CR 86-168

CERTIFICATE

STATE OF WISCONSIN)
OFFICE OF THE) SS
COMMISSIONER OF SECURITIES)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Ulice Payne, Jr., Commissioner of the State of Wisconsin Office of the Commissioner of Securities and custodian of the official records of said agency do hereby certify that the annexed rules relating to the operation of Ch. 551, Wis. Stats., the Wisconsin Uniform Securities Law, Ch. 552, the Wisconsin Corporate Take-Over Law, and Ch. 553, the Wisconsin Franchise Investment Law, relating to definitions under the securities and franchise laws, securities and franchise registration exemptions, securities and franchise registration standards, requirements and procedures, securities broker-dealer, securities agent and investment adviser licensing requirements and procedures, and examination fees under the securities, franchise and take-over laws, were duly approved and adopted by this agency on November 24, 1986.

I further certify that said copy has been compared by me with the original on file in this agency and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Office of the Commissioner of Securities in the city of Madison, this 24th day of November, 1986.

[SEAL]

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Ulice Payne Jr.
ULICE PAYNE, JR.
Commissioner of Securities
State of Wisconsin

1-1-87

ORDER OF THE

OFFICE OF THE COMMISSIONER OF SECURITIES

STATE OF WISCONSIN

ADOPTING, AMENDING AND REPEALING RULES

To repeal SEC 2.01(7m); to renumber SEC 5.01(4)(g); to amend SEC 1.02(6)(a), 2.01(1)(b), 2.01(1)(c)2. and 3., 2.01(3)(a), 2.01(4)(b), 2.02(1)(a), 2.02(9)(c), 3.06(1) and (2), 3.11, 3.17, 4.01(2)(b), 4.03(2), 4.06(1)(t), 5.01(3), 5.06(9), 7.01(1)(c), 7.01(2)(e) and (f), 7.01(3)(d) and (e), 8.01,. 27.01(4) and (5), 31.01(9) and 35.01(2)(a) and (b); and to create SEC 2.02(10)(k), 3.145, 5.01(4)(g), 5.06(10), 8.10, 9.01(1)(b) 15. and 16., 27.01(6), 32.06(3) and 35.05(3), relating to definitions under the securities and franchise laws; securities and franchise registration exemptions; securities and franchise registration standards, requirements and procedures; securities broker-dealer, securities agent and investment adviser licensing requirements and procedures; and examination fees under the securities, franchise and take-over laws.

Pursuant to the authority vested in the Office of the Commissioner of Securities by ss. 551.63(1) and (2), 551.22(1)(a) and (b), 551.22(8) and (9), 551.23(15), 551.23(18), 551.27(5), 551.32(2) and (4), 551.33(1) and (4), 551.34(1)(g), 551.52(3), 552.15, 553.58 and 553.72(3), Stats., the Office of the Commissioner of Securities repeals, amends and adopts rules interpreting those sections as follows:

SECTION 1. SEC 1.02(6)(a) is amended to read:

SEC 1.02(6)(a). Any investment in a common enterprise with the expectation of profit to be derived through the essential managerial efforts of someone other than the investor. In this subsection, a "common enterprise" means an enterprise in which the fortunes of the investor are ~~interwoven with and dependent upon~~ tied to the efficacy of the efforts ~~and successes~~ of those seeking the investment or of a 3rd party; and

ANALYSIS: These amendments broaden applicability of the so-called "modified Howey" test contained in this rule as used for determining the existence of an "investment contact" under the definition of "security" in sec. 551.02(13)(a), Wis. Stats. The investment contract/security concept has developed under state and federal court decisions that have held state and federal securities laws to be applicable to novel forms of financing and investment schemes, and not limited to the conventional forms of stock, bond and note financings. The so-called "modified Howey" test derives from the United States Supreme Court case SEC v. W.J. Howey Co. 328 U.S. 293 (1946) (involving the purchase of specified acreage in a producing citrus grove combined with an "optional" management

agreement), as modified by subsequent cases, particularly SEC v. Glenn W. Turner Enterprises, Inc. 474 F.2d 476 (1973) (cert. denied). One of the elements of an investment contract developed in such subsequent cases has been that of so-called "vertical commonality," which is codified in current rule SEC 1.02(6)(a).

The "modified Howey" test in this rule was promulgated in Wisconsin effective January 1, 1978, along with a companion rule in SEC 1.02(6)(b), Wis. Adm. Code, adopting the so-called "risk capital" test for an investment contract/security under State v. Hawaii Market Center, Inc. 485 P.2d 105 (1971). Neither of the two Wisconsin rules establishing these "investment contract" tests have been substantively amended since they were promulgated.

In federal court decisions over the past several years, a "split" of decisions has occurred construing the "vertical commonality" element of an investment contract security. In 2 recent cases in the Southern District of New York, Mechigian v. Art Capital Corp. 612 F. Supp. 1421 (1985) and Cahill v. Contemporary Perspectives, Inc. CCH Federal Securities Law Reporter Para. 92,720 (1986), courts have characterized language such as that used in current rule SEC 1.02(6)(a) as constituting a "more restrictive" definition of the so-called "vertical commonality" test in determining whether there is a "common enterprise" pursuant to Howey. Those recent decisions also referenced that "A broader definition of 'vertical commonality' requires only that 'the fortunes of all investors are inextricably tied to the efficacy of the promoter's efforts'." See SEC v. Continental Commodities, 497 F.2d 516 (5th Cir. 1974), SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974).

Because of the remedial nature of the securities laws and their investor protection purposes, the Wisconsin rule

is amended to provide the "less restrictive" language of the "vertical commonality" test, thereby making it harder for promoters of fraudulent or improvident investment schemes to evade the Wisconsin securities law. Virtually all such schemes can be tailored to generate large fees or the like for the promoter while the fortunes of the investors are not in some sense "interwoven with" the "successes" of the promoter, thus avoiding the "vertical commonality" element under the "more restrictive" definition. Under the rule as amended, aggrieved investors, as well as this agency, will continue to be able to establish the existence of an investment contract security as intended under the "modified Howey" rule. It is appropriate and warranted to substitute the less restrictive language also because of the policy enunciated in Howey (and followed in subsequent U.S. Supreme Court decisions) defining a "security," that there be created a "...flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits."

A letter submitted during the public comment process commented that the language of the amendment to the rule in its initial comment draft form appeared to sweep into the rule's coverage discretionary trading account arrangements that securities brokerage firms, as well as investment advisers, have for years routinely conducted for their customers--and which accounts have not generally been subject to the securities registration requirement under the Wisconsin Uniform Securities Law. To eliminate any such unintended effect, a separate registration exemption is created in SECTION 9 under the Commissioner's authority in sec. 551.23(18), Wis. Stats., to exempt by rule transactions where registration is not necessary or appropriate.

SECTION 2. SEC 2.01(1)(b) is amended to read:

SEC 2.01(1)(b) Any guarantee of, or any put option or similar agreement to purchase from a holder of, any security exempt under s. 551.22(1), Stats., is exempted from s. 551.21, Stats.

ANALYSIS: This amendment accords registration exemption status under the rule to any put option or similar agreement to purchase from a holder, any security exempt under the so-called "governmental security" exemption in sec. 551.22(1), Wis. Stats. The amendment deals with a recently developed mechanism to provide enhanced liquidity for the benefit of purchasers in offerings of governmental debt securities. The mechanism essentially involves an agreement whereby a third party agrees to repurchase the governmental debt security from the original purchaser in the offering under terms described in the offering documents. The mechanism has variations on the basic theme depending upon who the third party repurchaser is--in some instances the repurchaser is an affiliate of the broker-dealer firm selling the bond offering, in others a separate non-profit "liquidity corporation" is created, in yet others, a bank or trust company has the repurchase obligation.

The securities law issue created is that the repurchase agreement--whereby a third party is obligated to purchase bonds from the initial investors demanding repurchase--constitutes a "security" separate and distinct from the underlying bonds under the definition set forth in sec. 551.02(13)(a), Wis. Stats., as being an "...option...to purchase or sell, any of the foregoing [note, bond, debenture]." As such, and under sec. 551.21(1)., Wis. Stats., the "separate security" requires its own registration or registration exemption in order to be

offered or sold in a public offering in Wisconsin.

For the following reasons, it appears appropriate to accord registration exemption status to the repurchase obligation/separate security: (1) The repurchase obligation's purpose is only to facilitate liquidity for resale of a governmental security that is already exempt from registration. The repurchase obligation does not add to the safety of the security--in terms of enhancing or guaranteeing the payment of bond interest or principal. (2) Even a "guarantee" of a security exempt under 551.22(1)--which guarantee does add to the safety/ability to pay debt service and is also a "separate security"--is already accorded automatic exemption status under the rule in its current form.

SECTION 3. SEC 2.01(1)(c)2. and 3. are amended to read:

SEC 2.01(1)(c)2. The issuer's annual financial statements relating to fiscal years ending on or before December 31, ~~1985~~ 1990, are prepared according to generally accepted accounting principles as provided in subd. 1., but where the auditor's opinion is qualified with respect to the fixed asset account group; or

3. The issuer's annual financial statements relating to fiscal years ending on or before December 31, ~~1985~~ 1987, are prepared in compliance with accounting guidelines or procedures mandated by state law or by rule of any state agency, or recommended by any state agency.

ANALYSIS: The amendments to these rules extend the time periods that the alternative accounting procedures under

the rules can be used by certain issuers of governmental securities to qualify for the "governmental security" registration exemption in sec. 551.22(1)(a), Wis. Stats. The two rules were part of several rules promulgated after the enactment (effective January 1, 1983) of 1981 Wisconsin Act 53 under which the Wisconsin legislature: (1) established as a requirement for use of the exemption that the governmental issuer have its financial statements prepared on the basis of generally accepted accounting principles ("GAAP"); and (2) allowed the Commissioner to establish by rule alternative accounting guidelines that would enable use of the exemption. Using that statutory authority, the Commissioner of Securities' Office enacted several rules, including the two "grace period"-type rule provisions in this SECTION, SEC 2.01(1)(c)2. and 3. Those rules established alternative, less-than-full-GAAP, accounting procedures that could be used by governmental issuers for the offer and sale of their debt securities under the exemption of 551.22(1)(a), Wis. Stats., through the end of their 1985 fiscal year to allow those issuers time to implement and have in place full-GAAP financial statement and accounting procedures by such date. Those two rules established expiration dates for their use tied to an issuer's financial statements for fiscal years ending 1985. The practical effect is that, in the absence of an extension of the effective date of the rules, those issuers that do not have full-GAAP prepared financial statements by the end of their 1986 fiscal year will no longer be able to utilize the exemption under sec. 551.22(1)(a), Wis. Stats.

With regard to the amendments in this SECTION, the expiration date in rule SEC 2.01(1)(c)2. is extended to 1990. That rule allows as an alternative to full-GAAP financial statements, a governmental issuer's financial statements that are prepared according to GAAP except for the fixed asset account group. During the period of effectiveness of this "grace period" rule

in SEC 2.01(1)(c)2., numerous Wisconsin municipalities and other governmental securities issuers who used that rule have achieved total, full-GAAP financial statements. However, because a number of governmental issuers that have used the alternative accounting rule in SEC 2.01(1)(c)2. have not finished putting into place the fixed asset account group auditing and accounting procedures, it is appropriate to extend until 1990 the use of this rule by such governmental issuers to enable them to complete the fixed asset account group process and thereby achieve complete conversion to full-GAAP financial statements and accounting procedures.

With regard to the amendment to SEC 2.01(1)(c)3., the Wisconsin Department of Justice, as bond counsel for the State of Wisconsin, requested by letter that the Commissioner of Securities' Office extend until 1990 the expiration date for use of the exemption in subd. (c)3. An emergency rule was promulgated, effective July 1, 1986, making such a change to 1990, and the amendment to subd. (c)3. in its initial comment draft form had proposed to make permanent the emergency rule change. The rule provision in subd. (c)3. is the "grace-period-through-fiscal-year-1985" alternative accounting guideline rule that has been used by the State of Wisconsin for its debt securities offerings, as well as by other governmental securities issuers including Wisconsin school districts and vocational education districts, since the effectiveness of 1981 Wisconsin Act 53. The rule establishes as an alternative accounting guideline for use through fiscal year 1985, accounting procedures mandated or recommended by state law or rule.

During the "grace period" accorded since the rule was originally adopted in 1982 and 1983, all 400 Wisconsin school districts and virtually all vocational districts have achieved full-GAAP status. However, during as well as following the public comment period, discussions took place involving the Governor's Office and representatives of

the Wisconsin Department of Administration representing the State of Wisconsin in its bond sales activities, which discussions included the subject of what action has been taken by the State toward achieving full-GAAP financial statement and accounting procedures. At such discussions, representatives of the State of Wisconsin indicated to this Office that the State has not, to date, made any appreciable steps toward having its financial statements prepared according to generally accepted accounting principles under the general requirement established by the legislature in 1981 Wisconsin Act 53, and that no plans or directives have been given to have full-GAAP financial statements in place for the State of Wisconsin by 1990 or by any date certain. In the absence of any such plans or directives, it appears inappropriate to extend the effectiveness of the "grace period" accorded under current rule SEC 2.01(1)(c)3. for a full five years to the 1990 date requested by the Department of Justice and proposed in the initial comment draft form of the rule. Rather, it appears appropriate to extend the rule's effectiveness only to a 1987 date, at which time a final assessment can be made regarding whether to make any further extensions of this "grace period" rule. The assessment and any final determination would be based on what plans or directives have been given or what steps had been taken by such 1987 date toward having the State of Wisconsin achieve full-GAAP financial statement and accounting procedures.

SECTION 4. SEC 2.01(3)(a) is amended to read:

SEC 2.01(3)(a). Any evidence of debt issued by a domestic non-profit corporation to persons other than its members is exempted under s. 551.22(8), Stats., if the issuer or a licensed broker-dealer files a notice of the proposed issuance with the commissioner prior to the offering,

including: a trust indenture meeting the requirements of s. SEC 3.24, under which the evidence of debt is proposed to be issued; a prospectus describing the issuer, the trust indenture and the evidence of debt proposed to be issued, which shall be given or sent to each person to whom an offer of such evidence of debt is made at the time or times specified in s. SEC 3.23(1); and such additional information as the commissioner may require; and the commissioner does not by order deny or revoke the exemption with 10 days. In addition, if the domestic non-profit corporation is or operates as a church, the offering shall meet the requirements of s. SEC 3.14, and if the domestic non-profit corporation is or operates as a health care facility, the offering shall meet the requirements of s. SEC 3.145.

ANALYSIS: This amendment provides that an offering of debt securities by a Wisconsin non-profit corporation that is or operates as a health care facility, such as a hospital, and makes a filing seeking to qualify for use of the registration exemption under the rule, must meet the requirements in section SEC 3.145, Wis. Adm. Code, applicable to registrations for debt securities issued by a health care facility. The reason for requring an offering seeking use of the exemption to meet the registration requirement is because once use of the exemption is allowed, offers and sales of that issuer's securities in the offering can be made to the general public.

SECTION 5. SEC 2.01(4)(b) is amended to read:

SEC 2.01(4)(b) Is offered or sold through a broker-dealer that is in compliance with s. 551.31(1), Stats., or an institution described in s. 551.23(3), Stats., or a state or any agency or political of a customer;

ANALYSIS: This is a clarification amendment to one of the rules establishing requirements for use of the so-called "commercial paper" registration exemption under sec. 551.22(9), Wis. Stats. The amendment provides that where a sale of commercial paper under the exemption is made through a broker-dealer, the broker-dealer must either be licensed in Wisconsin or be excluded from the licensing requirement in accordance with the provisions of sec. 551.31(1), Wis. Stats.

SECTION 6. SEC 2.01(7m) is repealed.

ANALYSIS: This Section corrects an error made incident to the repeal earlier in 1986 of the "blue chip" registration exemption formerly in SEC 2.01(7). When that repeal was made, this rule (SEC 2.01(7m))--which related to and was part of the "blue chip" exemption--should have been separately repealed as well.

SECTION 7. SEC 2.02(1)(a) is amended to read:

SEC 2.02(1)(a) Any sale of an outstanding security by or on behalf of a person not in control of the issuer or controlled by the issuer or under common control with the

issuer and not involving a distribution; but if the sale is effected through a broker-dealer, the transaction is deemed isolated only ~~if--all--the--transactions--in--the--security effected--by--or--through--the--broker-dealer--are--isolated;--a transaction-is-presumed-to-be-"isolated"~~ if it is one of not more than 3 such transactions effected by or through the broker-dealer in this state during the prior 12 months; and

ANALYSIS: This amendment clarifies language in the rule relating to sales of securities made by or through a broker-dealer under the so-called "isolated nonissuer transaction" registration exemption in sec. 551.23(1), Wis. Stats. The amendment makes the basis for compliance by broker-dealers with the 3-transactions-per-prior-12- month test in the rule more certain. More certainty is achieved by revising the language to specify that a broker-dealer who effects transactions under the exemption can establish that the 3-transaction test is met on the basis of transactions by or through the broker-dealer itself.

SECTION 8. SEC 2.02(9)(c) is amended to read:

SECTION 2.02(9)(c). In addition, if the non-profit corporation is or operates as a church, the offering shall meet the requirements of s. SEC 3.14, and if the domestic non-profit corporation is or operates as a health care facility, the offering shall meet the requirements of s. SEC 3.145.

ANALYSIS: This amendment provides that an offering of debt securities by a non-profit corporation that is or operates as a health care facility, such as a hospital, and makes a filing seeking to qualify for use of the registration exemption under the rule, must meet the requirements in section SEC 3.145, Wis. Adm. Code, applicable to registrations for debt securities issued by a health care facility. The reason for requiring an offering seeking use of the exemption to meet the registration requirement is because once use of the exemption is allowed, offers and sales of that issuer's securities in the offering can be made to the general public.

SECTION 9. SEC 2.02(10)(k) is created to read:

SEC 2.02(10)(k) Offers or sales of a discretionary or managed trading account involving discretion or management provided by a broker-dealer licensed in this state or by an investment adviser licensed in this state.

ANALYSIS: Consistent with the discussion in the ANALYSIS to SECTION 1, this is a new rule provision added following consideration by the agency of a comment letter received relating to the amendments in SECTION 1 to SEC 1.02(6)(a). That rule contains the so-called "modified Howey" test for determining the existence of an "investment contract" security, and the comment letter stated that the language of the amendment to the rule in its initial comment draft form appeared to bring into the rule's coverage discretionary trading account arrangements that securities and commodities brokerage firms, as well as investment advisers, have for years routinely administered or managed for their customers--and which accounts have not generally been subject to the securities registration requirement under the Wisconsin Uniform Securities Law.

To eliminate any unintended effect whereby licensed broker-dealer or investment adviser firms involved in conducting discretionary or managed trading accounts for their customers would have to register such accounts as securities under the Wisconsin Uniform Securities Law, a registration exemption is created in this rule under the Commissioner of Securities' authority in sec. 551.23(18), Wis. Stats., to exempt by rule transactions where registration is not necessary or appropriate. The language of the exemption applies to discretionary trading accounts managed by a broker-dealer or investment adviser licensed in this state. The exemption does not separately deal with or refer to discretionary trading accounts involving commodities futures contracts because court determinations nationally have uniformly concluded that state securities laws are preempted from any application to discretionary trading accounts involving commodities futures contracts managed by a commodity brokerage firm that is registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.

Creation of this new rule provision following the public comment period is permissible and appropriate under the rule-making procedures of Chapter 227, Wis. Stats., because: (i) the new rule is germane to rule SEC 1.02(6)(a) which, as proposed to be amended, was submitted for public comment as part of the initial public comment draft form of the agency's annual rule revisions; and (ii) the new rule responds to a comment letter and the changes required to respond to such comments necessitate treatment in this separate section.

SECTION 10. SEC 3.06(1) and (2) are amended to read:

SEC 3.06 PREFERRED STOCK AND DEBT SECURITIES. (1) The offer or sale of preferred stock of an issuer may be deemed unfair and inequitable to purchasers unless the net earnings of the issuer, for its last fiscal year prior to the offering and for the average of its last 3 fiscal years prior to the offering, are sufficient to cover the dividends on the preferred stock proposed to be offered. Net earnings shall be determined exclusive of non-recurring items and shall be adjusted for any preferred stock to be redeemed with the proceeds of the offering, less applicable income tax effects. The commissioner may waive the requirement under this subsection upon evidence showing a sufficient future net earnings capability including, but not limited to, evidence set forth in a financial forecast ~~reviewed~~ examined by an independent certified public accountant in accordance with the Guide for ~~a Review of a~~ Prospective Financial ~~Forecast~~ Statements as promulgated by the american institute of certified public accountants.

(2) The offer or sale of debt securities of an issuer may be deemed unfair and inequitable to purchasers unless the net earnings of the issuer, for its last fiscal year prior to the offering and for the average of its last 3 fiscal years prior to the offering, are sufficient to cover the interest requirements on all debt securities issued subsequent to its

last fiscal year, including the securities proposed to be offered. Net earnings shall be determined before income taxes, depreciation and extraordinary items, and shall be adjusted for any debt securities to be redeemed with the proceeds of the offering. The commissioner may waive the requirement under this subsection upon evidence showing a sufficient future net earnings capability including, but not limited to, evidence set forth in a financial forecast ~~reviewed~~ examined by an independent certified public accountant in accordance with the Guide for ~~a Review of a~~ Prospective Financial ~~Forecast~~ Statements as promulgated by the american institute of certified public accountants.

ANALYSIS: The amendments in these two rules make non-substantive changes in terminology relating to preparation of financial forecasts by certified public accountants. The change of language from "reviewed" to "examined" is necessary to be consistent with the terminology used by the American Institute of Certified Public Accountants in their renamed Guide for Prospective Financial Statements that will become effective in September, 1986.

SECTION 11. SEC 3.11 is amended to read:

SEC 3.11 REAL ESTATE PROGRAMS. The offer or sale of interests in a limited partnership which will engage in real estate syndications may be deemed unfair and inequitable to purchasers unless the offering complies with the provisions of the North American Securities Administrators Association

Statement of Policy regarding real estate programs, adopted April 15, 1980, as amended effective March 30, 1982, ~~and~~ ~~amended~~ April 23, 1983, ~~and~~ April 27, 1984 and January 1, 1986, including comments. Copies of the Statement of Policy are available from the commissioner's office for a prepaid fee of $4. The Statement of Policy is published in ~~Volume 1 of the Commerce Clearing House Blue Sky Law Reporter~~ the CCH NASAA Reports published by Commerce Clearing House and is on file at the offices of the Wisconsin secretary of state and the revisor of statutes.

ANALYSIS: This amendment incorporates by reference the modifications to the North American Securities Administrators Association ("NASAA") Statement of Policy regarding real estate programs, as adopted for effectiveness January 1, 1986 by vote of its members, including Wisconsin, at the NASAA 1985 Fall Conference. Following receipt of a comment letter from the Commerce Clearing House informing that earlier in 1986 all the NASAA Statements of Policy were reprinted and are now contained in a separate publication entitled "CCH NASAA Reports," this rule is revised to substitute the correct name of the CCH publication where this Statement of Policy is now contained.

SECTION 12. SEC 3.145 is created to read:

SEC 3.145 DEBT SECURITIES ISSUED BY A HEALTH CARE FACILITY. (1) Except as provided in sub. (2), the offer or sale of debt securities issued by a hospital or other health care facility, the proceeds of which are to be utilized to

finance or refinance the purchase, construction or improvement of buildings or related facilities and equipment, including the underlying property, of the issuer may be deemed unfair and inequitable to purchasers unless the offering complies with the provisions of the North American Securities Administrators Association Health Care Facility Statement of Policy, adopted April 5, 1985. Copies of the Guidelines are available from the commissioner's office for a prepaid fee of $4. The Guidelines are published in the CCH NASAA Reports published by Commerce Clearing House and are on file at the offices of the Wisconsin secretary of state and the revisor of statutes.

(2)(a) With reference to the provisions of numbered paragraph 1. of the Financial Statement of Policy portion of the Health Care Facility Statement of Policy, the computation of the sufficiency of an issuer's excess of revenues over expenses using the formula in that paragraph may also include an add-back to revenues of the interest on existing indebtedness of the issuer that will remain outstanding after the proposed offering of debt securities by the issuer is completed.

(b) With reference to the provisions of numbered paragraph 4(b) of the Financial Statement of Policy portion of the Health Care Facility Statement of Policy, the following alternative is provided to the requirement in that

paragraph dealing with what a trust indenture shall provide with respect to a trustee's obligation to furnish a list of bondholders upon request. Alternatively, the trust indenture shall provide that if three or more bondholders apply in writing to the trustee under the trust indenture and furnish to the trustee reasonable proof that each bondholder has owned a bond for a period of at least six months preceding the date of the application, and the application states that the bondholders desire to communicate with other bondholders with respect to their rights under the trust indenture or under the bonds and is accompanied by a copy of the form of proxy or other communication which the applicants propose to transmit, then the trustee, within five business days after the receipt of the application shall do either of the following:

1. Afford the applicants access to the information preserved at the time by the trustee; or

2. Inform the applicants of the approximate number of bondholders whose names and addresses appear in the information preserved at the time by the trustee and the appoximate cost of mailing to the bondholders the form of proxy or other communication, if any, specified in the application. If the trustee determines not to afford the applicant bondholders access to the information requested, the trustee shall, upon the written request of the applicant

bondholders, mail to each bondholder whose name and address appears in the information preserved at the time by the trustee, a copy of the form of proxy or other communication that is specified in the request, with reasonable promptness after a tender to the trustee of the material to be mailed and of payment, or provision for payment, of the reasonable expenses of mailing, unless within five days after the copy of the material to be mailed, a written statement to the effect that, in the opinion of the trustee, the mailing would be contrary to the best interests of the bondholders or would be contrary to the best interests of the bondholders or would be in violation of applicable law. The written statement shall specify the basis of the trustee's opinion.

ANALYSIS: Consistent with the provisions of sec. 551.63(2), Wis. Stats., to achieve maximum uniformity among states in matters of registration policy, this rule adopts the North American Securities Administrators Association Health Care Facility Offering Statement of Policy which was adopted by members of the Association, including Wisconsin, on April 5, 1985. The Statement of Policy will aid a non-profit health care facility, such as a hospital, that seeks to offer and sell its debt securities to the public by establishing disclosure requirements and financial tests which, if met, will enable registration of the offering to take place in Wisconsin.

The principal provisions of the Statement of Policy relate to: (1) Requiring that the issuer meet a minimum earnings test for its most recent fiscal year prior to the offering that would be sufficient to cover the issuer's debt service requirements for all its outstanding debt plus the securities proposed to be offered

(excluding any debt securities redeemed with the proceeds of the proposed offering); (2) Requiring the securities be issued under a trust indenture where a trustee will act on behalf of purchasers in the event of any default; and (3) Establishing prospectus disclosure requirements. The Statement of Policy provides that certain of the requirements may be waived by the Commissioner for good cause shown.

The Policy Statement specifically provides that it is not intended to be applicable to any security exempted from registration by Section 402(a)(1) of the Uniform Securities Law, or any security issued by any nationally recognized religious organization for the benefit of a health care facility operated by a member thereof, the proceeds of the issuance of which are lent or otherwise advanced to a non-profit health care facility.

Following receipt of a comment letter from the Commerce Clearing House informing that earlier in 1986 all the NASAA Statements of Policy were reprinted and are now contained in a separate publication entitled "CCH NASAA Reports," this rule is revised to substitute the correct name of the CCH publication where this Statement of Policy is now contained.

As a result of a comment letter received during the public comment period, this rule is revised from its public comment draft form by the addition of two alternative provisions in (2)(a) and (b) that may be utilized instead of the two provisions contained in the NASAA Statement of Policy dealing with the computation of the sufficiency of an issuer's excess of revenues over expenses and the right of all bondholders to obtain a list of bondholders.

New para. (2)(a) provides that the computation of the sufficiency of an issuer's excess revenues may also include an add-back of the interest on existing indebtedness of the issuer that will

remain outstanding after the proposed offering of debt securities by the issuer is completed. The new provision regarding the add-back of interest on an issuer's existing indebtedness is necessary and warranted because the NASAA Statement of Policy inadvertently failed to provide that such item be considered in making the computation of the debt service coverage of the issuer. That add-back-of-interest-on-existing-indebtedness-to-remain-outstanding provision is specifically included in the other debt service coverage tests under the Wisconsin Uniform Securities Law and rules in sec. 551.23(15)(b), Wis. Stats., and SEC 3.06(2). If provision were not made for the add-back of interest, an issuer's historical revenues would have to be sufficient not only to cover debt service on its outstanding debt, but also sufficient to cover the debt service on the proposed offering. Such would be an inappropriate result and a requirement inconsistent with the earnings coverage tests elsewhere in the law and rules.

New paragraph (2)(b) of SEC 3.145 provides for an alternative to the requirement in the NASAA Statement of Policy relating to what a trust indenture shall provide concerning a trustee's obligation to furnish a list of all bondholders in response to a request for such a list by bondholders. The new paragraph contains as an alternative provision, language virtually identical with the provision on this subject contained in Section 11.02B of the American Bar Foundation Model Bond Indenture Form. Most of the past and current filings with this agency for registration or exemption of debt securities offerings by health care facility issuers contain a furnishing-bondholder-list provision based on the Model Form language, and this agency, to date, is not aware of any problems with the Model Form language regarding bondholders' ability to obtain a list of the names of other bondholders.

SECTION 13. SEC 3.17 is amended to read:

SEC 3.17 REAL ESTATE INVESTMENT TRUSTS. The offer or sale of securities of a corporation, trust or association, other than a real estate syndication, engaged primarily in investing in equity interests in real estate, including fee ownership and leasehold interests, or in loans secured by real estate, or both, may be deemed unfair and inequitable to purchasers unless the offering complies with the provisions of the North American Securities Administrators Association Statement of Policy on Real Estate Investment Trusts, adopted April 28, 1981, and amended effective January 1, 1986. Copies of the Statement of Policy are available from the commissioner's office for a prepaid fee of $4. The Statement of Policy is published in ~~Volume 1 of the Commerce Clearing House Blue Sky Law Reporter~~ the CCH NASAA Reports published by Commerce Clearing House and is on file at the offices of the Wisconsin secretary of state and the revisor of statutes.

ANALYSIS: This amendment incorporates by reference the modifications to the North American Securities Administrators Association ("NASAA") Statement of Policy regarding real estate investment trusts, as adopted for effectiveness on January 1, 1986 by vote of its members, including Wisconsin, at the NASAA 1985 Fall Conference. Following receipt of a comment letter from the Commerce Clearing House informing that earlier in 1986 all the NASAA Statements of Policy were reprinted and are now contained in a separate publication entitled "CCH NASAA Reports," this rule is revised to substitute the correct name of the CCH

publication where this Statement of Policy is now contained.

SECTION 14. SEC 4.01(2)(b) is amended to read:

SEC 4.01(2)(b) An "application" for initial license or for renewal of a license as securities agent for a broker-dealer registered with the national association of securities dealers, inc. consists of the payment of Wisconsin agent license renewal fees to the central registration depository of the national association of securities dealers as developed under contract with the north american securities administrators association. An application for initial license as an agent under this paragraph shall be deemed "filed" under s. 551.32(1)(a), Stats., on the date when the application is designated ready for approval on the records of the central registration depository. ~~The~~ An application for renewal of a license as an agent under this paragraph shall be deemed "filed" under s. 551.32(1)(a), Stats., when the fee on deposit with the central registration depository has been allocated to the commissioner.

ANALYSIS: This amendment adds language establishing the specific point in time that an application for initial license as an agent under the rule is considered "filed" for purposes of determining when the various time periods commence that are specified in the Licensing Procedure provision of sec. 551.32(1)(c), Wis. Stats. The rule in its current form only designates when an application for

renewal license as an agent is considered "filed" under the rule.

SECTION 15. SEC 4.03(2) is amended to read:

SEC 4.03(2) Every licensed broker-dealer shall preserve at its principal office or under the direct supervision and control of the principal office for at least 6 years, the first 2 years in an easily accessible place, all records required under sub. (1) and under s. SEC 4.035(2), exept that records required under sub. (1)(k), (1) and (m) shall be preserved by the broker-dealer for at least 6 years after the closing of the account; and records required under sub. (1)(o) shall be preserved by the broker-dealer for at least 6 years after withdrawal or expiration of its license in this state. The record may be retained by computer if a printed copy of the record can be prepared immediately upon request. In the event a record has been preserved for 1 year as required under this subsection, a microfilm copy may be substituted for the remainder of the required period. Compliance with the requirements of the U.S. securities and exchange commission concerning preservation and microfilming of records is deemed compliance with this subsection.

ANALYSIS: This amendment adds to the broker-dealer record retention requirement in this rule, language clarifying that such records must be retained at the broker-dealer's principal office or under the direct supervision and control of the principal office. The

language of the rule in its current form does not specify where or under whose supervision such records are to be retained. Similar clarification language is already in SEC 4.03(4), Wis. Adm. Code, relating to branch office records that specifies that the required records must be retained at each branch office.

SECTION 16. SEC 4.06(1)(t) is amended to read:

SEC 4.06(1)(t) Recommending to a customer that the customer engage the services of an investment adviser ~~that is~~ , broker-dealer or agent not licensed under ch. 551, Stats., unless the customer is a person described in s. 551.23(8), Stats.;

ANALYSIS: This amendment adds language to make it a Prohibited Business Practice under the rule for a broker-dealer to recommend that a customer engage the services of another broker-dealer, or any agent, that is not licensed in Wisconsin (unless the customer is one of the persons listed in the so-called "institutional investor/exempt account" provision of sec. 551.23(8), Wis. Stats.).

SECTION 17. SEC 5.01(3) is amended to read:

SEC 5.01(3). Unless waived under sub. (4), each applicant for an initial license as an investment adviser or for qualification as an investment adviser representative after the effective date of this rule and each applicant whose application has not become effective by the effective date of this rule, is required to pass with a grade of at least 75%, <u>each part of</u> the Wisconsin Investment Adviser Representative Examination.

<u>ANALYSIS</u>: Because the Investment Adviser Representative Examination referred to in this rule consists of two parts (part one relates to the Wisconsin Uniform Securities Law and Rule provisions, part two relates to general securities knowledge), this amendment clarifies that an applicant must obtain the minimum passing grade of at least 75% on each part of the examination.

SECTION 18. SEC 5.01(4)(g) is renumbered SEC 5.01(4)(h).

<u>ANALYSIS</u>: This renumbering moves the rule provision granting the Commissioner of Securities discretionary authority to waive the examination requirement to follow after a newly created waiver provision in SECTION 19 of this rule-making Comment Draft.

SECTION 19. SEC 5.01(4)(g) is created to read:

SEC 5.01(4)(g) The applicant, during the three years immediately preceding the filing of an application, has been continuously employed as a securities agent and is designated as a general securities representative by the national association of securities dealers, inc.

ANALYSIS: This rule creates an additional waiver from the examination requirement for licensure as an investment adviser. The waiver is intended to cover a category of persons who have been in the securities business for a period of several years and who, because they had been designated as a general securities representative by the NASD which has its own examination requirement, would have passed the older (pre-1975) NASD Series 1 Examination, but have never passed the NASD Series 2 or Series 7 Examinations that would have entitled them to the examination waiver under SEC 5.01(4)(a)3.

The requirement of continuous employment as a securities agent during the three years immediately prior to the filing of an application parallels the same requirement for waiver under SEC 5.01(4)(f), and indicates recent and ongoing securities industry business activities. The NASD designation will provide that the broker-dealer self-regulatory organization has evaluated the person's employment activities and determined that the person had the qualifications for designation as a general securities representative.

SECTION 20. SEC 5.06(9) is amended to read:

SEC 5.06(9) Placing an order <u>for a customer, or recommending that the customer place an order,</u> to purchase or sell a security ~~for a customer~~ through a broker-dealer or agent not licensed under ch. 551, Stats., unless the customer is a person ~~referenced~~ <u>described</u> in s. 551.23(8), Stats.

<u>ANALYSIS</u>: The amendment adds language to make the action of an investment adviser in recommending to a customer that the customer place a securities transaction order through an unlicensed broker-dealer or agent a Prohibited Business Practice equivalent to the situation under the rule in its current form where an investment adviser actually places a securities transaction order with an unlicensed broker-dealer.

The amendment parallels the concept relating to prohibitions against offers and sales of securities in violation of the registration requirement in sec. 551.23(1), Wis. Stats.--namely, it is just as unlawful to make an offer of a security in violation of the securities registration requirement (even if no sale results), as it is to make a sale of a security in violation of the registration requirement.

SECTION 21. SEC 5.06(10) is created to read:

SEC 5.06(10) Recommending to a customer that the customer engage the services of a broker-dealer, agent or investment adviser not licensed under ch. 551, Stats., unless the customer is a person described in s. 551.23(8), Stats.

ANALYSIS: This rule adds a Prohibited Business Practice provision relating to investment advisers that parallels a similar provision in SEC 4.06(1)(t) applicable to broker-dealers (as amended in SECTION 16 of this rule-making Comment Draft). This rule makes it a Prohibited Business Practice for an investment adviser to recommend that the customer engage the services of another investment adviser, or any broker-dealer or agent that is not licensed in Wisconsin (unless the customer is one of the persons listed in the so-called "institutional investor/exempt account" provision of sec. 551.23(8), Wis. Stats.).

SECTION 22. SEC 7.01(1)(c) is amended to read:

SEC 7.01(1)(c) Field examination pursuant to s. 551.27(5), Stats., of application for registration under ~~s.~~ ss. 551.25 or 551.26, Stats.,.....~~$75~~ $100 per day per examiner plus, if the examination is conducted outside of Wisconsin, each of the following costs incurred:

1. Reasonable transportation costs that may not exceed coach class air fare;

2. Ground transportation costs that on a per day basis may not exceed the daily rate charged by a national car rental agency in that locale for a compact-sized car; and

3. If the examination involves any overnight stay, hotel and meal costs not to exceed the per diem amounts prescribed for state agency reimbursement purposes by the department of employment relations at the time the examination is made.

ANALYSIS: This SECTION does the following: (1) Adds a cross-reference to the registration by coordination provision of sec. 551.25, Wis. Stats., to enable the field examination fees prescribed in the rule to be charged for registration applications filed by qualification as well as by coordination. Section 551.27(5), Wis. Stats., grants authority to the Commissioner to designate an agency exmployee to examine the business and records of an issuer of securities who has filed an application for registration in Wisconsin. That section specifies that the examination is to be made at the expense of the applicant or registrant and that it applies to registration statements filed by coordination as well as by qualification; and (2) Adds specific cost items in this examination fee rule for a field examination of a securities registration application identical to the specific cost items as listed and amended in SECTION 24 of this rule-making Comment Draft regarding the examination fee rule in SEC 7.01(3)(e) for a field examination of a broker-dealer or investment adviser license application.

During the review of comment letters and hearing testimony, it was determined to revise subd. 2. of the rule relating to rental car charges by deleting from its initial comment draft form the language that excluded mileage charges. Because ground transportation costs involving a car rental often include mileage costs that a car rental agency routinely charges, this rule permitting the charging of all reasonable ground

transportation costs properly allows for any mileage charges incident to the car rental.

SECTION 23. SEC 7.01(2)(e) and (f) are amended to read:

SEC 7.01(2)(e) Notice filed under s. 551.22(8), Stats., or under s. 551.23(3), (11) or (15), Stats., or under s. SEC 6.05.....~~$150.~~ $200.

(f) Notice filed under s. SEC 2.01(1)(a)3. or ~~(11)~~ (9).....~~$100.~~ $200.

ANALYSIS: The amendments to these rule sections increase the examination fee for the registration exemption filings listed in those rules to be equivalent to the $200 fee prescribed by statute for review of a filing under the so-called "Regulation D" non-public offering exemption in sec. 551.235, Wis. Stats. The extent of the review of the registration exemption filings listed in those rules is at least as great, or greater than, the disclosure-type review given Regulation D filings. Specifically, not only does each exemption filing listed in the rules receive a disclosure review, the exemption filings under 551.22(8), 551.23(11) and 551.23(15) additionally involve a review and application of various NASAA Statements of Policy depending upon the subject matter of the offering. The examination fees in these two rules were last revised during 1982. A non-substantive amendment to SEC 7.01(2)(f) changes the cross-reference therein to a rule provision to reflect a renumbering of that provision that took place effective April, 1986.

SECTION 24. SEC 7.01(3)(d) and (e) are amended to read:

SEC 7.01(3)(d) Field examination of applicant for initial license as broker-dealer or investment adviser under s. 551.32(2), Stats.....~~$75~~ $100 per day per examiner plus, if the examination is conducted outside of Wisconsin, each of the following costs incurred:

1. Reasonable transportation costs that may not exceed coach class air fare;

2. Ground transportation costs that on a per day basis may not exceed the daily rate charged by a national car rental agency in that locale for a compact-sized car; and

3. If the examination involves any overnight stay, hotel and meal costs not to exceed the per diem amounts prescribed for state agency reimbursement purposes by the department of employment relations at the time the examination is made.

(e) Periodic examination of a broker-dealer or investment adviser under s. 551.33(4), Stats.....~~$75~~ $100 per day per examiner plus, if the examination is

conducted outside of Wisconsin, each of the following costs incurred:

1. ~~reasonable~~ Reasonable transportation costs that may not exceed coach class air fare;

2. Ground transportation costs that on a per day basis may not exceed the daily rate charged by a national car rental agency in that locale for a compact-sized car; and

3. If the examination involves any overnight stay, hotel and meal costs not to exceed the per diem amounts prescribed for state agency reimbursement purposes by the department of employment relations at the time the examination is made.

ANALYSIS: The amendments to these licensing fees for examination of the offices of applicants or licensees do the following: (1) Increase the per day, per examiner charge under each rule to $100, which approximates the current cost of the agency's securities examiner per day compensation; (2) Adds to the examination costs prescribed in par. (e) relating to examinations of offices of licensees outside Wisconsin, any ground transportation costs (as limited) and the reasonable costs associated with any overnight stay involving hotel and meals, subject to the limitation that such costs cannot exceed the current per diem amounts prescribed for state agency reimbursement purposes. Subdivision 2. of both SEC 7.01(3)(d) and (3)(e) relating to ground transportation costs

is revised in the same manner as was done in SECTION 22 by deleting from the initial comment form of the rule, language that excluded mileage charges from car rental charges.

Specifying all of the charges in the rules is necessary because sec. 551.33(4), Wis. Stats., provides that the expenses attributable to periodic examinations of licensees shall not exceed amounts that the Commissioner prescribes by rule; (3) Adds to the examination costs prescribed in par. (d) relating to examinations of applicants for broker-dealer or investment adviser licenses, the identical travel and overnight stay-related costs specified in par. (e). Section 551.32(2), Wis. Stats., permits the Commissioner to have an employee examine the books, records and affairs of an applicant to license as a broker-dealer or investment adviser at the applicant's expense.

SECTION 25. SEC 8.01 is amended to read:

SEC 8.01 PETITIONS FOR HEARING. Every request for a hearing shall be in the form of a petition filed with the commissioner. A petition for a hearing to review an order shall ~~plainly:~~

(1) Plainly admit or deny each specific allegation, finding or conclusion in the order and incorporated papers. ~~(unless~~ However, if the petitioner lacks sufficient knowledge or information to permit an admission or denial, ~~in--which--case~~ the petition shall so state, and ~~such~~ that statement shall have the effect of a denial~~;~~; and

(2) ~~shall---state~~ State all affirmative defenses. Affirmative defenses not raised in the request for hearing may be deemed waived.

ANALYSIS: This amendment adds equivalent language to that provided in SEC 8.02, Wis. Adm. Code, which provides that the failure of a named party to raise an affirmative defense in its Answer to a Notice of Hearing may result in the affirmative defense being deemed waived. Because a Petition For Hearing filed by a named or interested party under this rule with regard to an Order issued by the agency is an equivalent pleading to an Answer filed by such a party to a Notice For Hearing issued by the agency, an equivalent result should obtain when there is a failure to raise an affirmative defense.

SECTION 26. SEC 8.10 is created to read:

SEC 8.10 BURDEN OF PROOF. In each class 1, 2 or 3 proceeding as defined in ch. 227, Stats., involving a contested case under ch. 551, 552 or 553, Stats., the burden of proof required on any issue in the proceeding shall be a preponderance of the evidence on the basis of the record in the proceeding.

ANALYSIS: This SECTION establishes, on the basis of a recent May, 1986 Wisconsin Attorney General's Opinion (OAG 16-86), a "preponderance of the evidence" burden of proof standard with regard to issues in contested case proceedings under chapters 551, 552 and 553, Wis. Stats.

The administrative procedure law in Chapter 227, Wis. Stats., does not establish any burden of proof standard with respect to Class 1, 2 or 3 contested cases. Section 227.57, Wis. Stats., does provide, however, that the grounds for court reversal or modification of agency rulings on judicial review of a contested case includes a review of the record to determine if "substantial evidence" supports the agency's decision.

Under sec. 227.01(2), a Class 1 proceeding involves an agency acting under standards conferring substantial discretionary authority and involves such matters as rate making, review of tax assessments and the grant or denial of licenses. A Class 2 proceeding is one in which an agency determines to impose a sanction or penalty and includes suspensions, revocations or refusals to review licenses. A Class 3 proceeding is any contested case not included in Class 1 or 2.

The Wisconsin Attorney General's opinion in OAG 16-86 dealt specifically with the burden of proof issue. The Opinion dealt with the question whether a section of 1985 Wisconsin Act 29 changing the standard of proof used in disciplinary proceedings conducted by licensing boards and the Wisconsin Department of Regulation and Licensing from the more strict or higher standard of "clear and convincing evidence" to the easier or lower standard of "preponderance of the evidence" met fourteenth amendment due process Constitutional requirements. Following an extensive discussion, the Attorney General's opinion concluded that the lower "preponderance of evidence" burden of proof in disciplinary matters involving licensure did not violate due process rights of the licensee involved.

SECTION 27. SEC 9.01(1)(b)15 and 16 are created to read:

SEC 9.01(1)(b)15. Fiduciary activities questionnaire.

16. Summary of fiduciary operations information.

ANALYSIS: This rule adds to the list of licensing-related forms used by this agency, a Fiduciary Activities Questionnaire form and a Summary of Fudiciary Operations Information form. Under Chapter 65, Laws of 1975, any entity engaged in "fudiciary operations" under the definitional tests of that law in sec. 223.105, Wis. Stats., is subject to certain regulatory requirements thereunder. The activities of some securities broker-dealer and/or investment advisory firms may bring them within the definitional test and thus trigger the regulatory requirements to be met under Ch. 223, Wis. Stats., for such fiduciary activities.

The Licensing and Regulation Division staff routinely includes the Questionnaire Form with its mailing of information to prospective applicants for a broker-dealer or investment adviser license in Wisconsin in order to notify them of the laws in Wisconsin regarding fiduciary activities and to require each applicant to check off on the form whether or not the applicant engages in fiduciary activities. If an applicant designates on the Questionnaire that it does engage in fiduciary activities, the Licensing and Regulation Division sends to the applicant the Summary of Fiduciary Operations Information form for the applicant to complete and furnish the information required to be in compliance with sec. 223.105(4), Wis. Stats.

SECTION 28. SEC 27.01(4) and (5) are amended to read:

SEC 27.01(4) Examination of matter relating to issuance of an interpretive opinion.....~~$50~~ $300.

(5) Photocopying fee--~~Per--Page~~ .....$ .25 per page for the first 10 pages and $.10 per page for any additional pages.

ANALYSIS: The amendments to these rules increase the respective fees to make them equal to the fees on those identical matters as prescribed in SEC 7.01 (under the Wisconsin Uniform Securities Law) and in SEC 35.01 (under the Wisconsin Franchise Investment Law).

SECTION 29. SEC 27.01(6) is created to read:

SEC 27.01(6) Examination of application for exemption order under ss. 552.05 or 552.12(3), Stats.....$200.

ANALYSIS: This Section prescribes a fee for examination of an application for issuance of an exemption order in a filing under the listed provisions of the Wisconsin Corporate Take-Over Law. The amount of the fee is equal to the exemption order examination fee prescribed in SEC 7.01 (under the Wisconsin Uniform Securities Law) and SEC 35.01 (under the Wisconsin Franchise Investment Law).

SECTION 30. SEC 31.01(9) is amended to read:

SEC 31.01(9). The commissioner shall, in ~~any determination--he--shall--make--as--to~~ determining whether a marketing plan or system of a manufacturer, licensor or a franchisor is a "bona fide wholesale transaction" or a series thereof within the meaning of s. ~~553.03(7)(a)~~ 553.03(5m), Stats., ~~include,--but--not--be--limited--to,--consideration--of~~ consider the following factors, among others:

ANALYSIS: These amendments: (1) Make the reference to the Commissioner gender-neutral; and (2) Correct the statutory cross-reference in the rule because the numbering of that statute was changed in 1983 Wisconsin Act 538.

SECTION 31. SEC 32.06(3) is created to read:

SEC 32.06(3). An applicant's offering circular shall disclose, and its franchise contract or agreement shall state, that ch. 135, Stats., the Wisconsin Fair Dealership Law, supersedes any provisions of the applicant's franchise contract or agreement inconsistent with that law.

ANALYSIS: This new rule requires an applicant for registration under the Wisconsin Franchise Investment Law to disclose in its offering circular, and to state in its franchise contract or agreement, that the Wisconsin Fair Dealership Law supersedes applicable provisions of the applicant's franchise contract or agreement to the extent those provisions are inconsistent with the Law. The Wisconsin Fair Dealership Law applies to all "dealerships" as defined in sec. 135.02(3), Wis. Stats., which

definition covers virtually all franchise arrangements registered under the Wisconsin Franchise Investment Law. The Wisconsin Fair Dealership Law, among other things, establishes certain minimum notice periods required before cancellation can take place, establishes minimum time periods to cure deficiencies, limits reasons for cancellation, and the Law provides that it supersedes any contractual provision on those points.

This new rule will provide specific notice to Wisconsin franchise registration applicants of the existence of the Wisconsin Fair Dealership Law and will enable applicants to conform their offering circular disclosures and franchise agreement provisions to comply with the requirements of that Law. Conformity with the provisions of ch. 135, Stats., is necessary to avoid denial, suspension or revocation of its exemption pursuant to sec. 553.28(1)(h), Stats., (franchisor's business includes activities that are illegal where performed) and 553.24(1), Stats. See Wisconsin Attorney General Opinion 66 OAG 11.

SECTION 32. SEC 35.01(2)(a) and (b) are amended to read:

SEC 35.01(2)(a) Advertising filed by a registrant pursuant to s. 553.53, Stats.,.....$10.00 per item minimum, plus $1.00 per page after the first ten pages, but not exceeding an aggregate amount of ~~$150.00~~ $250.00 per registrant in any one year.

(b) Advertising filed by a person or applicant not a registrant pursuant to s. 553.53, Stats., ...$10.00 per item minimum, plus $1.00 per page after the first ten pages, but not exceeding an aggregate amount of ~~$150.00~~ $250.00 per person or applicant in any one year.

ANALYSIS: These amendments increase the fees for examination of advertising materials filed under sec. 553.53 of the Wisconsin Franchise Investment Act. Many of the advertising filings involve materials that can be very extensive in length, such as supplements to registration statements. However, the fee of $10.00 per item under the rule in its current form--which fee fails to distinguish between short vs. lengthy filings--is not adequate to cover the staff time spent for review of lengthy advertising filings. Accordingly, the examination fee under each rule is amended to make the current $10.00 per item fee a minimum fee, and increases the fee $1.00 per page after the first ten pages. The maximum fee payable under the rule in any one year by a person is raised from $150.00 to $250.00.

SECTION 33. SEC 35.05(3) is created to read:

SEC 35.05(3). In addition to supplying a prospective franchisee with a copy of its franchise offering prospectus, a franchisor may open for inspection the books and records of any of its company-owned or operated units that are offered for sale by the franchisor and that the prospective franchisee has expressed an interest in purchasing.

ANALYSIS: This rule permits the inspection and use of the books and records of an existing company-owned or operated franchise business location (unit) in connection with the offer and sale by a franchisor of that specific franchise unit to a prospective franchisee/purchaser of the unit. The language of the rule is taken from section 200.4(21)(iv) of the Codes, Rules and Regulations of the State of New York, Title 13, Chapter VII, that deals with this subject. The only language change from the New York rule is that this provision refers to a "prospective" franchisee (rather than the term "potential" franchisee referred to in the New York rule that has a narrower industry interpretation than the term "potential") in order to broaden the class of persons to whom the provision applies. By according specific authorization for use of such financial data, the rule will have as a result that no antifraud liability would attach solely by the franchisor's act of making the financial data of a company-owned or operated franchise unit available to a prospective franchisee/purchaser of the unit.

* * * *

The rules and amendments contained in this Order shall take effect as provided in sec. 227.22(2) (Intro.), Wis. Stats., on the first day of the month following publication in the Wisconsin Administrative Register.

Dated this 24th day of November, 1986.

[SEAL]

ULICE PAYNE, JR.
Commissioner of Securities

UPJ:mec

State of Wisconsin \ OFFICE OF THE COMMISSIONER OF SECURITIES

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Governor

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November 24, 1986

Office of the Secretary of State
201 East Washington Avenue
Madison, WI 53702

Revisor of Statutes Bureau
30 West Mifflin Street
Madison, WI 53703

Gentlemen and Mesdames:

Re: Filing of Certified Copies of Order
Adopting Rules/Clearinghouse Rule 86-168

Pursuant to the requirements of ss. 227.20 and 227.21, Wis. Stats., a certified copy is herewith filed of the above-referenced Rule-Making Order in the form prescribed by sec. 227.14, Wis. Stats. The Rule-Making Order was adopted by this agency on November 24, 1986.

Also attached are photocopies of three regulatory standards incorporated by reference in sections SEC 3.11, 3.145 and 3.17 in SECTIONS 11, 12 and 13, respectively, of the Rule-Making Order. Authorization for the incorporation by reference of the three regulatory standards has been received under s. 227.20(2), Wis. Stats., from the Attorney General and the Revisor of Statutes. Attached as well are copies of the forms created in sections SEC 9.01(1)(b)15 and 16 (SECTION 27) in the Rule-Making Order.

Very truly yours,

Randall E. Schumann
General Counsel

RES:mec

Enclosures

cc: Ulice Payne, Jr.
Commissioner of Securities

RECEIVED
NOV 24 1986
Revisor of Statutes
Bureau

REPORT PREPARED BY THE
OFFICE OF THE COMMISSIONER OF SECURITIES
RELATING TO PROPOSED AMENDMENTS TO THE
RULES OF THE COMMISSIONER OF SECURITIES

(a) Statement Explaining Need for Proposed Rules

The statutory rule-making procedures under Chapter 227 of the Wisconsin Statutues are being implemented in this matter for the purpose of making the agency's annual revision to the Rules of the Commissioner of Securities currently in effect promulgated under Chapter 551, Wis. Stats., the Wisconsin Uniform Securities Law; Chapter 552, the Wisconsin Corporate Take-Over Law; and Chapter 553, the Wisconsin Franchise Investment Law. The annual rule revision is made for the following purposes: making clarifications to existing rule provisions where language is vague or ambiguous; adopting or amending rules necessary to effectively regulate new circumstnaces or developments which have occurred in the industry and the marketplace that require regulatory treatment; formally adopting and incorporating by reference both new securities registration guidelines, as well as amendments to existing securities registration guidelines previously adopted by a national securities administrators association of which Wisconsin is a member. Each SECTION in the proposed rules that adopts, repeals or amends a rule is followed by a separate explanatory ANALYSIS which discusses the nature of the revision as well as the rationale behind and/or the necessity for it.

The principal areas of the revisions to the rules include: (1) amending certain definitional provisions under the securities and franchise laws; (2) amending several securities and franchise registration exemptions; (3) adopting a new securities registration policy (relating to debt securities issued by a health care facility) and amending two existing securities registration policies (relating to real estate programs and to real estate investment trusts); (4) creating or amending numerous sections of the securities broker-dealer, agent, and investment adviser licensing provisions dealing with examination and examination waiver requirements, as well as prohibited business practices; and (5) revising various of the examination fees established under the securities law, take-over law and franchise law.

(b) Explanation of Modifications Made as a Result of Public Comment Letters and Hearing Testimony

-- A letter submitted during the public comment process relating to SEC 1.02(6)(a) in SECTION 1 of the attached proposed rule package, commented that the language of the amendment to the rule in its initial comment draft form appeared to bring into the rule's coverage discretionary trading account arrangements that securities brokerage firms, as well as investment advisers, have for years routinely administered or managed conducted for their customers--and which accounts have not generally been subject to the securities registration requirement under the Wisconsin Uniform Securities Law. To eliminate any such unintended effect, a separate registration exemption is created in SECTION 9 under the Commissioner's authority in sec. 551.23(18), Wis. Stats., to exempt by rule transactions where registration is not necessary or appropriate.

-- A new rule provision, SEC 2.02(10)(k), is added in SECTION 9 of the attached proposed rule package following consideration by the agency of a comment letter received relating to the amendments in SECTION 1 to SEC 1.02(6)(a). That rule contains the so-called "modified Howey" test for determining the existence of an "investment contract" security, and the comment letter stated that the language of the amendment to the rule in its initial comment draft form appeared to bring into the rule's coverage discretionary trading account arrangements that securities and commodities brokerage firms, as well as investment advisers, have for years routinely administered or managed for their customers--and which accounts have not generally been subject to the securities registration requirement under the Wisconsin Uniform Securities Law.

To eliminate any unintended effect whereby licensed broker-dealer or investment adviser firms involved in conducting discretionary or managed trading accounts for their customers would have to register such accounts as securities under the Wisconsin Uniform Securities Law, a registration exemption is created in SEC 2.02(10)(k) under the Commissioner of Securities' authority in sec. 551.23(18), Wis. Stats., to exempt by rule transactions where registration is not necessary or appropriate. The language of the exemption applies to discretionary trading accounts managed by a broker-dealer or investment adviser licensed in this state. The exemption does not separately deal with or refer to discretionary trading accounts involving commodities futures contracts because court determinations nationally have uniformly concluded that state securities laws are preempted from any application to discretionary trading accounts involving commodities futures contracts managed by a commodity brokerage firm that is registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.

Creation of this new rule provision following the public comment period is permissible and appropriate under the rule-making

procedures of Chapter 227, Wis. Stats., because: (i) the new rule is germane to rule SEC 1.02(6)(a) which, as proposed to be amended, was submitted for public comment as part of the initial public comment draft form of the agency's annual rule revisions; and (ii) the new rule responds to a comment letter and the changes required to respond to such comments necessitate treatment in this separate section.

-- With regard to the amendment to SEC 2.01(1)(c)3. in SECTION 3, the amendment in the initial comment draft form of the rule to extend to 1990 the rule's expiration date is revised to change the expiration date to 1987. The Wisconsin Department of Justice, as bond counsel for the State of Wisconsin, initially requested by letter that the Commissioner of Securities' Office extend until 1990 the expiration date for use of the rule in subd. (c)3. An emergency rule was promulgated, effective July 1, 1986, making such a change to 1990, and the amendment to subd. (c)3. in its initial comment draft form had proposed to make permanent the emergency rule change. The rule provision in subd. (c)3. is the "grace-period-through-fiscal- year-1985" alternative accounting guideline rule that has been used by the State of Wisconsin for its debt securities offerings, as well as by other governmental securities issuers including Wisconsin school districts and vocational education districts, since the January, 1983 effectiveness of 1981 Wisconsin Act 53. The rule establishes as an alternative accounting guideline for use through fiscal year 1985, accounting procedures mandated or recommended by state law or rule.

During the "grace period" accorded under the rule since it was originally adopted during 1982 and 1983, all 400 Wisconsin school districts and virtually all vocational districts have achieved full-GAAP status. However, during as well as following the public comment period, discussions took place involving the Governor's Office and representatives of the Wisconsin Department of Administration representing the State of Wisconsin in its bond sales activities, which discussions included the subject of what action has been taken by the State toward achieving full-GAAP financial statement and accounting procedures. At such discussions, representatives of the State of Wisconsin indicated to this Office that the State has not, to date, made any appreciable steps toward having its financial statements prepared according to generally accepted accounting principles under the general requirement established by the legislature in 1981 Wisconsin Act 53, and that no plans or directives have been given to have full-GAAP financial statements in place for the State of Wisconsin by 1990 or by any date certain. In the absence of any such plans or directives, it appears inappropriate to extend the effectiveness of the "grace period" accorded under current rule SEC 2.01(1)(c)3. for a full five years to the 1990 date requested by the Department of Justice and proposed in the initial comment draft form of the rule. Rather, it appears appropriate to extend the rule's effectiveness only to a 1987 date, at which time a final assessment can be made regarding whether to make any further extensions of this "grace

period" rule. At such 1987 date, the assessment and any final determination would be based on what plans or directives had been given or what steps had been taken as of that time toward having the State of Wisconsin achieve full-GAAP financial statement and accounting procedures.

-- Following receipt of a comment letter from the Commerce Clearing House informing that earlier in 1986 all the NASAA Statements of Policy were reprinted and are now contained in a separate publication entitled "CCH NASAA Reports," SECTIONS 11, 12 and 13 of the proposed rule revision package are revised to substitute the correct name of the CCH publication where the respective Statements of Policy are now contained.

-- As a result of a comment letter received during the public comment period, SEC 3.145 in SECTION 12 of the attached rule revision package is revised from its public comment draft form by the addition of two alternative provisions in (2)(a) and (b) that may be utilized instead of the two provisions contained in the NASAA Statement of Policy dealing with the computation of the sufficiency of an issuer's excess of revenues over expenses and the right of bondholders to obtain a list of all bondholders.

New para. (2)(a) provides that the computation of the sufficiency of an issuer's excess revenues may also include an add-back of the interest on existing indebtedness of the issuer that will remain outstanding after the proposed offering of debt securities by the issuer is completed. The new provision regarding the add-back of interest on an issuer's existing indebtedness is necessary and warranted because the NASAA Statement of Policy inadvertently failed to specifically provide that such item be considered in making the computation of the debt service coverage of the issuer. That add-back-of-interest-on-existing-indebtedness-to-remain-outstanding provision is specifically included in the other debt service coverage tests under the Wisconsin Uniform Securities Law and rules in sec. 551.23(15)(b), Wis. Stats., and SEC 3.06(2). If provision were not made for the add-back of interest, an issuer's historical revenues would have to be sufficient not only to cover debt service on its outstanding debt, but also sufficient to cover the debt service on the proposed offering. Such would be an inappropriate result and a requirement inconsistent with the earnings coverage tests elsewhere in the law and rules.

New paragraph (2)(b) of SEC 3.145 provides for an alternative to the requirement in the NASAA Statement of Policy relating to what a trust indenture shall provide concerning a trustee's obligation to furnish a list of all bondholders in response to a request for such a list by bondholders. The new paragraph contains as an alternative provision, language virtually identical with the provision on this subject contained in Section 11.02B of the American Bar Foundation Model Bond Indenture Form. Most of the past and current filings with this agency for registration or exemption of debt securities offerings by health care facility

past and current filings with this agency for registration or exemption of debt securities offerings by health care facility issuers contain a furnishing-bondholder-list provision based on the Model Form language, and this agency, to date, is not aware of any problems with the Model Form language regarding bondholders' ability to obtain a list of the names of other bondholders.

-- During the review of comment letters and hearing testimony, it was determined to revise subd. 2. in each of SEC 7.01(1)(c) and SEC 7.01(3)(d) and (e) relating to rental car charges by deleting from the initial comment draft form of those rules the language that excluded mileage charges. Because ground transportation costs involving a car rental often include mileage costs that a car rental agency routinely charges, the rules as revised permitting the charging of all reasonable ground transportation costs will now properly allows for any mileage charges incident to the car rental.

(c) List of Persons Appearing or Registering at Public Hearing Conducted by Commissioner of Securities Ulice Payne, Jr., as Hearing Officer

-- Randall E. Schumann, General Counsel of the Office of the Commissioner of Securities, made an appearance on behalf of the agency's staff to submit documents and information for the record.

-- James R. Fischer, Administrator of the Registration Division, appeared on behalf of the agency's staff to respond to questions relating to securities registration matters.

-- Mr. William Gehl, Senior Vice-President and General Counsel, B.C. Ziegler and Company, 215 North Main Street, West Bend, Wisconsin 53095.

-- Attorney Joseph P. Hildebrandt, 1 South Pinckney Street, Madison, Wisconsin 53701.

Comment Letters Received:

-- Comment letter dated August 19, 1986, received from William A. Bonfield, C.P.A., C.M.A., of Bonfield & Company, S.C., Milwaukee, Wisconsin.

-- Comment letter dated September 17, 1986, received from B.C. Ziegler and Company, West Bend, Wisconsin.

-- Comment letter dated September 18, 1986, received from the Investment Company Institute, 1600 M. Street, N.W., Washington, D.C.

-- Comment letter dated September 19, 1986, received from Randall E. Schumann, General Counsel of the staff of the Wisconsin Commissioner of Securities Office.

-- Comment letter dated September 22, 1986, received from Attorney Joseph Hildebrandt, 1 South Pinckney Street, Madison, Wisconsin.

-- Comment letter dated September 22, 1986, received from the State of Wisconsin Department of Revenue, Division of State/Local Finance, 125 South Webster Street, Madison, Wisconsin.

-- Comment letter dated September 22, 1986, received from Alex. Brown & Sons, Inc., 135 East Baltimore Street, Baltimore, Maryland.

(d) Response to Legislative Council/Rules Clearinghouse Report Recommendations

(1) Acceptance of recommendations in whole:

Under 2. Form, Style and Placement in Administrative Code

-- Consistent with the Rules Clearinghouse comment in para. a. regarding the "Pursuant to" clause, the language "secs." is changed to "ss." and "Wis. Stats." changed to "Stats."

-- Consistent with the Rules Clearinghouse comment in para. b. regarding SECTION 5 relating to an apparent typographical error in current rule SEC 2.01(4)(b), the Revisor of Statutes is being requested to make a correction by replacing an entire line of that rule which was inadvertently deleted by the printers the last time this agency's rules were reprinted earlier in 1986.

-- Consistent with the Rules Clearinghouse comment in para. c. regarding SECTION 12 of the initial comment draft form of the rule revisions, the parentheses contained in rule SEC 3.145 is replaced by commas.

-- Consistent with the Rules Clearinghouse comment in para. d. regarding SECTION 14 concerning SEC 4.01(2)(b), an ending quotation mark is added after "application" in the first line of the rule.

-- Consistent with the Rules Clearinghouse comment in para. e. regarding SECTION 20, concerning SEC 5.06(9), the term "described" is substituted for the term "referenced."

-- Consistent with the Rules Clearinghouse comment in para. f. regarding SECTION 22 and 24, concerning SEC 7.01(1)(c) and (3)(d) and (e), items (i), (ii) and (iii) of each paragraph are changed to become separate subdivisions 1., 2. and 3. In addition, the references therein to "State of Wisconsin Department of Employment Relations" is changed to "department of employment relations."

-- Consistent with the Rules Clearinghouse comment in para. g., the entire proposed rule was examined to change the format where more than one subunit of the same rule section is affected in the same SECTION of the rule. Accordingly, such changes were made in the format to SECTIONS 23, 24, 27 and 28.

-- Consistent with the Rules Clearinghouse comment in para. h. regarding SECTION 25 relating to SEC 8.01, the second sentence of the rule is restructured so as to delete the parentheses and instead create two subsections. Also, the language "as herein provided" is deleted from the last sentence.

Under 4. References to Related Statutes, Rules and Forms

-- Consistent with the Rules Clearinghouse comment in para. a. regarding SECTION 27 relating to the forms referred to in newly created SEC 9.02(1)(b)15. and 16., the requirements of s. 227.14(3), Stats., are met by the inclusion of a copy of those two forms with this proposed rule as filed incident to providing notice to the legislature that the proposed rule is in final draft form.

-- Consistent with the Rules Clearinghouse comment in para. b. regarding the ANALYSIS in SECTION 26, the cross-reference in SEC 8.10 made to s. 227.20(6), Stats., is changed to refer to s. 227.57, Stats., as renumbered from 1985 Wisconsin Act 182.

Under 5. Clarity, Grammar, Punctuation and Plainess

-- Consistent with the Rules Clearinghouse comment in para. a., the ANALYSIS to SECTION 7 relating to SEC 2.02(1)(a) is changed to add the word "or" between the terms "by" and "through" in the last sentence. Also, the phrase "and which it has information and knowledge of" is deleted.

-- Consistent with the Rules Clearinghouse comment in para. b., the ANALYSIS to SECTION 19 relating to SEC 5.01(4)(g) is amended to state that it is because of the designation of a person as a general securities representative by the NASD which has its own examination requirement, that the persons referred to in the rule would have passed certain examinations.

(2) Acceptance of recommendations in part: None

(3) Rejection of recommendations: None

(4) Reasons for rejection of recommendations: Not applicable

FISCAL ESTIMATE
AD-MBA-23 (Rev. 11/84)

1985 Session

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.

Amendment No. if Applicable

Subject Proposed amendments to Wis. Adm. Code, Rules of the Commissioner of Securities under Chapters SEC 1, 2, 3, 4, 5, 7, 8, 9, 27, 31, 32 and 35.

Fiscal Effect

State: ☐ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation ☒ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs – May Be Possible to Absorb Within Agency's Budget ☐ Yes ☐ No
☐ Decrease Costs

Local: ☒ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others _____

Fund Sources Affected: ☐ GPR ☐ FED ☒ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The amendment in SECTION 21 permitting specified travel costs to be charged as fees under SEC 7.01(1)(c) incident to an out-of-state field examination relating to a securities registration application is not estimated to have an annual fiscal effect because such field examinations have been very infrequent. The last such registration field examination was three years ago and it is not anticipated that there will be any increase in frequency. The amendment in the SECTION was primarily to make the field examination rule in that SECTION identical with the amendments to the other field examination rules in SECTION 23, to be in place if future staffing increases would permit time and staff to conduct field examinations under the rule.

The amendments in SECTION 22 increasing the prescribed fee under 7.01(2)(e) to $200 from $100 and the fee under (2)(f) from $100 to $200 will result in an annual revenue increase of approximately $49,400. The dollar amount is computed on the basis of the following assumptions: (a) an average over the past two fiscal years of 3 filingsper week subject to the fee in (2)(e) times the $50 increase (3 X 52 X $50 = $7,800); (b) an average over the past two fiscal years of 8 filings per week subject to the fee in (2)(f) times the $100 fee increase (8 X 52 X $100 = $41, 600).

(Cont'd on next page)

Long-Range Fiscal Implications

None beyond the annualized fiscal implications set forth in the worksheet.

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Office of the Commissioner of Securities 111 W. Wilson St., Madison, WI	Ulice Payne, Jr. Commissioner 266-3433	8-15-86

(Cont'd)

The amendments in SECTION 23 permitting specified travel costs to be charged as fees incident to a field examination relating to an application for initial license as a securities broker-dealer or investment adviser (in SEC 7.01(3)(d)), and relating to a periodic examination of an existing broker-dealer or investment adviser licensee (in SEC 7.01(3)(e)) will result in an annual revenue increase of approximately $5,773. The dollar amount is computed on the basis of the following assumptions: (a) out-of-state field examinations incident to review of applications for initial licenses are infrequent, averaging not more than one per year and it is not anticipated that there will be any significant increase in frequency. The estimated annual effect of $669 is based on an assumption of a $400 air fare plus the other charges for a 3-day field exam for 1 securities examiner as discussed in sub. (b) below. The amendment in the SECTION regarding (3)(d) was primarily to make that field examination rule identical with the amendments to (3)(e). (b) Out-of-state periodic field examinations relating to existing broker-dealer or investment adviser licensees aggregating increased annual fees of $5,104 are estimated relating to charges for field examinations involving a total of 16 examiner trips per year (this does not mean examinations of 16 different licensees, rather, it would for instance involve examinations of 10 licensees, 6 of which examinations would involve 2 examiners each, the other 4 would involve 1 examiner each). Transportation costs not to exceed coach class air fare are already provided for in the rule. The $5,104 is computed on the basis of the agency's experience regarding travel costs incurred by agency examiners during the prior fiscal year (1985-86) in out-of-state examinations of existing licensees involving a total of 13 examiner trips (assuming the average examination takes 3 days with 2 nights staying at a hotel). The per examiner/per day average costs are assumed to be hotel $50, food $23 and ground transportation $25, plus the $25 increase (from $75 to $100) in the per day examiner charge.

The amendments in SECTIONS 27 and 28 increasing the fees therein relating to take-over law related matters will result in an estimated annual increase in fee revenues of approximately $1,150. This estimate is based on the following assumptions: an average of 2 exemption orders per year over the last biennium (2 X $200 = $400); an average of 3 interpretive opinions per year for the last biennium (3 X $250 increase = $750).

The amendments in SECTION 31 increasing the advertising examination fees will result in an estimated annual increase in fee revenues of approximately $11,000. This estimate is based on the following assumptions: The additional $100 fee to reach the examination fee under SEC 35.01(2)(a) will affect an estimated 75 registrants ($100 X 75 = $7,500); the additional $100 fee to reach the maximum fee under (2)(b) for nonregistrants will affect 35 nonregistrants ($100 X 35 = $3,500).

* * * *

FISCAL ESTIMATE WORKSHEET — 1985 Session

Detailed Estimate of Annual Fiscal Effect
AD-MBA-22 (Rev. 11/84)

☒ ORIGINAL ☐ UPDATED ☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.	Amendment No.

Subject: Proposed amendments to Wis. Adm. Code, Rules of the Commissioner of Securities under Chapters SEC 1, 2, 3, 4, 5, 7, 8, 9, 27, 31, 32 and 35.

I. One-time Costs or Revenue Fluctuations for State and/or Local Government (do not include in annualized fiscal effect):

None

II. Annualized Costs: Note: Treat fiscal costs like a "checkbook": increased costs reduce available funds (-); decreased costs increase available funds (+).	Annualized fiscal impact on State funds from: Increased Costs	Decreased Costs
A. State Costs by Category		
Salaries and Fringes	S –	S +
Staff Support Costs	–	+
Other State Costs	–	+
Local Assistance	–	+
Aids to Individuals or Organizations	–	+
TOTAL State Costs by Category	S – 0	S + 0
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	S –	S +
FED	–	+
PRO PRS	– 0	+ 0
SEG SEG S	–	+
C. FTE Position Changes	Increased Pos. + (0)	Decreased Pos. – (0)
III. State Revenues- Complete this only when proposal will increase or decrease state revenues, such as taxes, license fees, etc.	Decreased Rev.	Increased Rev.
GPR Taxes	S –	S +
GPR Earned	–	+
FED	–	+
PRO PRS	–	+ 67,323
SEG SEG S	–	+
TOTAL State Revenues	S –	S + 67,323

Net Annualized Fiscal Impact on State & Local Funds

State	Annual Increases	Annual Decreases	Local	Annual Increases	Annual Decreases
Total Costs	S – 0	S + 0	Total Costs	S – 0	S + 0
Total Revenues	+ 67,323	– 0	Total Revenues	+ 0	– 0
NET Impact on State Funds	S (+) or (–) 67,323		NET Impact on Local Funds	S (+) or (–) 0	

Agency/Prepared by: (Name & Phone No.)
Office of the Commissioner of

Authorized Signature/Telephone No.
Ulice Payne, Jr.

Date

Form referred to in SEC 9.01(1)(b) 15.

Re: Fiduciary Activities of Broker-Dealers or Investment Advisers

On September 15, 1975, a law became effective in Wisconsin requiring any organization engaged in "fiduciary operations," as defined, to be regulated in accordance with the provisions of the law. A copy of the law is enclosed.

Sec. 223.105, Wis. Stats., provides that any "organization" which holds itself out to residents of this state as available to act, for compensation, as "trustee" or which seeks or consents to serve in any "fiduciary capacity" is subject to rules established by the Commissioner of Banking or other appropriate regulatory agency and subject to periodic examination of its fiduciary operations.

> "'Organization' means any corporation, association, partnership, business trust, other than a national bank, federal savings and loan association or credit union..."
>
> "'Trustee' means a person holding in trust, title to, or holding in trust a power over property."
>
> "'Fidicuary operation' means any action taken by an organization acting as trustee in any fiduciary capacity requiring appointment or issuance of letters by a court or probate registrar in this state."

With respect to the regulatory jurisdiction of this office, the effect of the law is to require that any securities broker-dealer or investment adviser, whether engaging as a corporation, association or partnership, intending to engage in fiduciary operations, must so notify this office.

All notification of fiduciary operations must contain the information specified on forms that will be sent to those license applicants indicating they do engage, or intend to engage, in such fiduciary operations.

In order to determine if any applicants are subject to the provisions of this law, we are requesting your response as to whether or not your firm intends to hold itself out to residents of Wisconsin as available to act, for compensation, as a trustee, or seeks or consents to serve in any fiduciary capacity for compensation. To facilitate your response, please complete and return the questionnaire below.

- -

Office of the Commissioner of Securities
P. O. Box 1768
Madison, Wisconsin 53701

Attention:

____(1) No, this applicant does not now, nor does it have any intention to, engage in fiduciary operations, as defined.

____(2) Yes, this applicant presently engages in fiduciary operations, as defined. Please send the necessary notification forms.

____(3) This applicant does not presently engage in fiduciary operations, as defined, but intends to or may do so in the future. Please send the necessary notification forms.

Name of firm _____

By _____

(Signatory's name and title. Please type information and manually sign.)

Date _____

Form referred to in SEC 9.01(1)(b)16.

Summary of Fiduciary Operations Information

The following information is submitted by the undersigned for the purpose of providing to the Wisconsin Commissioner of Securities, a Notice that it presently engages, or intends to engage, in furnishing certain services as a fiduciary organization under Section 223.105(4) of the Wisconsin Statutes.

(1) Business Name_____

(2) Address at Principal Place of Business_____

_____

(3) Telephone No._____

(4) Address(es) in Wisconsin where fiduciary activities are or will be conducted, together with the name and title of any person furnishing such services at that address._____

_____

_____

(5) Name and title of chief executive of party filing hereunder.

_____

(6) Name and title of the person in charge of the filing party's fiduciary operations. _____

(7) Kinds of fiduciary activities engaged in or proposed to be engaged in: (Trustee under an inter vivos trust, guardian, custodian of individual retirement account fund, trustee under any retirement account fund, trustee under any retirement, or employee benefit plan, etc.) _____

_____

(8) With regard to the activities specified above, set forth the current book value of assets held in each such capacity.

_____

_____

Submitted to the Wisconsin Commissioner of Securities this ____ day of _____, 1978.

_____
(Name of filing party)

By_____
(Name and title)

RES:mb