

Chapter DFI-Sec 6

FRAUDULENT PRACTICES

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Note: Renumbered from SEC 5, Register, December, 1977. Chapter SEC 6 was renumbered chapter DFI-Sec 6 under s. 13.93 (2m) (b) 1., Stats., Register, December, 1996, No. 492.

DFI-Sec 6.01 Application of proceeds. An issuer of securities or any person who is an officer, director or controlling person of the issuer is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities within the meaning of s. 551.41 (1), Stats., if the person applies or authorizes or causes to be applied any material part of the proceeds from the sale of the securities in any material way contrary to the purposes specified in the prospectus used in the offering of the securities and not reasonably related to the business of the issuer as described in the prospectus.

History: Cr. Register, December, 1969, No. 168, eff. 1-1-70; am., Register, December, 1980, No. 300, eff. 1-1-81.

DFI-Sec 6.02 Stock distributions. A person authorizing or causing the distribution of securities as a stock dividend by a corporation other than the issuer, without registration of the securities under ch. 551, Stats., or the securities act of 1933, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities in broker-dealer transactions, within the meaning of s. 551.41 (1), Stats., if:

(1) The issuer of the securities was organized or the securities were acquired for the purpose of the distribution or in connection therewith, either by the distributing corporation or by any person in control of, controlled by, or under common control with, the distributing corporation; or

(2) The issuer has nominal assets or income at the time of the distribution; and if the person has reason to believe that the distribution will be followed by transactions in the securities effected through broker-dealers.

History: Cr. Register, December, 1969, No. 168, eff. 1-1-70; am. Register, August, 1972, No. 200, eff. 9-1-72; am., Register, December, 1980, No. 300, eff. 1-1-81; corrections made under s. 13.93 (2m) (b) 1., Stats., Register, December, 1996, No. 492.

DFI-Sec 6.03 Securities transfers. An issuer of outstanding securities registered under s. 551.25 or 551.26, Stats., or transactions in which are exempted from registration under s. 551.23 (3) (c) or (d), Stats., or any controlling person of the issuer, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities within the meaning of s. 551.41 (1), Stats., if the issuer fails to provide adequate facilities for the transfer and delivery of the securities to the purchasers thereof without unreasonable delay, either directly or through its transfer agent for the securities.

History: Cr. Register, August, 1972, No. 200, eff. 9-1-72; am., Register, December, 1980, No. 300, eff. 1-1-81.

DFI-Sec 6.04 Broker-dealer activities. The terms "manipulative, deceptive or other fraudulent device or contrivance" in s. 551.43, Stats., are defined to include the activities described in rules 15c1-1, 2, 4, 5, 6, 7 and 8, 15c2-1, 4, 5, 6, 7, 8 and 11, and 15g-2, 3, 4, 5 and 6 under the securities exchange act of 1934.

History: Cr. Register, December, 1969, No. 168, eff. 1-1-70; renum. from SEC 5.03 to be SEC 5.04 and am., Register, August, 1972, No. 200, eff. 9-1-72; am. Register, December, 1990, No. 420, eff. 1-1-91; am. Register, December, 1994, No. 468, eff. 1-1-95.

DFI-Sec 6.05 Going private transactions. (1) An issuer whose equity securities of any class have been registered under ch. 551, Stats., or predecessor laws or section 12 of the securities exchange act of 1934, and which, on the date of the initial offer, notice or solicitation relating to the proposed transaction, are held of record by 100 or more persons in this state, which number of holders constitutes 20% or more of the total number of holders of record of the securities, or any affiliated person of the issuer, is deemed to employ a "device, scheme or artifice to defraud" holders of the securities, or to engage in an "act, practice or course of business which operates or would operate as a fraud or deceit" upon the holders, within the meaning of s. 551.41, Stats., if the issuer or person enters into any transaction (including a series of transactions) in this state involving a purchase of any equity security of the issuer, other than an arm's length purchase by a person not affiliated with the issuer, which transaction has, or may have, either of the effects described in sub. (2) unless:

(a) 1. The terms of the transaction, including compensation for the equity securities to be purchased, are fair to all holders of the securities. The terms of the transaction shall be presumed to be fair if:

a. The compensation is no less than that independently recommended by 2 qualified, independent appraisers after reasonable investigation considering all relevant factors, and the issuer's board of directors states that the compensation is fair to security holders and was determined in good faith;

b. The latest public offering of the securities occurred more than 10 years prior to the transaction, or the compensation is greater than the public offering price;

c. More than 50% of the securities held by persons not affiliated with the issuer approve the transaction; and

d. Disclosure materials are distributed to all holders of the securities containing the disclosures meeting the requirements in rule 13e-3 under the securities exchange act of 1934 and schedule 13E under that rule.

2. The failure to meet one or more of the conditions in subd. 1 shall not create a presumption as to the fairness or unfairness of the transaction.

(b) The issuer or person mails or delivers to each holder of record of the securities and files with the division, at least 20 days prior to any purchase or shareholder vote authorizing the purchase (if required), a complete and accurate description of the transaction, including, without limitation, the identity of the parties to the transaction, the source and amount of funds, the purpose of the transaction, any material plans or proposals concerning the issuer, any contracts, arrangements or understanding involving the issuer with respect to its equity securities, a statement of the intentions of all affiliated persons (if known), current financial information concerning the issuer including pro forma data showing the effect of the transaction, federal tax consequences of the transaction to security holders and the issuer, the nature of the market for the securities before and after the transaction, the price at which purchases will be made and the basis therefor, summaries in reasonable detail of all appraisal reports or opinions (including any contrary or additional to those relied upon) and a statement that copies of the reports or opinions will be provided upon request, a state-

ment of all projected expenses in connection with the transaction, and all other material information;

(c) If the transaction includes a tender offer or request or invitation for tenders, the offeror shall:

1. Permit tenders to be withdrawn at any time within 7 days and after 60 days from the date of the offer;

2. Purchase on a pro rata basis those securities tendered within 10 days from the date of the offer, if more valid tenders are received within that period than the offeror has agreed to accept; and

3. Purchase on substantially identical terms and for identical compensation from all validly tendering security holders;

(d) Security holders of the class not affiliated with the issuer shall be treated not less favorably in connection with the transaction than any who are so affiliated; and

(e) The division does not disallow the transaction by order within 15 days of the filing of the description of the transaction required by par. (b), upon a finding that the transaction constitutes a device, scheme or artifice to defraud or tends to operate as a fraud or deceit upon holders of the securities, or would so operate.

(2) The provisions of sub. (1) apply to a transaction or series of transactions which has, or may have the effects in par. (a) or (b), unless the transaction meets the requirement of rule 13e-3 (g) (2)

under the securities exchange act of 1934.

(a) Causing a class of equity securities of the issuer to be subject to delisting from a national securities exchange registered under the securities exchange act of 1934, or cease to be authorized to be quoted in NASDAQ; or

(b) Causing a class of equity securities of the issuer to be eligible for termination of registration, or suspension of reporting requirements, under the securities exchange act of 1934 or under ch. 551, Stats.

(3) In this section, "affiliated" refers to persons who are partners, officers or directors of the issuer (or persons occupying a similar status or performing similar functions), or directly or indirectly in control of, controlled by, or under common control with, the issuer. Control may be presumed by ownership of, or the power to vote, more than 5% of the outstanding voting securities of the issuer (either alone or pursuant to an arrangement or understanding with one or more other persons).

History: Emerg. cr. eff. 11-4-75; Cr. Register, February, 1976, No. 242, eff. 3-1-76; am. (1) (intro.) and (e) and (2) (intro.), Register, December, 1977, No. 264, eff. 1-1-78; am. (2) (intro.), Register, September, 1978, No. 273, eff. 10-1-78; am. (1) (a) 1. and 3., (b), (c) intro. and (3), Register, December, 1980, No. 300, eff. 1-1-81; am. (2) (intro.), Register, December, 1983, No. 336, eff. 1-1-84; am. (1) (a) 2. and 3., cr. (1) (a) 4., Register, December, 1984, No. 348, eff. 1-1-85; renum. (1) (a) to be (1) (a) 1. and am. 1. c., cr. (1) (a) 2., Register, December, 1991, No. 432, eff. 1-1-92; correction in (2) (intro.) made under s. 13.93 (2m) (b) 4., Stats., Register, December, 1994, No. 468; reprinted to restore dropped copy in (2) (intro), Register, October, 1995, No. 478.