

CHAPTER 552

CORPORATE TAKE-OVER LAW

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552.01 Definitions. In this chapter:

(1) "Commissioner" means the commissioner of securities.

(2) "Equity security" means any shares of stock or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of investors, is deemed an equity security pursuant to rule of the commissioner.

(3) "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made. "Offeror" does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employe, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the take-over offer.

(4) "Offeree" means a record or beneficial owner of a security that an offeror acquires, or offers or proposes to acquire, in connection with a take-over offer.

(5) "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror 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 a target company pursuant to:

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

(b) 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.

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

(d) An offer made to all the stockholders of the target company, if the number of its stockholders does not exceed 100 at the time of the offer.

(e) 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.

(f) An offer by the target company to acquire its own equity securities.

(6) "Target company" means a corporation or other issuer of securities:

(a) Which is organized under the laws of this state or has its principal office in this state;

(b) Which has substantial assets located in this state;

(c) Whose equity securities of any class are or have been registered under ch. 551 or predecessor laws or are registered under s. 12 of the securities exchange act of 1934; and

(d) Which has at least 100 record or beneficial holders of securities qualifying under par. (c) who are residents of this state or which has at least 5% of the securities qualifying under par. (c) held by residents of this state.

History: 1971 c. 300; 1981 c. 16.
State regulation of tender offers. Moylan, 58 MLR 687.
Challenges to state takeover laws: Preemption and the commerce clause. 64 MLR 657 (1981).

Regulation of tender offers in Wisconsin and the effect of *Great Western v. Kidwell*: The day of reckoning approaches. Harth, 1978 WLR 833.

552.03 Filing of ownership information.

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or

indirectly a beneficial owner of more than 5% of any class of the outstanding equity securities of the issuer shall, within 10 days after such acquisition, file with the commissioner on a form prescribed by the commissioner a statement containing the following information and such additional information as the commissioner by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation, or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements or understandings have been entered into.

(2) If the target company is an issuer the acquisition of whose equity securities is subject to the requirements of s. 13 (d) of the securities exchange act of 1934, any person may file with the commissioner a signed copy of the statement prescribed therein in lieu of the statement prescribed in sub. (1).

(3) Any person may file with the commissioner, in lieu of the statement prescribed in sub. (1) and unless otherwise ordered by the commissioner, a statement containing the person's name and address, the number of shares or units

of any equity security of the target company which are beneficially owned directly or indirectly by the person and each of the person's associates, the date of their acquisition and such other information as the commissioner may by rule prescribe, if the person certifies that such securities were acquired by the person in the ordinary course of the person's business and not for the purpose or having the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect, and that the person does not intend to make a take-over offer involving the target company.

(4) If any material change occurs in the facts set forth in the statement, the person filing the statement shall, within 10 days thereafter, file with the commissioner an amendment describing the change, in accordance with rules adopted by the commissioner.

(5) Each person required to file any statement or amendment thereto with the commissioner under this section shall send a signed copy of such statement or amendment by certified mail to the target company at its principal office not later than the date of filing.

(6) No person required to file any ownership statement under this section, who is delinquent in the filing of such statement, may file a registration statement relating to a proposed take-over offer for a period of 60 days after the date of filing of the ownership statement, except as may be permitted by order of the commissioner.

History: 1971 c. 300; 1981 c. 16 ss. 6 to 8, 18.

552.05 Registration of take-over offers.

(1) It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the commissioner. The commissioner may by an exemption order, with or without petition of the offeror, permit a take-over offer to be made without prior registration under this chapter if the offeror's purchase of any securities tendered incident to the offer is conditioned upon subsequent registration under this chapter. The commissioner may hold a hearing under sub. (4) with respect to the registration of a take-over offer which is subject to an exemption order. Before a take-over offer becomes effective under this chapter, the offeror shall file with the commissioner a registration statement containing the information prescribed in sub. (2), and send a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the pro-

posed offer, not later than the date of filing of the registration statement.

(2) The registration statement shall be filed on forms prescribed by the commissioner, and shall be accompanied by a consent by the offeror to service of process specified in s. 551.65 (1) and the filing fee specified in s. 552.15 (1), and shall contain the following information and such additional information as the commissioner by rule prescribes:

(a) All of the information specified in s. 552.03 (1), any part of which may be incorporated by reference to the extent that it was previously filed.

(b) Three copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company.

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past 3 years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past 3 years, and financial statements of the offeror for its 3 most recent annual accounting periods and any current period.

(d) Material information concerning the identity and background of any offeror who is not a corporation, including the offeror's material business activities and affiliations during the past 3 years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(3) The commissioner may require the offeror to file any other documents, exhibits and information that the commissioner deems material to the take-over offer, and the commissioner may permit the omission of any of the information specified in sub. (2) if the commissioner determines that such information is not required for the protection of offerees. The commissioner may by order summarily delay the effective date of the offer if the commissioner determines that the registration statement does not contain all of the information specified in sub. (2) or does not provide full disclosure to offerees of all material information concerning the offer.

(4) A take-over offer becomes effective 10 days after the date of filing the registration statement with the commissioner unless delayed by order, or unless prior thereto the commissioner calls a hearing with respect to the offer. The commissioner may call a hearing if it is necessary or appropriate for the protection of offerees in this state. Within 5 days after the filing of the registration statement, the target company, acting through its board of directors, may petition the commissioner to hold a hearing with respect to the take-over offer, except that the target company may not request a hearing if it has requested a hearing with respect to the take-over offer under a law of any other state similar to this chapter. The petition shall set forth the specific basis asserted under sub. (5) for denying, delaying or requiring amendment of the registration statement. Within 72 hours after the petition is filed the commissioner shall either call a hearing or notify the target company in writing or by telephone or telegraph why a hearing was not called. If a hearing is called by the commissioner and the target company subsequently requests a hearing with respect to the take-over offer under a law of another state similar to this chapter the commissioner shall dismiss any hearing proceedings under this chapter. If a hearing is called, the offer is not effective until registered by order of the commissioner, except that the commissioner may issue an exemption order permitting a conditional take-over offer under sub. (1) to commence.

(5) Any hearing called by the commissioner under this section shall be held within 20 days of the date of filing of the registration statement under sub. (1), and any determination made following the hearing shall be made within 30 days after the filing, unless extended by order of the commissioner for the convenience of the parties or for the protection of offerees in this state, but an extension may not exceed offering period limitations relating to take-over offers prescribed by the securities exchange act of 1934 or rules and regulations under that act, if the take-over offer is subject to the securities exchange act of 1934. If, following the hearing, the commissioner finds that the take-over offer fails to provide for full and fair disclosure to offerees of all material information concerning the offer, the offer will not be made to all stockholders on substantially equal terms, the offer is in violation of ch. 551 or this chapter or the offeror is delinquent in the filing of an ownership information statement or has filed an ownership information statement that contains a false statement of a material fact or omits to state a material fact necessary to make the statements made not misleading, the commis-

sioner may, by order, deny registration of the offer, prohibit the offeror from filing a registration statement relating to a proposed take-over offer involving the target company for a period of up to 180 days or permit the take-over offer to be amended and by order register the amended take-over offer.

(6) If the commissioner does not enter an order denying or postponing registration under sub. (5), the commissioner shall, by order, register the take-over offer or amended take-over offer. Registration of the take-over offer is not approval of the take-over offer by the commissioner.

History: 1971 c. 300; 1981 c. 16 ss. 9, 18.

552.07 Filing of solicitation materials. (1)

Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the commissioner and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to security holders of the target company.

(2) Solicitation materials used in connection with a take-over offer shall not contain any false statement of a material fact or omit to state a material fact necessary to make the statements therein not misleading. The commissioner may by rule or order prohibit the use of any solicitation materials deemed false or misleading.

History: 1971 c. 300.

552.08 Comity. The registration and filing requirements of ss. 552.05 and 552.07 do not apply to a take-over offer subject to this chapter if the commissioner determines by order that another jurisdiction has statutes or rules which are applicable to the take-over offer and are being applied which afford protection to security holders located in this state substantially equal to the protection afforded security holders by this chapter. The issuance of an order under this section does not prohibit the commissioner from participating in any proceeding in the other jurisdiction to the extent necessary to protect security holders in this state.

History: 1981 c. 16.

552.09 Fraudulent and deceptive practices.

It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation:

(1) Solicitation of any offeree for acceptance or rejection of a take-over offer, acquisition of any equity security of a target company, or acquisition, removal or exercise of control, directly or indirectly, of any target company assets in this state, in connection with a nonexempt take-over offer, before the take-over offer is permitted to be made under this chapter.

(2) Publication or use in connection with the offer of any false statement of a material fact or omitting to state a material fact necessary to make the statements made by him or her not misleading, but not including the mailing by a target company to its stockholders of solicitation materials published by an offeror.

(3) Sale to the offeror by any controlling person of a target company of any equity securities of the target company for consideration higher than that to be paid other offerees under the take-over offer.

(4) Refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statute, for the purpose of making a take-over offer in compliance with this chapter, or in lieu thereof, to mail any solicitation materials published by the offeror to its security holders with reasonable promptness after receipt from the offeror of such materials and the reasonable expenses of postage and mailing.

(5) Acquisition by or through a broker-dealer acting on behalf of an offeror or a target company of any equity security of the target company in connection with a take-over offer unless the broker-dealer files with the commissioner such information as the commissioner requires and to the extent permitted by rule or order by the commissioner, or unless the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or a target company or that the acquisition was in connection with a take-over offer.

History: 1971 c. 300; 1981 c. 16 ss. 11, 18.

552.11 Limitations on offerors. (1) No offeror may make a take-over offer involving a target company which is not made to its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.

(2) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a registered take-over offer may be withdrawn by or on behalf of any offeree at any time within 7 days from the date the offer has become effective under this chapter and

after 60 days from the date the offer has become effective under this chapter, except as to offers subject to and made in compliance with withdrawal requirements under the securities exchange act of 1934 or rules and regulations under that act, or except as the commissioner may otherwise prescribe by rule or order for the protection of investors. In any offer permitted to commence by an exemption order under s. 552.05 (1), the offeror shall provide that any equity securities tendered or deposited pursuant to the conditional offer will be purchased by the offeror only in the event a subsequent registration of the offer occurs under this chapter.

(3) If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto within 10 days after the offer has become effective under this chapter and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted proportionally, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(4) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(5) No offeror may make a take-over offer involving a target company in this state, or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding has been brought by the commissioner against the offeror for violation of this chapter that has not been finally determined.

(6) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this state unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the commissioner.

History: 1971 c. 300; 1979 c. 110 s. 60 (12); 1981 c. 16.

552.13 Administration, rules and orders.

(1) This chapter shall be administered by the commissioner of securities, who may exercise all powers granted to the commissioner under ch. 551 which are not inconsistent with this chapter.

(2) The commissioner may adopt rules necessary to carry out the purposes of this chapter,

including rules defining fraudulent or deceptive practices and other terms used in this chapter.

(3) The commissioner may by rule or order exempt from any provisions of this chapter take-over offers that the commissioner determines are not made for the purpose or do not have the effect of changing or influencing the control of a target company or where compliance with this chapter is not necessary for the protection of offerees in this state, and may exempt any person from the filing of statements under this chapter.

(4) The commissioner may by order direct any person to file any statement provided for in this chapter if it appears that such person is required to file such statement and is delinquent in the filing of such statement.

History: 1971 c. 300; 1981 c. 16 ss. 13, 18.

552.15 Fees and expenses. (1) The commissioner shall charge a filing fee of \$100 for a registration statement filed by an offeror and \$100 for a request for hearing filed by a target company.

(2) The expenses reasonably attributable to any hearing held under this chapter shall be charged ratably to the offeror and the target company.

(3) The expenses reasonably attributable to the examination of solicitation materials shall be charged to the person filing them, but the expenses so charged shall not exceed such maximum amounts as the commissioner by rule prescribes.

History: 1971 c. 300; 1981 c. 16.

552.17 Injunctions. Whenever it appears that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter, the commissioner may bring an action in the name of the state in the circuit court of the appropriate county to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter, or may refer the matter to the attorney general or the district attorney of the appropriate county. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order, may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order under this chapter or may grant other appropriate relief. The court may not require the commissioner to post a bond.

History: 1971 c. 300; 1981 c. 16.

552.19 Criminal penalties. (1) Any person, including a controlling person of an offeror or

target company, who violates this chapter or any rule under this chapter, or any order of which the person has notice, may be fined not more than \$5,000 or imprisoned not more than 5 years or both. Each of the acts specified constitute a separate offense and a prosecution or conviction for any one of the offenses does not bar prosecution or conviction for any other offense.

NOTE: Chapter 16, laws of 1981, effective June 17, 1981, provides in Section 19:

"Section 552.19 (1) of the 1979 statutes applies to any violation which occurred prior to the date which is 6 years prior to the effective date of this act. Section 939.74 of the statutes applies to any violation which occurs after that date."

(2) The commissioner may refer such evidence as is available concerning violations of this chapter or of any rule or order under this chapter to the attorney general or the district attorney of the appropriate county who may, with or without any reference, institute the appropriate criminal proceedings under this chapter. If referred to a district attorney, the district attorney shall, within 90 days, file with the commissioner a statement concerning any action taken or, if no action has been taken, the reasons therefor.

(3) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute.

History: 1971 c. 300; 1981 c. 16 ss. 16, 19.

552.21 Civil liabilities. (1) Any offeror who purchases a security in connection with a take-over offer not in compliance with this chapter or by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, is liable to the person selling the security to the offeror, who may sue either at law or in equity to recover the security, plus any income received by the purchaser on the security, upon tender of the consideration received, or for damages. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last-known address of the person liable.

(2) Every person who directly or indirectly controls a person liable under sub. (1), every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employe of such person who materially aids in the act or transaction constituting the violation,

and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person liable under this subsection proves that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) No action may be maintained under this section unless commenced before the expiration of 3 years after the act or transaction constituting the violation or the expiration of one year after the discovery of the facts constituting the violation, whichever first expires, but the time specified for commencing such action shall be extended by reason of any fact and for the time specified in ss. 893.13 and 893.16 to 893.23.

(4) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity.

History: 1971 c. 300; 1979 c. 323 s. 33; 1981 c. 16.

552.23 Application of chapter. (1) If the target company is an insurance company subject to regulation by the commissioner of insurance, a banking corporation subject to regulation by the commissioner of banking, a savings and loan association subject to regulation by the commissioner of savings and loan, or a public service corporation subject to regulation by the public service commission, the department of transportation or the office of the commissioner of transportation, the commissioner shall promptly furnish a copy of the registration statement filed under this chapter to the regulatory agency having supervision of the target company. Any hearing under this chapter involving any such target company shall be held jointly with the regulatory agency having supervision, and any determination following the hearing shall be made jointly with that regulatory agency.

NOTE: Sub. (1) is shown as affected by ch. 347, laws of 1981, section 80 (2) which substitutes "office of the commissioner of transportation" for "transportation commission" eff. 7-1-83.

(2) If the target company is a public utility, public utility holding company, national banking association, bank holding company or savings and loan association subject to regulation by a federal agency and the take-over of such company is subject to approval by that agency, this chapter shall not apply.

(3) This chapter shall not apply to any offer involving a class vote by stockholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate

assets in consideration of the issuance of securities of another corporation, or sale of its securities in exchange for cash or securities of another corporation.

History: 1971 c. 300; 1977 c. 29; 1981 c. 347 s. 80 (2).

552.25 Application of securities law. All of the provisions of ch. 551 which are not in conflict with this chapter shall apply to any take-over offer involving a target company in this state.

History: 1971 c. 300.