

## Chapter SEC 5

## FRAUDULENT PRACTICES

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**SEC 5.01 Application of proceeds.** An issuer of securities registered under chapter 551, Wis. Stats., or any person who is an officer, director or controlling person of such issuer is deemed to employ a "device, scheme or artifice to defraud" the purchasers of such securities within the meaning of section 551.41 (1), Wis. Stats., if such person applies or authorizes or causes to be applied any material part of the proceeds from the sale of such securities in any material way contrary to the purposes specified in the prospectus used in the offering of such 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.

**SEC 5.02 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 such securities under chapter 551, Wis. Stats., or the securities act of 1933, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of such securities in broker-dealer transactions, within the meaning of section 551.41 (1), Wis. Stats., if (a) 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 (b) the issuer has nominal assets or income at the time of the distribution; and if such 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.

**SEC 5.03 Securities transfers.** An issuer of outstanding securities registered under sections 551.25 or 551.26, Wis. Stats., or transactions in which are exempted from registration under section 551.23 (3) (c) or (d), Wis. Stats., or any controlling person of such issuer, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of such securities within the meaning of section 551.41 (1), Wis. Stats., if the issuer fails to provide adequate facilities for the transfer and delivery of such securities to the purchasers thereof without unreasonable delay, either directly or through its transfer agent for such securities.

**History:** Cr. Register, August, 1972, No. 200, eff. 9-1-72.

**SEC 5.04 Broker-dealer activities.** The terms "manipulative, deceptive or other fraudulent device or contrivance" in section 551.43, Wis. Stats., are defined to include the activities described in rules

Register, February, 1976, No. 242

15c1-1, 2, 4, 5, 6, 7 and 8 and 15c2-1, 4, 5, 7, 8 and 11 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.

**SEC 5.05 Going private transactions.** (1) An issuer whose equity securities of any class are or have been registered under chapter 551, Wis. Stats., or predecessor laws or s. 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 such securities, or any affiliated person of such issuer, is deemed to employ a "device, scheme or artifice to defraud" holders of such securities, or to engage in an "act, practice or course of business which operates or would operate as a fraud or deceit" upon such holders, within the meaning of section 551.41, Wis. Stats., if such 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 is intended to have, either of the effects described in subsection (2) hereof, unless:

(a) 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:

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

2. 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; and

3. More than 50% of the securities held by persons not affiliated with the issuer approve the transaction; provided, however, the absence of one or more of the above conditions shall create no presumption as to the fairness or unfairness of the terms of the transaction;

(b) Such issuer or person mails or delivers to each holder of record of the securities and files with the commissioner, at least 20 days prior to any purchase or shareholder vote authorizing such 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 such reports or opinions will be provided upon request, a statement 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, such 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 commissioner does not disallow the transaction by order within 15 days of the filing of the description of the transaction required by subsection (1) (b), upon a finding that the transaction tends to operate as a fraud or deceit upon holders of the securities, or would so operate.

(2) The provisions of subsection (1) apply to a transaction which has, or is intended to have, either of the following effects:

(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 chapter 551, Wis. Stats.

(3) "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.