

GUIDANCE DOCUMENT

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**NEBRASKA DEPARTMENT OF BANKING AND FINANCE
BUREAU OF SECURITIES**

INTERPRETATIVE OPINION NO. 18:--RESCISSION OFFERS AND SECTIONS 8-1116, 8-1117 AND 8-1118.

This Interpretative Opinion discusses rescission offers and other possible administrative and criminal sanctions available under the Securities Act of Nebraska.

Section 8-1104 prohibits any person from offering or selling securities without registration of the securities with the Department of Banking and Finance ("Department"), unless an exemption from registration is available under Section 8-1110 or 8-1111 or unless the security qualifies as a federal covered security defined by Section 8-1101(5) of the Act. Section 8-1103 of the Act prohibits any person from offering or selling securities without registering as a broker-dealer, issuer-dealer or agent of a broker-dealer or issuer-dealer with the Department, unless an exemption from registration is available. Section 8-1102 prohibits any person from employing fraudulent or deceptive practices, or from making material misrepresentations or omissions, in connection with the offer or sale of securities.

The Act provides the Department with administrative, civil, and criminal enforcement remedies. Persons who may be held liable for violations include, but are not limited to:

1. The seller of the securities; every person who directly or indirectly controls the seller; every partner, limited liability company member, officer, director, or and person occupying a similar status or performing similar functions; or every employee of the seller who materially aids in the sale; and every broker-dealer, issuer-dealer, or agent who materially aids in the sale; and
2. The issuer of the securities; every person who directly or indirectly controls the issuer; every partner, limited liability company member, officer, director, or person occupying a similar status or performing similar functions; every employee of the issuer who materially aids in the issuance of the securities; and every broker-dealer, issuer-dealer, or agent who materially aids in the issuance of the securities.

The Department also has the authority to enter into agreements with the above individuals and entities to resolve violations of the Act by other appropriate remedies. In some cases, the Department and the seller or issuer may enter into an agreement in which the issuer or seller agrees to rescind the transaction and make a refund to investors. Such agreements do not involve the offer and sale of an additional security.

In other situations the Department and the issuer or seller may enter into an agreement in which an agreement by the seller or issuer, who has sold securities in violation of certain provisions of the Act, to make a rescission offer to purchasers of the securities. These rescission offers provide the investor with the option as to whether to rescind the transaction and receive a refund, or to decline the rescission and continue in the investment. In these situations, the rescission offer is a separate security and must be registered with the Department, unless the Director concludes that facts of a particular offering are such that registration is not necessary for the protection of investors.

A rescission offer required to be registered shall be done so in the following manner:

1. The following materials must be filed with, and receive prior approval from, the Department:
 - a. A written offer to repurchase in accordance with the provisions of Section 8-1118(4) of the Act;
 - b. A registration statement and statutory prospectus meeting the provisions of either Section, 8-1106, or 8-1107 of the Act, plus any other information about the issuer and the rescission offer which may be material; and
 - c. The registration fee prescribed by the provisions of Section 8-1108.

No rescission offer may be given to the purchasers of the securities until the rescission offer has been registered and has become effective with the Department.

2. All persons who have a cause of action under the provisions of Section 8-1118(1) against the seller and/or issuer of any securities, and who are not denied damages by the provisions of Section 8-1118(5) because of their involvement in the specific violation of the Act, must receive the rescission offer
3. The person making the rescission offer must furnish documentary evidence to the Department that he or she has adequate resources to complete the rescission offer. Adequate resources shall mean the ability to pay all purchasers of the securities who may choose to accept the rescission offer:
 - a. The consideration paid for the security;
 - b. Plus interest at six percent per annum from the date of payment for the securities purchased;
 - c. Less the amount of any income received thereon.
4. When the rescission offer has been completed and the appropriate funds paid, the person making the rescission offer must verify to the Department that the rescission offer was made in accordance with the provisions of Section 8-1118(4) and this Opinion. The verification may be performed by an independent third party, such as an accountant or escrow agent, or by providing the pertinent records documenting the rescission offer to the Department. The following information must be included:
 - a. Names and addresses of all securities holders of the issuer in question and the amount of securities held by each;
 - b. Names of all such securities holders of the issuer who had a right to receive the rescission offer;
 - c. Names of all such securities holders of the issuer who did not receive the rescission offer and the reason why they did not receive the rescission offer;
 - d. Documentary evidence that all such securities holders of the issuer who had a right to receive the rescission offer in fact received the offer;

- e. Documentary evidence of which such securities holders accepted the rescission offer and which rejected the rescission offer; and
- f. Documentary evidence of full payment, together with interest, to all securities holders who accepted the rescission offer.

The fact that a rescission offer has been made shall not prohibit the Department from initiating any action available to it under the Act.

Questions regarding this opinion should be addressed to:

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