

September 1987 Spec. Sess.
Assembly Bill 2

Date of enactment: **September 17, 1987**
Date of publication: **September 17, 1987**

1987 Wisconsin Act 45

AN ACT to create 180.726 of the statutes, relating to certain business combinations involving resident domestic corporations and interested stockholders, and providing for a study, and requiring shareholder approval of certain actions by corporate officers or directors during a take-over offer.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Legislative declaration. It is declared that:

(1) This state has traditionally regulated the affairs of domestic corporations, including the regulation of mergers and other business combinations. The U.S. supreme court has recently reaffirmed the power of states to regulate these affairs.

(2) Resident domestic corporations, as defined in section 180.726 (1) (L) of the statutes, as created by this act, encompass, represent and affect, through their ongoing business operations, a variety of constituencies including shareholders, employees, customers, suppliers and local communities and their economies whose welfare is vital to this state's interests.

(3) In order to promote the welfare of these constituencies, the regulation of the internal affairs of resident domestic corporations by the laws of this state governing business corporations should allow for the stable, long-term growth of resident domestic corporations.

(4) Business combinations involving public corporations are frequently financed largely through debt to be repaid in the short-term through changes in operations of the public corporation, the sale of assets of the public corporation and other means. These measures involve a substantial risk of unfair business dealing, may prevent shareholders from realizing the full value of their holdings through forced mergers and other coercive devices, and may undermine the state's interest in promoting stable relationships involving the corporations that it charters.

SECTION 1g. 180.725 (1) (mm) of the statutes is created to read:

180.725 (1) (mm) "Take-over offer" means the offer to acquire or the acquisition of any equity security, as defined in s. 552.01 (2), of an issuing public corporation, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror, as defined in s. 552.01 (3), would be directly or indirectly a beneficial owner of more than 5% of any class of the outstanding equity securities of the issuer. "Take-over offer" does not include an

offer or acquisition of any equity security of an issuing public corporation pursuant to:

1. Brokers' transactions effected by or through a broker-dealer in the ordinary course of its business.

2. An exchange offer for securities of another issuer, if the offer is exempted from registration under ch. 551 and does not involve any public offering under the securities act of 1933.

3. An offer made to not more than 10 persons in this state during any period of 12 consecutive months.

4. An offer made to all the stockholders of the issuing public corporation, if the number of its stockholders does not exceed 100 at the time of the offer.

5. An offer if the acquisition of any equity security pursuant thereto, together with all other acquisitions by the offeror of securities of the same class during the preceding 12 months, would not exceed 2% of that class of the outstanding equity securities of the issuer.

6. An offer by the issuing public corporation to acquire its own equity securities.

SECTION 1r. 180.725 (5) of the statutes is created to read:

180.725 (5) In addition to a vote otherwise required by law or the articles of incorporation of the issuing public corporation, approval by vote of holders of a majority of the shares of the issuing public corporation entitled to vote on the proposal is required at a shareholders' meeting held in conformance with ss. 180.24 and 180.28 before any of the following actions may be taken by the officers or board of directors of the issuing public corporation, while a take-over offer is being made, or after a take-over offer has been publicly announced and before it is concluded, for the issuing public corporation's voting shares:

(a) Acquiring more than 5% of the issuing public corporation's voting shares at a price above the market value from any individual who or organization which holds more than 3% of the voting shares and has held the shares for less than 2 years, unless the issuing public corporation makes at least an equal offer to acquire all voting shares and all securities which may be converted into voting shares.

(b) Selling or optioning assets of the issuing public corporation which amount to at least 10% of the mar-

ket value of the issuing public corporation. This paragraph does not apply to an issuing public corporation if all of the following are satisfied:

1. The issuing public corporation has at least 3 directors who are not either officers or employees of the issuing public corporation.

2. A majority of the directors who are not either officers or employees of the issuing public corporation vote to not be governed by this paragraph.

SECTION 2. 180.726 of the statutes is created to read:

180.726 Restrictions on certain business combinations involving a resident domestic corporation and interested stockholder. (1) DEFINITIONS. In this section:

(a) "Affiliate" has the meaning given in s. 180.725 (1).

(b) "Announcement date" means the date of the first public announcement of the final, definitive proposal for a business combination.

(c) "Associate" of a person means any of the following:

1. A corporation or organization of which the person is an officer, director or partner or is the beneficial owner of at least 10% of any class of voting stock.

2. A trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity.

3. A relative or spouse of the person, or a relative of the spouse, who has the same principal residence as the person.

(d) 1. "Beneficial owner" of stock means a person, except as provided in subd. 2, that meets any of the following conditions:

a. Individually, or with or through any of the person's affiliates or associates, beneficially owns the stock, directly or indirectly.

b. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right, whether exercisable immediately or only after the passage of time, to acquire the stock pursuant to a written or unwritten agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise.

c. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right to vote the stock pursuant to a written or unwritten agreement, arrangement or understanding, except that a person is not the beneficial owner of stock under this subd. 1. c if the agreement, arrangement or understanding to vote that stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the exchange act and is not reportable under the report required under 17 CFR 240.13d-1 (1) (a) or a comparable or successor report.

d. Has a written or unwritten agreement, arrangement or understanding with another person that is directly or indirectly a beneficial owner, or whose affiliates or associates are direct or indirect beneficial owners, of the stock, if the agreement, arrangement or understanding is for the purpose of acquiring, holding, disposing of or voting the stock, unless the voting is pursuant to a revocable proxy or consent described in subd. 1. c.

2. A person is not the direct or indirect beneficial owner of stock tendered pursuant to a tender or exchange offer which is made by that person or an affiliate or associate of that person until the tendered stock is accepted for purchase or exchange.

(e) "Business combination" means any of the following:

1. A merger, including a merger under s. 180.685, or consolidation of the resident domestic corporation or any subsidiary of the resident domestic corporation with any of the following:

a. An interested stockholder.

b. A corporation, whether or not it is an interested stockholder, which is, or after a merger or consolidation would be, an affiliate or associate of an interested stockholder.

2. A sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, to or with an interested stockholder or an affiliate or associate of an interested stockholder of assets of the resident domestic corporation or a subsidiary of the resident domestic corporation if those assets meet any of the following conditions:

a. Have an aggregate market value equal to at least 5% of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation.

b. Have an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

c. Represent at least 10% of the earning power or income, determined on a consolidated basis, of the resident domestic corporation.

3. The issuance or transfer by the resident domestic corporation or a subsidiary of the resident domestic corporation, in one transaction or a series of transactions, of any stock of the resident domestic corporation or a subsidiary of the resident domestic corporation if all of the following conditions are satisfied:

a. The stock has an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

b. The stock is issued or transferred to an interested stockholder or an affiliate or associate of an interested stockholder, except for stock of the resident domestic corporation or such subsidiary issued or transferred pursuant to the exercise of warrants, rights or options to purchase such stock offered, or a dividend paid, or

distribution made, proportionately to all stockholders of the resident domestic corporation.

4. The adoption of a plan or proposal for the liquidation or dissolution of the resident domestic corporation which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, an interested stockholder or an affiliate or associate of an interested stockholder.

5. Any of the following, if the direct or indirect effect is to increase the proportionate share of the outstanding stock of a class or series or securities convertible into voting stock of the resident domestic corporation or a subsidiary of the resident domestic corporation beneficially owned by the interested stockholder or an affiliate or associate of the interested stockholder, unless the increase is the result of immaterial changes due to fractional share adjustments:

a. A reclassification of securities, including, without limitation, a stock split, stock dividend or other distribution of stock in respect of stock, or reverse stock split.

b. A recapitalization of the resident domestic corporation.

c. A merger or consolidation of the resident domestic corporation with a subsidiary of the resident domestic corporation.

d. Any other transaction, whether or not with, into or involving the interested stockholder, which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, the interested stockholder or an affiliate or associate of the interested stockholder.

6. Receipt by an interested stockholder or an affiliate or associate of an interested stockholder of the direct or indirect benefit of a loan, advance, guarantee, pledge or other financial assistance or a tax credit or other tax advantage provided by or through the resident domestic corporation or any subsidiary of the resident domestic corporation, unless the interested stockholder receives the benefit proportionately as a holder of stock of the resident domestic corporation.

(g) "Consummation date" means the date of consummation of a business combination.

(h) 1. "Control", "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, except as provided in subd. 2, by contract, or otherwise.

2. "Control" of a corporation is not established under subd. 1 if a person, in good faith and not for the purpose of circumventing this section, holds voting power as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation.

(i) "Exchange act" means the securities exchange act of 1934 and amendments thereto.

(j) 1. "Interested stockholder", with respect to a resident domestic corporation, means a person other than the resident domestic corporation or a subsidiary of the resident domestic corporation that meets any of the following conditions:

a. Is the beneficial owner of at least 10% of the voting power of the outstanding voting stock of that resident domestic corporation.

b. Is an affiliate or associate of that resident domestic corporation and at any time within 3 years immediately before the date in question was the beneficial owner of at least 10% of the voting power of the then outstanding voting stock of that resident domestic corporation.

2. For the purpose of determining whether a person is an interested stockholder, the number of shares of voting stock of the resident domestic corporation considered outstanding includes shares beneficially owned by the person but does not include any other unissued shares of voting stock of the resident domestic corporation which may be issuable pursuant to an agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(L) 1. "Resident domestic corporation" means a domestic corporation that, as of the stock acquisition date in question, satisfies any of the following:

a. Its principal executive offices are located in this state.

b. It has significant business operations located in this state.

c. More than 10% of the holders of record of its shares are residents of this state.

d. More than 10% of its shares are held of record by residents of this state.

2. For purposes of subd. 1. c and d, the record date for determining the percentages and numbers of shareholders and shares is the most recent shareholder record date established under s. 180.26 before the stock acquisition date in question, and the residence of each shareholder is the address of the shareholder which appears on the records of the resident domestic corporation.

(m) "Stock" means any of the following:

1. Shares, stock or similar security, certificate of interest, participation in a profit sharing agreement, voting trust certificate, or certificate of deposit for any of the items described in this subdivision.

2. Security which is convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock, or any other security carrying a right to acquire, subscribe to or purchase stock.

(n) "Stock acquisition date", with respect to any person, means the date that that person first becomes an interested stockholder of that resident domestic corporation.

(o) "Subsidiary" of a resident domestic corporation means any other corporation, whether or not a domestic corporation, of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by the resident domestic corporation.

(p) "Voting stock" means capital stock of a corporation, whether or not a domestic corporation, entitled to vote generally in the election of directors.

(2) BUSINESS COMBINATIONS DURING THE 3 YEARS AFTER THE STOCK ACQUISITION DATE. Except as provided in sub. (5), a resident domestic corporation may not engage in a business combination with an interested stockholder of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock made by the interested stockholder on that stock acquisition date.

(3) BUSINESS COMBINATIONS MORE THAN 3 YEARS AFTER THE STOCK ACQUISITION DATE. At any time after the 3-year period described in sub. (2), the resident domestic corporation may engage in a business combination with the interested stockholder but only if any of the following is satisfied:

(a) The board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, the purchase of stock made by the interested stockholder on that stock acquisition date.

(b) The business combination is approved by the affirmative vote of the holders of a majority of the voting stock not beneficially owned by the interested stockholder at a meeting called for that purpose.

(c) The business combination meets all of the following conditions:

1. Holders of all outstanding shares of stock of the resident domestic corporation not beneficially owned by the interested stockholder are each entitled to receive per share an aggregate amount of cash and the market value, as of the consummation date, of non-cash consideration at least equal to the higher of the following:

a. The highest of: the market value per share on the announcement date with respect to the business combination, the market value per share on the interested stockholder's stock acquisition date, the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the announcement date of the business combination, or the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the interested stockholder's

stock acquisition date; plus, in each case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid or the per share market value was determined, through the consummation date, at the rate for one-year U.S. treasury obligations from time to time in effect; less the aggregate amount of any cash and the market value, as of the dividend payment date, of any noncash dividends paid per share since that date, up to the amount of that interest.

b. The highest preferential amount per share, if any, to which the holders of shares of that class or series of stock are entitled upon the voluntary or involuntary liquidation of the resident domestic corporation, plus the aggregate amount of dividends declared or due which those holders are entitled to before payment of dividends on another class or series of stock, unless the aggregate amount of those dividends is included in the preferential amount.

2. The form of consideration to be received by holders of each particular class or series of outstanding stock in the business combination is in cash or, if the interested stockholder previously acquired shares of that class or series, the same form as the interested stockholder previously used to acquire the largest number of shares of that class or series.

(d) The business combination is a business combination as described in sub. (5) (a), (b), (c), (d) or (e).

(4) DETERMINATION OF MARKET VALUE. For purposes of this section, the market value of stock or property other than cash or stock is determined as follows:

(a) In the case of stock, by:

1. The highest closing sale price during the 30 days immediately before the date in question of a share of that class or series of stock on the composite tape for stocks listed on the New York stock exchange, or, if that class or series of stock is not quoted on the composite tape or if that class or series of stock is not listed on the New York stock exchange, on the principal U.S. securities exchange registered under the exchange act on which that class or series of stock is listed.

2. If that class or series of stock is not listed on an exchange described in subd. 1, the highest closing bid quotation for a share of that class or series of stock during the 30 days immediately before the date in question on the national association of securities dealers automated quotation system, or any similar system then in use.

3. If no quotations described in subd. 2 are available, the fair market value on the date in question of a share of that class or series of stock as determined in good faith by the board of directors of the resident domestic corporation.

(b) In the case of property other than cash or stock, the fair market value of the property on the date in question as determined in good faith by the board of directors of the resident domestic corporation.

(4m) **PRESUMPTION OF CONTROL.** For purposes of this section, a person's beneficial ownership of at least 10% of the voting power of a corporation's outstanding voting stock creates a presumption that the person has control of the corporation.

(5) **EXCLUSIONS FROM SECTION.** This section does not apply to any of the following:

(a) Unless the articles of incorporation provide otherwise, a business combination of a resident domestic corporation with an interested stockholder if the resident domestic corporation did not have a class of voting stock registered or traded on a national securities exchange or registered under section 12 (g) of the exchange act on the interested stockholder's stock acquisition date.

(b) Unless the articles of incorporation provide otherwise, a business combination with an interested stockholder who was an interested stockholder immediately before the effective date of this paragraph [revisor inserts date], unless subsequently the interested stockholder increased its beneficial ownership of the voting power of the outstanding voting stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before the effective date of this paragraph [revisor inserts date], excluding an increase approved by the board of directors of the resident domestic corporation before the increase occurred.

(c) A business combination of a resident domestic corporation with an interested stockholder which became an interested stockholder inadvertently, if the interested stockholder satisfies all of the following:

1. As soon as practicable divests itself of a sufficient amount of the voting stock of the resident domestic corporation so that the interested stockholder is no longer the beneficial owner of at least 10% of the voting power of the outstanding voting stock of the resident domestic corporation, or a subsidiary of that resident domestic corporation.

2. Would not at any time within the 3 years before the announcement date with respect to the business combination in question have been an interested stockholder except for the inadvertent acquisition.

(d) A business combination of a resident domestic corporation with an interested stockholder which was an interested stockholder immediately before the effective date of this paragraph [revisor inserts date], and inadvertently increased its beneficial ownership of the voting power of the outstanding voting

stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before the effective date of this paragraph [revisor inserts date], if the interested stockholder divests itself of a sufficient amount of voting stock so that the interested stockholder is no longer the beneficial owner of a proportion of the voting power in excess of the proportion of voting power that the interested stockholder held immediately before the effective date of this paragraph [revisor inserts date].

(e) A business combination of a resident domestic corporation if the business combination is governed by s. 180.04 (6), with respect to acquiring or holding stock of a state bank or trust company, or by s. 186.31, 186.41, 215.36, 215.53, 215.73, 221.25, 221.58 or 223.11.

(6) **RELATIONSHIP OF SECTION TO OTHER LAWS.** (a) The requirements of this section are in addition to the requirements of other applicable law, including the other provisions of this chapter, and any additional requirements contained in the articles of incorporation or bylaws of a resident domestic corporation with respect to business combinations.

(b) For purposes of applying this section, if any other provision of this chapter is inconsistent with, in conflict with or contrary to this section, that provision does not apply to the extent that it is inconsistent with, in conflict with or contrary to this section.

(7) **SUNSET.** This section does not apply after September 10, 1991.

SECTION 2m. Nonstatutory provisions; legislative council study. The legislative council is requested to study the effect of section 180.726 of the statutes, as created by this act, and other laws of this state on business combinations, as defined in section 180.726 (1) (e) of the statutes. The legislative council is requested to report its findings, conclusions and recommendations to the 1989 legislature when it convenes.

SECTION 3m. Effective dates. This act takes effect retroactive to September 10, 1987, except as follows:

(1) The treatment of section 180.726 (5) (b) of the statutes is effective the day after publication for any person who was an interested stockholder on September 10, 1987.

(2) The treatment of section 180.725 of the statutes is effective the day after publication.