

Chapter SEC 31

DEFINITIONS

SEC 31.01 Definitions

History: Emergency rules covering general subject matter were adopted effective July 1, 1972.

SEC 31.01 Definitions. (1) A franchisor shall be presumed to have "conducted business" within the meaning of s. 553.22 (2), Stats., if 25 locations of such franchisor, whether operated by its employes or franchisees, are open or have been open for business to the public or are or have been marketing the product or service of the franchisor at the time of request for or assertion of the availability of an exemption.

(2) (a) "Franchise fee" within the meaning of s. 553.03 (5m), Stats., may be determined by the commissioner to include, but not necessarily be limited to:

1. Payment which is made before, upon, or after execution of an agreement to purchase, process, resell or otherwise distribute a manufacturer's or licensor's goods, services, equipment, inventory or real estate.

2. Payment referred to in subd. 1 which is made in the form of a lump sum, installments, periodic royalties, profits, or cash flow, or is or may be reflected in the price of goods, services, equipment, inventory or real estate sold or leased by the licensor to the distributor or licensee.

(b) "Franchise fee" under s. 553.03 (5m), Stats. does not include the following:

1. The purchase or agreement to purchase goods by consignment, if the proceeds remitted by the franchisee from sale of the goods reflects only the bona fide wholesale price of the goods.

2. The purchase or agreement to purchase goods at a bona fide retail price, subject to a commission or compensation arrangement that results in the transaction amounting to a bona fide wholesale transaction.

3. A bona fide loan to the franchisee from the franchisor.

4. The purchase or lease of, or agreement to purchase or lease, supplies or fixtures necessary to enter into the business of the franchisor or to continue the business under the franchise agreement at the fair market or rental value of the supplies or fixtures.

5. The purchase or lease or agreement to purchase or lease real property necessary to enter into the business of the franchisor or to continue the business under the franchise agreement at the fair market or rental value of the real property.

(3) "Material event or material change" within the meaning of s. 553.31 (1), Stats., shall include, but not be limited to, the following:

(a) The termination, closing or failure to renew during any 3-month period of 1) the greater of 1% or 5 of all franchises of a franchisor regard-

less of location or 2) the lesser of 15% or 2 of the franchises of a franchisor located in the state of Wisconsin.

(b) Any change in control, corporate name or state of incorporation, or reorganization of the franchisor whether or not the franchisor or its parent, if the franchisor is a subsidiary, is required to file reports under section 12 of the securities exchange act of 1934.

(c) The purchase by the franchisor in excess of 5% of its existing franchises during any 3-month period on a running basis.

(d) The commencement of any new product service or model line involving, directly or indirectly, additional investment by any franchisee or the discontinuation or modification of the marketing plan or system of any product or service of the franchisor where the total sales from such product or service exceeds 20% of the gross sales of the franchisor on an annual basis.

(e) An adverse financial development involving the franchisor or the franchisor's parent company, controlling person or guarantor of the franchisor's obligations. In this paragraph, "adverse financial development" includes, but is not limited to:

1. The filing of a petition under federal or state bankruptcy or receivership laws; or

2. A default in payment of principal, interest, or sinking fund installment on indebtedness that exceeds 5% of total assets which is not cured within 30 days of the default.

(4) "Net worth" within the meaning of s. 553.22 (1), Stats., shall include those excesses of assets over liabilities which are recognized by generally accepted accounting principles consistently applied with the exception that: 1) intangible assets in making the above computation shall include only the liquidation value of such intangibles, 2) receivables of a franchisor due from its franchisees shall be stated with an appropriate asset offset or reserve for losses, and 3) lump sum franchise fee receipts, or any portion thereof, shall include an appropriate offset under liabilities for accrued obligations to be performed in part or in whole as consideration for such fees.

(5) The commissioner shall, in any determination he or she shall make as to whether a marketing plan or system is deemed to be "prescribed in a substantial part by a franchisor," within the meaning of s. 553.03 (4) (a) 1., Stats., include, but not be limited to, consideration of the following factors:

(a) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the distributor or licensee operate a business which can purchase a substantial portion of its goods solely from sources designated or approved by the licensor.

(b) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that such distributor or licensee follow an operating plan, standard procedure, or training manual or its substantial equivalent promul-

gated by the licensor in the operation of the licensed business, violations of which may, under the terms of the agreement, permit the licensor to terminate the agreement.

(c) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the distributor or licensee be limited as to the type, quantity and/or quality of any product or service the distributor or licensee may sell or limits the distributor or licensee as to the persons or accounts to which he may sell the licensor's product or service.

(d) Whether the provisions of the agreement permitting the licensor to terminate the agreement, to buy back the distributor or license rights assigned by the agreement, or to refuse to renew the grant of such distributor or license rights are such as to operate or be exercisable substantially at the will of the licensor, or

(e) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the licensor aid or assist the distributor or licensee in training, obtaining locations or facilities for operation of the franchisee's business or in marketing the franchisor's product or service.

(6) "Published in this state" within the meaning of s. 553.59 (4), Stats., may be determined by the commissioner to include, but not be limited to, advertising circulated for particular regional use within this state by residents of this state although printed outside of this state and mailed to residents of this state located at a Wisconsin address.

(7) The commissioner shall, in any determination he or she shall make as to whether a marketing plan or system of a franchisee is "substantially associated with the franchisor's business and trademark, service mark, trade name, logotype, advertising or other commercial symbol" within the meaning of s. 553.03 (4) (a) 2., Stats., include, but not be limited to, consideration of the following factors:

(a) Whether the identification of the licensor's business or utilization of a trademark, service mark, trade name, logotype, advertising or other commercial symbol is utilized either by the licensor or the licensee to enhance the chances of licensee's success in respect to licensee's transactions with persons dealing in or purchasing licensor's product or service.

(b) Whether the agreement provides for the distributor or licensee to contribute a portion of operating revenue to the licensor for advertising expense or representations made by the licensor or agents or employees suggest payment by the licensee for advertising conducted, managed or prescribed by the licensor.

(8) The commissioner shall, in 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 (5m), Stats., consider the following factors, among others:

(a) Whether, in connection with an agreement to process, resell or otherwise distribute a manufacturer's or licensor's product or service, consideration in purchase transactions thereunder is solely for the payment of goods, services, equipment, inventory or real estate and such

consideration does not reflect, in part or in whole, payment for the right to continue such purchase transactions or business whether on the same or different terms than those stated in the subject agreement.

(b) Whether, in connection with an agreement to process, resell or otherwise distribute a manufacturer's or licensor's product or service, a purchase of goods, services, equipment, inventory or real estate is required in connection with the subject agreement.

(c) Whether, in connection with an agreement to process, resell or otherwise distribute a manufacturer's or licensor's product or service, the cost of goods, services, equipment, inventory or real estate thereunder to the seller thereof is reasonably related to the price of the same to the distributor or licensee, taking into account the respective circumstances in the market of both the seller and buyer thereof.

(9) "Timely" within the meaning of s. 553.41 (4), Stats., means at least 10 business days prior to the execution of an agreement or the taking of consideration constituting the sale of a franchise.

History: Cr. Register, October, 1972, No. 202, eff. 11-1-72; am. (10), Register, December, 1981, No. 312, eff. 1-1-82; correction in (2) (intro.) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1985, No. 360; am. (2) (b), Register, May, 1986, No. 365, eff. 6-1-86; am. (9) (intro.), Register, December, 1986, No. 372, eff. 1-1-87; r. (5), renum. (2) and (6) to (10) to be (2) (a) and (5) to (9), cr. (2) (b) and (3) (e), Register, December, 1988, No. 396, eff. 1-1-89; corrections in (2) (a) 2., (5) (intro.) and (7), made under s. 13.93 (2m) (b) 4 and 5, Stats., Register, January, 1989, No. 397.