

No. 278

## AN ACT

HB 2392

Amending the act of June 12, 1968 (P.L.173, No.94), entitled "An act to provide for the incorporation and regulation of cooperative agricultural associations; providing for the operation, taxation, merger, dissolution and winding up of such associations; conferring certain rights, powers, duties, restrictions, privileges and immunities upon them and their directors, officers, stockholders and members; conferring powers and imposing duties upon the courts, the Department of State, the Department of Agriculture and other State offices; and imposing penalties for the violation of this act," further providing for indemnification of certain officers, providing for records to be open, further providing for charges in the articles and bylaws, imposing additional duties on the Department of Agriculture and requiring the filing of a complete audit with the department.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Clause (16) of section 12, act of June 12, 1968 (P.L.173, No.94), known as the "Cooperative Agricultural Association Act," is amended to read:

Section 12. Powers of Association.—Each association shall have the following powers:

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(16) To indemnify any director or officer or former director or officer of the association, or any person who may have served at its request as a director or officer of another corporation or association in which it holds membership or owns shares of capital stock, or of which it is a creditor, in the manner provided by [law] *section 12.1*.

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Section 2. The act is amended by adding sections to read:

***Section 12.1. Indemnification of Directors, Officers and Other Persons.—(a) An association shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the association) by reason of the fact that he is or was a director, officer, employe or agent of the association, or is or was serving at the request of the association as a director, officer, employe or agent of another corporation, association, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the association, and, with respect to any criminal action or proceeding, had no***

*reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in, or not opposed to, the best interests of the association, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.*

*(b) An association shall have power to indemnify any person who was or is a party, or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the association to procure a judgment in its favor by reason of the fact that he is or was director, officer, employe or agent of the association, or is or was serving at the request of the association as a director, officer, employe or agent of another corporation, association, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the association and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence in the performance of his duty to the association unless and only to the extent that the court of common pleas of the county in which the registered office of the association is located or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court of common pleas or such other court shall deem proper.*

*(c) To the extent that a director, officer, employe or agent of an association has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) or (b) or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.*

*(d) Any indemnification under subsections (a) or (b) (unless ordered by a court) shall be made by the association only as authorized in the specific case upon a determination that indemnification of the director, officer, employe or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in such subsection. Such determination shall be made:*

*(1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding;*

*(2) if such a quorum is not obtainable, or, even if obtainable a majority vote of a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or*

*(3) by the shareholders.*

*(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the association in advance of the final disposition of such action, suit or proceeding as authorized in the manner provided in subsection (d) upon receipt of an undertaking by or on behalf of the director, officer, employe or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the association as authorized in this section.*

*(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any bylaw, agreement, vote of shareholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employe or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.*

*(g) An association shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employe or agent of the association, or is or was serving at the request of the association as a director, officer, employe or agent of another corporation, association, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the association would have the power to indemnify him against such liability under the provisions of this section, such insurance is declared to be consistent with the public policy of this Commonwealth.*

*Section 12.2. Association Records; Inspection.—(a) Every association shall keep at its registered office or principal place of business an original or duplicate record of the proceedings of the members and of the directors, and the original or a copy of its bylaws, including all amendments or alterations thereto to date, certified by the secretary of the association, and shall keep at its registered office or principal place of business or at the office of its transfer agent or registrar an original or a duplicate share register, giving the names of the members, their respective addresses and the number and classes of shares held by each. Every such association shall also keep appropriate, complete and accurate books or records of account including a record of all salaries, per diem payments, or other remunerations paid to each officer and director by the cooperative association in addition to remuneration received for agricultural commodities marketed through the association, which may be kept at its registered office, or at its principal place of business.*

*(b) Every member shall, upon written demand under oath stating the purpose thereof, have a right to examine in person or by agent or attorney, during the usual hours for business for any proper purpose, the share register, books or records of account, and records of the proceedings of the members and directors, and make copies of extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest*

*as a member. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the member. The demand under oath shall be directed to the association at its registered office in this Commonwealth or at its principal place of business.*

*(c) If the association, or an officer or agent thereof, refuses to permit an inspection sought by a member or attorney or other agent acting for the member pursuant to subsection (b) or does not reply to the demand within five business days after the demand has been made, the member may apply to the court of common pleas of the county in which the registered office of the association is located for an order to compel such inspection. Such court of common pleas is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The court may summarily order the association to permit the member to inspect the share register and the other books and records of the association and to make copies or extracts therefrom; or the court may order the association to furnish to the member a list of its members as of a specific date on condition that the member first pay to the association the reasonable cost of obtaining and furnishing such list and on such other conditions as the court deems appropriate. Where the member seeks to inspect the books and records of the association, other than its share register or list of members, he shall first establish:*

*(1) that he has complied with the provisions of this section respecting the form and manner of making demand for inspection of such document; and*

*(2) that the inspection he seeks is for a proper purpose.*

*Where the member seeks to inspect the share register or list of members of the association and he has complied with the provisions of this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the association to establish that the inspection he seeks is for an improper purpose. The court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this Commonwealth and kept in this Commonwealth upon such terms and conditions as the order may prescribe.*

Section 3. Sections 15 and 16 of the act are amended by adding subsections to read:

Section 15. Sale or Transfer of Stock; Redemption of Stock.—\* \* \*

*(e) A member shall not lose his membership in the association by his failure to do business with it if the failure is due to an act of God unless the period of time involved is at least twenty-four months.*

Section 16. Termination of Membership.—\* \* \*

*(c) A member shall not lose his membership in the association by his*

***failure to do business with it if the failure is due to an act of God unless the period of time involved is at least twenty-four months.***

Section 4. Section 18 of the act is amended to read:

Section 18. Voting by Proxy or Mail.—Unless provided otherwise in the articles of association or the bylaws, no member may vote by proxy or by mail. If proxy voting is authorized in the bylaws, every proxy shall be executed in writing by the member, or by his duly authorized attorney-in-fact, and filed with the secretary of the association. No unrevoked proxy shall be valid eleven months from the date of its execution. If voting by mail is permitted, absent members may, under rules prescribed by the bylaws, be permitted to vote on specific questions by written ballot prepared by the association, sent by mail to or deposited with the secretary or other proper officer of the association.

***Except for day to day operating decisions relating to existing programs, no cooperative association shall vote for its members on any new programs or substantially modified proposals affecting existing marketing or marketing development program or an amendment thereto, unless it has first conducted a mail poll of its membership, apprised the members of their rights to cast a vote and method of voting under the program and notified its membership of the results and its intentions at least five days prior to casting its vote. If proxy voting is allowed by the bylaws of the association the proxy shall be good only for the particular date and the specific issue for which the vote is called. For purposes of this paragraph, a proxy vote shall become null and void after the date set for the vote in the notices sent to the members.***

Section 5. Section 20 of the act is amended by adding subsections to read:

Section 20. Amendments to the Articles of Association.—\* \* \*

***(c) Each member of an association shall be notified by the association at least fifteen days before any vote is taken to amend the articles of the association as set forth in subsection (a) or to change the association to a capital stock basis as provided in subsection (b). Notification for proposed amendments to the articles of the association shall include a copy of the proposed amendment, a statement of its purpose and effect and the time, date, place and manner in which the vote will be taken on the proposed amendment. Notification for purposes of subsection (c) shall include a description of the stock as set forth in clause (3) of subsection (b) and the time, place and date of the meeting wherein the vote will be taken on the changeover.***

***(d) Whenever an amendment to the articles of an association is approved or an association changes to a capital stock basis, the association shall notify each member within thirty days of the approval or change by sending a copy of the approved amendment to the articles or a complete description of the capital stock to be issued by the association when the association basis changes.***

Section 6. Section 21, section 22, subsection (a) of section 24, section 27 and subsection (a) of section 29 of the act are amended to read:

Section 21. Bylaws.—**(a)** The association, before commencing business, shall adopt bylaws not inconsistent with law or its articles of association, and the bylaws may be altered, amended or revised from time to time in the manner provided *by law*, in the articles of association or the bylaws; **provided, that any bylaws].** *The association shall notify each member of a proposed change in the bylaws by sending to each member at least fifteen days prior to any vote on the proposed change, a copy of the proposed bylaw along with the time, date, place and manner of voting for the proposed changes. Whenever a proposed bylaw change is approved, the association shall mail each member a copy of the approved bylaw within thirty days of the approval. Bylaws authorized to be made by the board of directors may be repealed or changed and new bylaws made by the members or delegates. [and the members] Members may amend, repeal or change bylaws adopted by the directors or the delegates by petitioning the president of the board to hold a special meeting or special vote on the changes proposed by the members. The petition shall be signed by twenty-five per cent of the membership and shall state the specific bylaw to be changed and the proposed change. The president of the board shall call a special meeting or special vote within thirty days of the receipt of the petition. When a special meeting is called at least ten per cent of the membership shall be present to change the bylaws. [or delegates] Delegates may prescribe that any bylaw made by them shall not be altered, amended or repealed by the directors and members may provide that any bylaw made by them shall not be altered, amended or repealed by either the directors or the delegates.*

**(b)** The bylaws may provide for the following matters:

(1) The time, place and manner of calling and conducting meetings of the members or delegates, and the number of members or delegates (which may be less than a majority) that shall constitute a quorum;

(2) The manner of voting and the conditions upon which members or delegates may vote at general and special meetings;

(3) Subject to any provision thereon in the articles of association and in this act, the number, qualifications, eligibility requirements, manner of nomination, duties and terms of office of directors and officers; the time of their election and mode and manner of giving notice thereof;

(4) The time, place and manner for calling and holding meetings of the directors and any executive committee, and the number that shall constitute a quorum;

(5) Rules consistent with law and the articles of association for the management of the association, the establishment of any election districts, the making of contracts, the issuance, redemption and transfer of stock, the relative rights, duties, interests and preferences of members and stockholders, the mode, manner and effect of expulsion of a member;

(6) Any other provisions deemed necessary or proper to carry out the purposes of the association;

(7) Penalties for violations of the bylaws.

Section 22. Directors.—(a) The business of the association shall be managed by a board of not less than five directors, who shall be adult natural persons. All directors shall be members. The first directors shall serve until the first annual meeting of the association, at which time their successors shall be elected by the members of the association. Thereafter, a director shall hold office for **[the] a term of not less than one year nor more than three years** for which he is elected and until his successor shall have been elected and qualified. **Every election for a director shall be by secret ballot. A director may succeed himself.**

(b) Except as otherwise provided in the articles of association or the bylaws:

(1) A director shall be elected for a term of at least one year, except that the first directors shall serve only until the first annual meeting;

(2) Vacancies in the board of directors, including vacancies resulting from an increase in the number of directors, shall be filled by a majority of the remaining members of the board, though less than a quorum, and in the case in which the election of directors is by districts, the board shall fill the vacancy with a person who resides in or is a member of a local in the district in which the vacancy exists. Each person so elected shall be a director until his successor is elected by the members, who **[may] shall** make such election at the next annual meeting of the members or at any special meeting duly called for that purpose and held prior thereto;

(3) The meetings of the board of directors may be held at such place within this Commonwealth, or elsewhere, as a majority of the directors may from time to time appoint, or as may be designated in the notice calling the meeting;

(4) A majority of the directors in office shall be necessary to constitute a quorum for the transaction of business and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors;

(5) The board of directors may, by resolution adopted by a majority of the whole board, delegate two or more of its number to constitute an executive committee, which, to the extent provided in such resolution, shall have and exercise the authority of the board of directors and the management of the business of the association;

(6) Any action which may be taken at a meeting of the directors or the members of the executive committee may be taken without a meeting, if consent in writing setting forth the action so taken shall be signed by all of the directors or all of the members of the executive committee, as the case may be, and shall be filed with the secretary of the association.

**(7) Each director shall be provided with an updated copy of the articles of the association and the bylaws of the association along with any proposed amendments or changes.**

(c) The articles of association or the bylaws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such case the bylaws shall specify or the board of directors shall determine the number of directors to be elected by each district and the manner and method of dividing the directors and of districting and redistricting of the territory in which the association has members. The board of directors may use such standards as are reasonable for assigning directors and districting and redistricting the territory in which the association has members. The bylaws or the board of directors may provide for dividing districts into locals and for the election of district delegates at local meetings of members. The articles of association or the bylaws shall prescribe the procedures by which districts shall elect directors. The board of directors shall hear and decide any controversy arising out of a district election, and such decisions shall be incontestable except for fraud.

(d) If the articles or bylaws so provide, the directors of an association may be classified in respect to the time for which they shall severally hold office. In such case, each class shall be as nearly equal in number as possible, the term of office of at least one class shall expire in each year, and the members of a class shall not be elected for a shorter period than one year or for a longer period than three years. If, at any meeting, directors of more than one class are to be elected, each class of directors to be elected shall be elected in a separate election.

Section 24. Removal of Director; Removal of Officer.—(a) A director may be removed from office by the affirmative vote of not less than **[two-thirds] a majority** of the members present and voting at any regular or special meeting called for that purpose; or, in the case the bylaws provide for the election of directors by districts, by the affirmative vote of no less than **[two-thirds] a majority** of the members or delegates residing in or representing the district from which he was elected. The bylaws shall provide for the filing of charges, the giving of notice thereof, an opportunity to be heard and the procedures under which a director may be removed.

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Section 27. Audit of Operations; **[Summary of] Audit**; Failure to File **[Summary of] Audit**; Penalties.—(a) At the close of each fiscal year a complete *certified* audit of the operations of the association shall be made, by a qualified *certified public* accountant or accountants *or by a qualified public accountant or accountants*, employed by the board of directors, the written report of whom shall include the balance sheet, operating statement commissions; salaries and other remunerations of managers and officers and other proper information, and shall be submitted to the members at the next regular meeting. Within **[three] six** months after the expiration of the fiscal year for which made, the secretary of the association shall file a



[summary of the statistical information contained in the report of audit, to be called a "summary of audit,") *copy of the certified audit* with the Secretary of Agriculture of this Commonwealth upon a form prescribed by the Secretary of Agriculture. *The secretary of the association shall also include in the yearly audit report to the Secretary of Agriculture a list of the current officers and directors and their addresses.*

(b) Any association which, [for three successive years,] *after one hundred-twenty days from the close of the fiscal year* shall fail to file with the Secretary of Agriculture the [summaries of] *certified* audit hereinbefore provided, shall be notified by certified mail by the Secretary of Agriculture that such [summaries] *certified audit* must be filed within sixty days from the date of mailing of such notice, and that upon failure to so file such [summaries] *certified audit* within the time so limited, the Secretary of Agriculture shall notify the Secretary of the Commonwealth and the association that its articles of association have been forfeited, annulled and vacated for failure to comply with the provisions of this section. However, such forfeiture shall not prejudice the rights of creditors and members in and to any property, assets, claims or demands of or belonging to such association. The Secretary of Agriculture shall, on or before April 1, 1968, and annually thereafter, furnish each existing association and make public and record with the Secretary of the Commonwealth, a listing of the status of existing associations. Any association which has so automatically forfeited its articles of association shall be reinstated as an association under this act if the unfiled [summaries of] *certified* audit [for the three preceding years] be submitted to the Secretary of Agriculture within [one year] *ninety days* next succeeding such automatic forfeiture or within any extension thereof as may be granted by the Secretary of Agriculture, who shall thereupon notify the Secretary of the Commonwealth that such association has complied with the provisions of this section of this act, and in such event no new articles of association need be filed with or obtained from the Department of State. *The Department of Agriculture shall review such yearly certified audits and issue such reports and recommendations to each member of the board of directors of the association as the department deems necessary.*

(c) No person shall, without the consent or authorization of the board of directors of the association, except for official purposes or in obedience to judicial process, make or permit any disclosure whereby any information contained in a [summary of] *certified* audit may be identified as having been furnished by said association. No person shall knowingly exercise or attempt to exercise any powers, privileges or franchises for an association, given by this act, while such association's articles are forfeit, unless such person shall be and disclose that he is acting to reinstate the association to full privileges under this act, or is acting to wind up the affairs of such an association. Any person violating the prohibitions set forth in this subsection shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than three

hundred dollars (\$300), or imprisoned for not more than six months, or both.

*(d) The Department of Agriculture in cooperation with the Pennsylvania State University's College of Agriculture shall develop and implement an educational program relating to the powers, duties, functions and responsibilities of directors for cooperative associations. The Secretary of Agriculture shall appoint an advisory council consisting of nine individuals including members and directors of associations, two association managers and other interested individuals who shall advise the Department of Agriculture on the development of the director's educational program. Two members of the advisory council shall be managers of associations. In addition the Department of Agriculture shall furnish to each cooperative association director, free of charge when said director is first elected as a director, an updated copy of this act and any amendments thereto within sixty days of the amendment's enactment.*

*(e) A certified audit shall not be withdrawn without the approval of the board of directors. The board of directors may seek legal recourse if the audit is conducted improperly.*

Section 29. Dissolution, Merger, Consolidation or Sale, Lease or Exchange of Assets.—(a) A domestic association may dissolve and wind up, may merge or consolidate with one or more domestic or foreign associations or business corporations engaged in a related activity, or may sell, lease, or exchange all, or substantially all, of its property and assets, in the same manner as is provided for business corporations under the provisions of the "Business Corporation Law" insofar as such provisions are applicable, and where not applicable, in a manner analogous to that set forth in said provisions. ***Before any dissolution, merger, consolidation, sale, lease or exchange of assets of a domestic association can take effect, the membership shall be notified by the association at least fifteen days prior to a vote on the proposed change. A majority of the members voting shall be necessary for approval of the proposed change.*** The procedures and effect of the dissolution and winding up, merger or consolidation, or the sale, lease, or exchange of all, or substantially all, the property and assets of an association shall be governed in accordance with the aforesaid provisions of the "Business Corporation Law." For the purposes of this section, dissenting stockholders or members of an association shall acquire the same rights and remedies with respect to their stock or membership interest as are granted to dissenting shareholders with respect to their stock under the provisions of the "Business Corporation Law."

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Section 7. This act shall take effect in 60 days.

APPROVED—The 2nd day of December, A. D. 1976.

MILTON J. SHAPP