

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 21 – ~~UNDERWRITING EXPENSES, UNDERWRITER'S WARRANTS, SELLING EXPENSES, AND SELLING SECURITY HOLDERS~~NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION STATEMENTS OF POLICY

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120~~(3)~~ of the Securities Act of Nebraska ("Act").

~~001.02—The Department has determined that this Rule relating to underwriting expenses, selling expenses and selling security holders is consistent with investor protection and is in the public interest.~~

001.02 The Department has determined that this Rule relating to the registration of securities is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

~~001.04—The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.~~

001.04 A copy of each North America Securities Administrators Association ("NASAA") Statement of Policy referenced in subsection 002 below is available as an appendix to this rule at www.ndbf.ne.gov/legal and are also contained in NASAA REPORTS published by Commerce Clearing House, and on NASAA's website at www.nasaa.org.

~~002—DEFINITIONS.~~ The following definitions, in addition to definitions contained in 48 NAC 2, shall apply to this Rule:

~~002.03—The term Underwriting expenses include, but are not limited to,~~

~~002.03A—Commissions to underwriters or broker-dealers;~~

~~002.03B—Non-accountable fees or expenses paid to underwriters or broker-dealers;~~

~~002.03C—The value of underwriter's warrants;~~

~~002.03D—Rights of first refusal, to be valued at one percent of the public offering or the amount payable to the underwriter if the issuer terminates the right of first refusal;~~

~~002.03E— Solicitation fees payable to the underwriter, to be valued at the lesser of actual cost or one percent of the public offering if the fees are payable within one year of the offering;~~

~~002.03F— Financial consulting or financial advisory agreements with an underwriter or any other similar type of agreement or fees, however designated, to be valued at actual cost;~~

~~002.03G— Underwriter’s due diligence expenses;~~

~~002.03H— Payments made either six months prior to or required to be made six months following the offering to investor relations firms that the underwriter designated; and~~

~~002.03I— Other underwriting expenses incurred in connection with the public offering of securities as determined by the Director.~~

002 NASAA STATEMENTS OF POLICY: In order to promote uniform regulation, the Director adopts the following NASAA Statements of Policy for issuers registering an offering pursuant to the Act. This rule does not incorporate any subsequent amendments or adoptions:

002.01 “Statement of Policy Regarding Corporate Securities Definitions” as amended on May 6, 2018.

002.02 “Statement of Policy Regarding Underwriting and Selling Expenses, Underwriter’s Warrants and Selling Expenses” as amended on May 6, 2018.

002.03 “Statement of Policy Regarding Promotional Shares” as amended on March 31, 2008.

002.04 “Statement of Policy Regarding Promoters’ Equity Investment” as amended on September 11, 2016.

002.05 “Statement of Policy Regarding Loans and Other Material Transactions” as amended on May 6, 2018.

002.06 “Statement of Policy Regarding the Impoundment of Proceeds” as amended on March 31, 2008.

002.07 “Statement of Policy Regarding Unequal Voting Rights” as amended on September 11, 2016.

002.08 “Statement of Policy Regarding Specificity in Use of Proceeds” as amended on September 11, 2016.

002.09 “Statement of Policy Regarding Unsound Financial Condition” as amended on May 6, 2018.

002.10 “Statement of Policy Regarding Debt Securities” as adopted on April 25, 1993.

002.11 “Statement of Policy Regarding Preferred Stock” as amended on September 11, 2016.

002.12 “Statement of Policy Regarding Options and Warrants” as amended on March 31, 2008.

002.13 “Statement of Policy Regarding Real Estate Investment Trusts” as amended on May 7, 2007.

002.14 “Statement of Policy Regarding Real Estate Programs” as amended on May 7, 2007.

002.15 “Registration of Oil and Gas Programs” as amended on May 6, 2012.

002.16 “Registration of Publicly-Offered Cattle Feeding Programs” as adopted on September 17, 1980.

002.17 “Registration of Commodity Pool Programs” as amended on May 6, 2012.

002.18 “Equipment Programs” as amended on May 6, 2012.

002.19 “Registration of Asset Backed Securities” as amended on May 6, 2012.

002.20 “Statement of Policy Regarding Church Extension Fund Securities” as amended on April 18, 2004.

002.21 “Mortgage Program Guidelines” as amended on May 7, 2007.

002.22 “Omnibus Guidelines” as amended on May 7, 2007, which apply to limited partnerships programs or other entities for which more specific statements of policy have not been adopted by NASAA.

002.23 “Statement of Policy Regarding Use of Electronic Offering Documents and Electronic Signatures” as adopted on May 7, 2017.

~~003—~~ ~~GROUNDS FOR DENIAL OF SECURITIES REGISTRATIONS.~~ The Director may deny the registration of securities if:

~~003.01—~~ The underwriting expenses exceed seventeen percent of the gross proceeds from the public offering;

~~003.02—~~ The selling expenses of the offering exceed twenty percent of the gross proceeds from the public offering; or

~~003.03—~~ Selling security holders are offering more than ten percent of the securities for sale in the public offering.

003 COMPLIANCE WITH STATEMENTS OF POLICY: An issuer registering an offering that falls within one or more of the statements of policy listed in subsection 002 of this Chapter shall comply with the requirements of said statement of policy or policies.

~~004—SELLING SECURITY HOLDERS. The Director may permit a public offering or sale of securities to include securities offered for sale by existing security holders if the offering document discloses the amount of selling expenses which the selling security holders shall pay and one of the following circumstances apply:~~

~~004.01—The selling security holders pay a pro rata share of all selling expenses that are the result of the inclusion of their shares in the public offering; or~~

~~004.02—The selling security holders have a written agreement with the issuer that was entered into in an arm's-length transaction, under which the issuer agreed to pay all of the selling security holders' selling expenses, with the exception of underwriter's or broker-dealer's compensation.~~

004 WAIVER OF RULE. While applications not conforming to the standards contained herein are looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

~~005—RESTRICTIONS ON WARRANTS GRANTED TO UNDERWRITERS. Warrants granted to underwriters are subject to the following restrictions:~~

~~005.01—The underwriter must be a managing underwriter.~~

~~005.02—The public offering must be either a firmly underwritten offering or a "minimum-maximum" offering. Options or warrants may be issued in a "minimum-maximum" public offering only if:~~

~~005.02A—The options or warrants are issued on a pro rata basis; and~~

~~005.02B—The "minimum" amount of securities has been sold.~~

~~005.03—The exercise price of the warrants must be at least equal to the public offering price.~~

~~005.04—The number of shares covered by the underwriter's options or warrants must not exceed ten percent of the shares of common stock actually sold in the public offering.~~

~~005.05—The options or warrants must not be exercisable more than five years after the public offering is completed.~~

~~005.06—The options or warrants must not be exercisable during the first year after the public offering is completed.~~

~~005.07—Option or warrants may not be transferred, except:~~

~~005.07A~~—To partners of the underwriter, if the underwriter is a partnership;

~~005.07B~~—To officers and employees of the underwriter, who are also shareholders of the underwriter, if the underwriter is a corporation; or

~~005.07C~~—By will, under the laws of descent and distribution, or by operation of law.

~~005.08~~—The warrant agreement may not allow for a reduction in the exercise price of the options or warrants resulting from the issuer subsequently issuing shares except if the issuer issues shares under a stock dividend or stock split, or a merger, consolidation, reclassification, reorganization, recapitalization, or sale of assets.

~~006~~—EXCLUDED UNDERWRITING EXPENSES. Underwriting expenses shall not include expenses paid under financial consulting or financial advisory agreements with the underwriter payable at the time the services are rendered which agreements were entered into at least twelve months before the issuer filed the registration statement with the Securities and Exchange Commission.

~~007~~—VALUATION OF UNDERWRITER'S WARRANTS. The value of underwriter's warrants must be determined by the following formula: one hundred sixty-five percent of the aggregate offering price less the exercise price multiplied by the number of shares offered to the public, all divided by two, multiplied by the number of shares with underlying warrants divided by the number shares offered to the public

$$\frac{A-B}{2} \times \frac{C}{D}$$

where: A equals one hundred sixty-five percent of the aggregate offering price
B equals the exercise price multiplied by the number of shares offered to the public;
C equals the number of shares with underlying warrants, and
D equals the number of shares offered to the public _____

~~008~~—WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.