

Chapter SEC 2

REGISTRATION EXEMPTIONS

SEC 2.01 Exempt securities

SEC 2.03 Exemption proceedings

SEC 2.02 Exempt transactions

SEC 2.01 Exempt securities. (1) (a) Any revenue obligation payable from payments to be made in respect of property or money used under a lease, sale or loan arrangement by or for a nongovernmental industrial or commercial enterprise, is exempted under s. 551.22 (1), Stats., if:

1. The enterprise is a public utility described under s. 551.22 (6), Stats., having securities registered under section 12 of the securities exchange act of 1934, or is a wholly-owned subsidiary of one or more of such utilities.

2. Any securities of the enterprise, or any securities of an unconditional guarantor of all payments under the lease, sale or loan arrangement, are exempt under s. SEC 2.01 (7), or

3. A notice of the proposed offering is filed with the commissioner prior to the offering, including a trust indenture meeting the requirements of s. SEC 3.24, Wis. Adm. Code, an official statement or a prospectus meeting the requirements of s. SEC 3.23, Wis. Adm. Code, that contains financial statements for the enterprise meeting the requirements of s. SEC 3.22 (1) (p), Wis. Adm. Code, and such additional information as the commissioner may require, and the commissioner does not by order deny the exemption within 20 days of the date the notice is filed. The financial statement requirement in this subdivision is not applicable if the revenue obligations being offered are the subject of an irrevocable letter of credit from a bank in favor of holders of the revenue obligations providing for payment of principal and interest on the revenue obligations, and the letter of credit is accompanied by an opinion of counsel stating that: a.i. payment of debt service will not constitute a preference under the U.S. bankruptcy code in the event of a filing of a petition in bankruptcy with respect to the enterprise, or ii. the letter of credit will provide for reimbursement to holders of the revenue obligations in the event they are required by order of a U.S. bankruptcy court to disgorge as a preference any payment of a debt service, or a combination of i. and ii.; and stating that b. the enforceability of the letter of credit would not be materially affected by the filing of a petition under the U.S. bankruptcy code with respect to the enterprise or any person obligated to reimburse the bank for payments made pursuant to the letter of credit.

(b) Any guarantee of any security exempt under s. 551.22 (1), Stats., is exempted from s. 551.21, Stats.

(2) For purposes of s. 551.22 (3), Stats., an issuer or a guarantor is "subject to regulation in respect of the issuance or guarantee of its securities by a governmental authority" if that governmental authority has authority to regulate the issuer's or guarantor's business and the terms of the particular securities to be offered and sold.

SEC 2

(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, Wis. Adm. Code, 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), Wis. Adm. Code; and such additional information as the commissioner may require; and the commissioner does not by order deny or revoke the exemption within 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, Wis. Adm. Code.

(b) A person does not become a "member" for purposes of s. 551.22 (8), Stats., solely by reason of the purchase of the issuer's securities.

(4) "Commercial paper" exempted under s. 551.22 (9), Stats., means any note, draft or bill of exchange, which:

(a) Evidences an obligation to pay cash within 9 months of the date of issuance, exclusive of days of grace, any renewal of the paper which is likewise limited, or any guarantee of the paper or the renewal;

(b) Is offered or sold through a broker-dealer, or an institution described in s. 551.22 (3), Stats., or a state or any agency or political subdivision thereof, whether the person is acting for itself or for the account of a customer;

(c) Is not offered or sold to the general public by means of the publication or circulation of any advertising; and

(d) Is issued to finance liquid current assets (including inventories and receivables) or current operating expenses.

(5) A notice filed under s. 551.22 (10), Stats., shall consist of a complete description of the plan, including any advertising to be published, circulated or used. The exemption may be denied if the plan is unfair or inequitable to purchasers of securities thereunder. If the plan involves purchases of the employer's securities, a plan may be deemed unfair or inequitable unless:

(a) The formula price at which employes may purchase shares is calculated at least annually, and is not less than 85% of the fair market value of the stock at the beginning of the one-year purchase period or the end of the purchase period, whichever is lower, and shares purchased are fully paid for at the end of each period, stock certificates are issued and no fractional shares are issued;

(b) The issuer files an undertaking to deliver to all participating employes copies of the issuer's annual financial statements;

(c) A participating employe has the right to withdraw from the plan at any time without penalty;

(d) If there is no adequate public market for the issuer's shares as defined in s. SEC 3.02 (1) (b), Wis. Adm. Code, the issuer offers to re-

purchase the shares at a price determined by the same formula pursuant to which the shares were purchased by the employe under the issuer's plan, upon the happening of either of the following events:

1. The employe ceases to be employed by the issuer (or a subsidiary), and a written request for repurchase is received by the issuer within 180 days after termination of employment; or

2. The employe experiences severe financial hardship due to illness or death in the immediate family, major uninsured casualty loss or other unforeseen events, and delivers to the issuer a written irrevocable election to have the issuer repurchase the shares, including a statement in reasonable detail as to the nature of the employe's financial hardship, and within 20 days the issuer's board of directors does not determine that no severe financial hardship exists.

(e) All funds contributed to the plan for the purchase of shares are protected from claims of creditors of the issuer;

(f) Any withholding from an employe's compensation is limited to not more than 10% of the compensation each pay period;

(g) All shares issued under the plan have voting, dividend and liquidation rights meeting the requirements of s. SEC 3.07; and

(h) If the securities to be purchased under the plan are not registered under the securities act of 1933, the issuer files a satisfactory opinion of counsel as to its exempt status under that act.

(6) Any security issued by a licensed broker-dealer to its officers, partners or employes is exempted under s. 551.22 (14), Stats., if:

(a) The issuer files with the commissioner prior to the offering a notice of the proposed issuance and such additional information as the commissioner requires, and the commissioner does not by order disallow the exemption within 10 days; or

(b) The security evidences a temporary subordinated borrowing by a broker-dealer that is a member of a national securities exchange, which is made in accordance with the rules of that exchange.

(7) Any security that meets all of the following conditions is exempted under s. 551.22 (17), Stats.:

(a) If the issuer is not organized under the laws of the United States or a state, it has appointed a duly authorized agent in the United States for service of process and has set forth the name and address of the agent in its prospectus;

(b) A class of the issuer's securities is required to be and is registered under section 12 of the securities exchange act of 1934, and has been so registered for the 3 years immediately preceding the offering date;

(c) Neither the issuer nor a significant subsidiary has had a material default during the lesser of the last 7 years or the issuer's existence in the payment of (i) principal, interest, dividend, or sinking fund installment on preferred stock or indebtedness for borrowed money, or (ii) rentals under leases with terms of 3 years or more. A "material default" is a failure to pay, the effect of which is to cause indebtedness to become due prior to its stated maturity or to cause termination or reentry under a

SEC 2

lease prior to its stated expiration, if the indebtedness or the rental obligation for the unexpired term exceeds 5% of the issuer's (and its consolidated subsidiaries) total assets, or if the arrearage in required dividend payments on preferred stock is not cured within 30 days;

(d) The issuer has had annual consolidated net income (before extraordinary items and the cumulative effect of accounting changes) as follows: (i) at least one million dollars in 4 of its last 5 fiscal years including its last fiscal year, and (ii) if the offering is of interest bearing or fixed dividend securities, at least 1½ times its annual interest and fixed dividend expense, calculating net income before deduction for income taxes and depreciation and giving effect to the proposed offering and the intended use of the proceeds, for its last fiscal year. In this paragraph, "last fiscal year" means the most recent year for which audited financial statements are available, if the statements cover a fiscal period ended not more than 15 months from the commencement of the offering;

(e) If the offering is of stock or shares (other than preferred stock or shares), and except as otherwise required by law, the securities have voting rights at least equal to the securities of each of the issuer's outstanding classes of stock or shares (other than preferred stock or shares), with respect to (i) the number of votes per share, and (ii) the right to vote on the same general corporate decisions;

(f) If the offering is of stock or shares (other than preferred stock or shares), the securities are owned beneficially or of record, on any date within 6 months prior to the commencement of the offering, by at least 1,200 persons, and on that date there are at least 750,000 of the shares outstanding with an aggregate market value, based on the average bid price, of at least \$3,750,000. In determining the number of persons who are beneficial owners of the stock or shares, the issuer or a broker-dealer may rely in good faith upon written information furnished by record owners;

(g) Provided that, if the securities to be issued are listed, or approved for listing upon notice of issuance, on the New York Stock Exchange, Inc. or the American Stock Exchange, Inc., and the current original listing standards of that exchange are satisfied as of the end of the issuer's most recent fiscal year, the conditions of clause (c) need be met for only 5 years and the annual net earnings requirement of clause (d) (i) shall be \$250,000;

(h) And provided further that, if the issuer of the securities is a finance company with liquid assets of at least 105% of its liabilities (other than deferred income taxes, deferred investment tax credits, capital stock and surplus) at the end of each of its last 5 fiscal years, the net income requirement of clause (d) (ii), but before deduction for interest expense, shall be 1¼ times its annual interest expense. "Finance company" means a company engaged (directly or through consolidated subsidiaries), primarily in the business of wholesale, retail, installment, mortgage, commercial, industrial or consumer financing, banking or factoring. "Liquid assets" means cash, receivables payable on demand or not more than 12 years following the close of the company's last fiscal year, and readily marketable securities, in each case less applicable reserves and unearned income.

(7m) An issuer meets the conditions in sub. (7) (b) to (d) if either the issuer or the issuer and the issuer's predecessor, taken together,

meet those conditions and if: (i) the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or (ii) all predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

(8) Any security issued or guaranteed as to both principal and interest by an international bank of which the United States is a member is exempted under s. 551.22 (17), Stats.

History: Cr. Register, December 1969, No. 168, eff. 1-1-70; r. and recr. Register, August, 1972, No. 200, eff. 9-1-72; cr. (6), Register, October, 1974, No. 226, eff. 11-1-74; r. (1), renum. (6) to be (1) and am., renum. (2) to (5) to be (3) to (6), am. (3) and (4), r. and recr. (5), cr. (2) and (7), Register, December, 1977, No. 264, eff. 1-1-78; am. (2), r. (3), renum. (4), (5) and (7) to be (3), (4) and (5), am. (3) (a), cr. (7) and (8), Register, September, 1978, No. 273, eff. 10-1-78; emerg. am. (1) (a) 2., eff. 10-1-78; am. (1) (a) 2., Register, January, 1979, No. 277, eff. 2-1-79; am. (7) (d) and (h), Register, December, 1979, No. 288, eff. 1-1-80; am. (1) (a) 1. to 3., (3) (a), (4) (a) and (b), (5) (f), (6) (a) and (7) (a) and (d), Register, December, 1980, No. 300, eff. 1-1-81; am. (1) (a) 3. and (3) (a), cr. (7m), Register, December, 1981, No. 312, eff. 1-1-82.

SEC 2.02 Exempt transactions. (1), An "isolated nonissuer transaction" within the meaning of s. 551.23 (1), Stats., includes:

(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 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 during the prior 12 months; and

(b) Any sale of an outstanding security by or on behalf of a person in control of the issuer or controlled by the issuer or under common control with the issuer if the sale is effected pursuant to brokers' transactions in accordance with section 4 (4) of the Securities Act of 1933 and rule 144 thereunder; or pursuant to any other transaction not effected through a broker-dealer and not involving a distribution if the sale, including any other sales by the person of securities of the same class during the prior 12 months, does not exceed 1% of the outstanding shares or units of that class.

(2) In any nonissuer transaction effected by or through a licensed broker-dealer under s. 551.23 (2), Stats., pursuant to an unsolicited order or offer to purchase, the broker-dealer shall obtain from the purchaser a written acknowledgment that the purchase was unsolicited, or the confirmation delivered to the purchaser or a memorandum delivered in connection therewith shall confirm that the purchase was unsolicited by the broker-dealer or any agent of the broker-dealer. This exemption includes only transactions between a broker-dealer and a purchaser of a security.

(3) Any sale of an outstanding security is exempted under s. 551.23 (3), Stats., if:

(a) With respect to a security qualifying under s. 551.23 (3) (c), Stats., the issuer or a licensed broker-dealer files a notice of the proposed sale with the commissioner prior to the offering, including the latest prospectus filed under the securities act of 1933 describing the securities proposed to be sold, and the information concerning the public

02. 2.01 (1) (b) & (d)
(10) (11) & (12)
eff 5-1-82

SEC 2

market for the security specified in s. SEC 3.02 (1) (b), Wis. Adm. Code. The exemption, unless denied or revoked by order of the commissioner within 10 days, is effective so long as the issuer is filing periodic information, documents and reports under section 15 (d) of the securities exchange act of 1934.

(b) With respect to a security qualifying under s. 551.23 (3) (d), Stats., the issuer or an applicant files with the commissioner prior to the offering a notice of the proposed sale, including: the prospectus used in the most recent offering of the securities proposed to be sold; any information specified in ss. SEC 3.22 and 3.23, Wis. Adm. Code, and not contained in the filed prospectus; the trust indenture, if any, under which the securities proposed to be sold are issued; the information concerning the public market for the security specified in s. SEC 3.02 (1) (b), Wis. Adm. Code; a balance sheet of the issuer as of the end of the last fiscal year of the issuer preceding the date of filing and statements of income and changes in financial position and analysis of surplus for such fiscal year meeting the requirements of s. SEC 7.06, Wis. Adm. Code; an undertaking to file with the commissioner within 120 days (180 days with respect to a corporation organized and operated not for private profit but exclusively for religious, educational, benevolent or charitable purposes) after the end of each fiscal year of the issuer comparable financial statements of the issuer for each such fiscal year; and an undertaking to furnish the commissioner with a written report within 30 days after the happening of any material event affecting the issuer or the securities proposed to be sold. The exemption, unless disallowed by order of the commissioner within 10 days, is effective so long as the information required to be furnished is kept current.

(4) A "financial institution or institutional investor" within the meaning of s. 551.23 (8), Stats., includes:

(a) An endowment or trust fund of a charitable organization specified in section 170 (b) (1) (A) of the Internal Revenue Code;

(b) An issuer which has any class of securities registered under section 12 of the Securities Exchange Act of 1934, and any wholly owned subsidiary thereof;

(c) Any other corporation, partnership or association which has been in existence for 10 years or whose net assets exceed \$500,000, and whose principal purpose as stated in its articles, by-laws or other organizational instrument is investing in securities; and

(d) Any other person or entity whom the commissioner by order designates.

(5) With respect to an offer or sale of a security exempted under s. 551.23 (10) or (11), Stats.:

(a) Offerees or persons holding directly or indirectly all the issuer's securities include all joint or common owners and all beneficial owners of its securities, and all beneficial owners of any corporation, partnership, association or trust holding any of the issuer's securities and organized in connection with the offer or sale of the securities, provided that any relative or spouse, or any relative of the spouse, having the same home as the offeree or person, shall not be deemed a separate offeree or person;

(b) Issuers affiliated by reason of direct or indirect control or persons affiliated by reason of direct or indirect control of any issuer are deemed to be a single issuer or person; but use of an exemption for the offer and sale of securities by such affiliated issuer or person shall not be denied on account of such affiliation provided the offer and sale are not part of a common business purpose or plan of offering, or if upon the filing of an application the commissioner so orders. A "common business purpose or plan of offering" is presumed where the offer or sale of securities is not separate and distinct from another offer and sale of securities with respect to (i) the application of proceeds, (ii) the physical proximity of real property or other assets, or (iii) the financial affairs of the business;

(c) A reasonable commission or fee may be paid to a broker-dealer licensed in this state for services rendered in connection with a sale of securities effected under s. 551.23 (10) or (11), Stats.; a commission or fee will be presumed reasonable if it does not exceed the amount permitted under s. SEC 3.01 (1), Wis. Adm. Code; and

(d) The exemption for any offer or sale under s. 551.23 (11), Stats., is withdrawn with respect to:

1. Any offer or sale of interests in a limited partnership, irrespective of the kind of assets held or business engaged in by the partnership, any investment contract irrespective of the kind of assets held or business engaged in by the enterprise, or any certificate of interest or participation in an oil, gas or mining title or lease, or in payments out of production under the title or lease, if the aggregate offering price or face amount, whichever is greater, of all securities to be offered by or on behalf of the issuer, together with the value of any securities sold to persons in this state by or on behalf of the issuer during the prior 12 months, exceeds \$100,000, unless prior to the offering the issuer files a notice of the proposed offer or sale with the commissioner, including any prospectus, circular or other material to be delivered to offerees, and such other information as the commissioner may require, and the commissioner does not by order withdraw, deny or revoke the exemption within 10 days;

2. Any offer or sale of equity securities by or on behalf of any person directly or indirectly controlling an issuer whose equity securities were registered under ch. 551, Stats., or any predecessor law and are held of record by more than 100 shareholders in this state, otherwise than in compliance with s. SEC 2.02 (1) (b); and

3. Any offer or sale of securities registered under the securities act of 1933 or exempted by regulations A or B thereunder, unless permitted by order of the commissioner in compliance with such conditions as the commissioner may prescribe.

(6) Notice of an offer to existing security holders exempted under s. 551.23 (12), Stats., shall be filed with the commissioner prior to the offering, and shall include any prospectus, circular or other material to be delivered to offerees in connection with such transaction.

(7) "Class vote" within the meaning of s. 551.23 (13), Stats., includes any vote pursuant to the articles of incorporation or the applicable corporation statute, of the stockholders of a corporation voting as one class, and any vote of stockholders of any class taken in accordance with the

SEC 2

provisions of s. 180.52, Stats., or comparable provisions of the articles of incorporation or of an applicable corporation statute of another state.

(8) (a) "Stock split" within the meaning of s. 551.23 (14), Stats., does not include any action by the corporation which has or may have the effect of consolidating securities of a class of outstanding equity securities into a smaller number of securities of that class;

(b) "Stock dividend" within the meaning of s. 551.23 (14), Stats., includes the issuance of shares under a dividend reinvestment plan in which the election by a shareholder to participate in the plan is voluntary and such election may be rescinded at any time upon notice to the issuer.

(9) Notice of an offer of an evidence of debt of a non-profit corporation exempted under s. 551.23 (15), Stats., shall be filed with the commissioner prior to the offering, and shall include: a trust indenture meeting the requirements of s. SEC 3.24, Wis. Adm. Code, under which the evidence of debt is proposed to be issued; a prospectus describing the issuer, trust indenture and 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), Wis. Adm. Code; such additional information as the commissioner may require; and

(a) With respect to an offer qualifying under s. 551.23 (15) (a), Stats., a signed or conformed opinion of counsel for the issuer or other evidence satisfactory to the commissioner with respect to the validity and rank of the lien of the mortgage or deed of trust and evidence satisfactory to the commissioner that the total amount of the securities proposed to be offered does not exceed 50% of the then fair market value of the land and buildings included in the mortgage or deed of trust, less the amount of any unpaid special assessment taxes; or

(b) With respect to an offer qualifying under s. 551.23 (15) (b), Stats., a balance sheet of the issuer as of the end of the last fiscal year of the issuer preceding the date of filing, and statements of income and changes in financial position and an analysis of surplus of the issuer for each of its 3 immediately preceding fiscal years meeting the requirements of s. SEC 7.06, Wis. Adm. Code.

(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, Wis. Adm. Code.

(10) The following transactions are exempted under s. 551.23 (18), Stats., without limiting the commissioner's authority thereunder:

(a) Any isolated issuer transaction relating to redeemable securities of an investment company registered under the investment company act of 1940, effected through a licensed broker-dealer pursuant to an unsolicited order or offer to purchase, provided that the broker-dealer obtains from the purchaser a written acknowledgment that the purchase was unsolicited or the confirmation delivered to the purchaser or a memorandum delivered in connection therewith confirms that the purchase was unsolicited by the broker-dealer or any agent of the broker-dealer. A transaction is presumed to be "isolated" if it is one of not more than 3 such transactions during the prior 12 months.

(b) Any issuance of securities by a corporation in a transaction meeting the requirements of section 368 (a) (1) (B) of the internal revenue code, if the issuer files with the commissioner the reorganization agreement and plan pursuant to which such securities are proposed to be issued and such additional information as the commissioner may require, and the commissioner does not by order disallow the exemption within 10 days.

(c) Any transaction pursuant to an offer to existing security holders of the issuer, and to not more than 10 other persons in this state less the number of persons in this state with whom the issuer has effected any transactions during the period of 12 months preceding the offer pursuant to s. 551.23 (10) or (11), Stats., if no commission or other remuneration other than a standby commission is paid or given directly or indirectly for soliciting any security holder in this state; and if the issuer files with the commissioner prior to the offering a notice specifying the terms of the offer, including any prospectus, circular or other material to be delivered to offerees in connection with the transaction and such other information as the commissioner may require, and the commissioner does not by order disallow the exemption within 10 days.

(d) Any transaction incident to a vote of security holders of any issuer other than a corporation, pursuant to its organizational instrument or the applicable statute of any state, on a reorganization or a sale or transfer of assets in consideration of the issuance of securities of another person.

(e) Any offer or sale of securities pursuant to a transaction not involving a public offering under the securities act of 1933 which the commissioner by order exempts upon application filed by the issuer or seller, including such information as the commissioner may require, effected in compliance with such conditions as the commissioner may prescribe.

(f) Any offer or sale of securities to the employes or agents of the issuer or its subsidiaries pursuant to a stock option plan, provided there is filed with the commissioner a notice consisting of a complete description of the plan including any advertising to be published, circulated or used, and the commissioner by order exempts the plan. The commissioner may find the order inappropriate for the protection of investors unless:

1. The plan extends for no longer than 10 years;
2. The total amount of options and the exercise price meet the requirements of s. SEC 3.03 (4) and (5), Wis. Adm. Code;
3. The issuer files an undertaking to deliver to all participating employes copies of the issuer's annual financial statements;
4. Installment payments for shares issued upon exercise are not permitted;
5. Certificates are issued upon exercise;
6. The plan meets the repurchase standards of s. SEC 2.01 (5) (d);
7. All shares issued under the plan have voting, dividend and liquidation rights meeting the requirements of s. SEC 3.07, Wis. Adm. Code; and

SEC 2

8. If the shares to be issued under the plan are not registered under the securities act of 1933, the issuer files a satisfactory opinion of counsel as to its exempt status under that act.

(g) Any offer by a licensed broker-dealer pursuant to a preliminary prospectus, provided the securities are the subject of a registration statement filed under s. 551.25 or 551.26, Stats., or a notice filed under s. 551.22 (1) or (8) or 551.23 (12) or (15), Stats., and provided that the preliminary prospectus has been filed with the U.S. securities and exchange commission or the commissioner for a period of 10 days, and the commissioner does not by order deny the exemption.

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SEC 2.03 Exemption proceedings. (1) A notice of exemption pursuant to s. 551.22 or 551.23, Stats., shall be accompanied by a copy of any prospectus, circular or other material to be delivered to offerees, the fee prescribed by s. SEC 7.01 (2), Wis. Adm. Code, and a cover letter describing how the offering will meet all the requirements for use of the exemption sought to be utilized.

(2) If any information is reasonably required by the commissioner prior to the effective date of an exemption, in connection with the examination of any notice filed pursuant to s. 551.22 or 551.23, Stats., the notice is not deemed filed until the information so required is filed with the commissioner.

(3) An order of the commissioner disallowing an exemption with respect to a specified security or transaction pursuant to s. 551.22 or 551.23 Stats., has the same effect as an order denying or revoking an exemption pursuant to s. 551.24, Stats.

History: Cr. Register, December, 1969, No. 168, eff. 1-1-70; r. and recr. Register, August, 1972, No. 200, eff. 9-1-72; am. (1), Register, December, 1977, No. 264, eff. 1-1-78; r. and recr. (1), Register, December, 1981, No. 312, eff. 1-1-82.