, 292 (1985) (quoting H.R. CONF. REP. NO. 2951, 74th Cong., 2d Sess., 9 (1936)).
- <sup>68</sup> *See, e.g.*, *In Re Mushroom Direct Purchaser Antitrust Litig.*, 655 F. 3d 158, 162-163 (3rd Cir. 2011).
- <sup>69</sup> *Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976).
- <sup>70</sup> *Id.*
- <sup>71</sup> *State of California ex rel Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1153 (1988). *See also*, *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal. App. 4th 1, 8 (2012).
- <sup>72</sup> *Fisherman’s Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 334 (2003). *See also* *RLH Indus., Inc. v. SBC Comm’ns, Inc.*, 133 Cal. App. 4th 1277, 1284; *Amarel v. Connell*, 202 Cal. App. 3d 137, 142 (1988).
- <sup>73</sup> BUS. & PROF. CODE §16725.
- <sup>74</sup> CORP. CODE §12300(a).
- <sup>75</sup> *See* CORP. CODE §18008.
- <sup>76</sup> CORP. CODE §12301(a).
- <sup>77</sup> CORP. CODE §12300.
- <sup>78</sup> CORP. CODE §12245.
- <sup>79</sup> CORP. CODE §12301(a)-(d).
- <sup>80</sup> CORP. CODE §§201, 12311, 12300(c), 12302(b).
- <sup>81</sup> *See* CORP. CODE §12310(b)-(f).
- <sup>82</sup> CORP. CODE §§12313.
- <sup>83</sup> *Id.*
- <sup>84</sup> CORP. CODE §12313(c).
- <sup>85</sup> CORP. CODE §12300(c).
- <sup>86</sup> CORP. CODE §12316.
- <sup>87</sup> CORP. CODE §12331(a).
- <sup>88</sup> *Id.*
- <sup>89</sup> CORP. CODE §12331(c).
- <sup>90</sup> *Id.*
- <sup>91</sup> CORP. CODE §12333.
- <sup>92</sup> CORP. CODE §§12405; 12484.
- <sup>93</sup> CORP. CODE §12332.
- <sup>94</sup> CORP. CODE §§12331(c)-(d).
- <sup>95</sup> CORP. CODE §12400.
- <sup>96</sup> CORP. CODE §12420.
- <sup>97</sup> CORP. CODE §12314.
- <sup>98</sup> CORP. CODE §12421.
- <sup>99</sup> CORP. CODE §12430(c).
- <sup>100</sup> Promoters cannot expect or intend to make a profit and other conditions may apply. CORP. CODE §§25012(r).
- <sup>101</sup> *See* note 43, *supra*.
- <sup>102</sup> *See, e.g.*, CORP. CODE §25401.
- <sup>103</sup> CORP. CODE §§12240, 12248, 12401.
- <sup>104</sup> CORP. CODE §§12240, 12248.
- <sup>105</sup> CORP. CODE §12401(e).
- <sup>106</sup> CORP. CODE §12401(b).
- <sup>107</sup> CORP. CODE §12430. *See, e.g.*, *Scheenstra v. California Dairies, Inc.*, 213 Cal. App. 4th 370, 380 (2013).
- <sup>108</sup> CORP. CODE §12441.
- <sup>109</sup> CORP. CODE §12431.
- <sup>110</sup> CORP. CODE §12431(c); *cf.* *Sanchez v. Grain Growers Ass’n*, 126 Cal. App. 3d 665 (1981).
- <sup>111</sup> CORP. CODE §§12422, 12452.
- <sup>112</sup> CORP. CODE §12314.
- <sup>113</sup> CORP. CODE §12404.
- <sup>114</sup> CORP. CODE §12314.
- <sup>115</sup> CORP. CODE §12238.
- <sup>116</sup> CORP. CODE §12243.
- <sup>117</sup> CORP. CODE §12201. *See also* *People ex rel City of Dana Point v. Holistic Health*, 213 Cal. App. 4th 1016, 1027 (2013).
- <sup>118</sup> CORP. CODE §§12243, 12244, 12451, 12454.