

NEBRASKA ADMINISTRATIVE CODE

~~Title 48 – DEPARTMENT OF BANKING AND FINANCE~~

~~Chapter 22 – PROMOTIONAL SHARES~~

~~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 the promotional shares 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.

~~001.05~~—Federal statutes referenced herein shall mean those statutes as amended on or before the effective date of this Rule. A copy of the statutes referenced in this Rule is attached hereto.

~~002 – ESCROW OF PROMOTIONAL SHARES.~~ As a condition to registering a public offering of equity securities, the Director may require that some or all of the promoters deposit promotional shares into an escrow account with an escrow agent, as provided by an escrow agreement. Promoters who deposit promotional shares into the escrow account will be collectively referred to as “depositors.”

~~002.01~~—Except as provided in Section 002.02, below, the number of promotional shares required to be deposited in the escrow account shall equal the total number of shares that the promoters hold less the number of fully paid shares.

~~002.01A~~—The number of fully paid shares shall be equal to the total amount that the promoters paid for the shares divided by eighty five percent of the public offering price per share.

~~002.01B~~—In determining the amount that the promoters paid for the shares, the promoters cannot use consideration other than cash unless the Director accepts the value of the consideration.

~~002.02~~—If the issuer’s most recent audited financial statements contain an auditor’s report or footnote that contains an opinion or statement regarding the ability of the issuer to continue as a going concern, the promoters must deposit all promotional shares in the escrow account.

~~002.03~~—The Director may require the promoters to deposit promotional shares into the escrow account on a pro rata basis.

~~003 — RELEASE OF PROMOTIONAL SHARES.~~

~~003.01 — The escrow agent must release the promotional shares held in the escrow account in the manner set out in the table below:~~

~~003.01A — If the issuer's aggregate revenues are five hundred thousand dollars (\$500,000.00) or more, and neither the auditor's opinion nor any footnote to the issuer's most recent audited financial statements contain an opinion or statement regarding the ability of the issuer to continue as a going concern, then the required release of the escrow account or lock-in shares is as follows:~~

~~003.01A1 — Year 1 — none~~

~~003.01A2 — Year 2 — two and one-half percent pro rata per quarter~~

~~003.01A3 — Year 3 — all~~

~~003.01B — If the issuer's aggregate revenues are less than five hundred thousand dollars (\$500,000.00), then the required release of the escrow account or lock-in shares is as follows:~~

~~003.01B1 — Year 1 — none~~

~~003.01B2 — Year 2 — none~~

~~003.01B3 — Year 3 — two and one-half percent pro rata per quarter~~

~~003.01B4 — Year 4 — two and one-half percent pro rata per quarter~~

~~003.01B5 — Year 5 — all~~

~~003.02 — In the event securities in the escrow account become federal "Covered Securities," as defined in Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. § 77r, the escrow agent must release all securities in the escrow account.~~

~~003.03 — If the public offering is terminated, and no securities were sold, the escrow agent must release all securities in the escrow account.~~

~~003.04 — If the public offering is terminated, and all of the gross proceeds of the offering have been returned to the public investors, the escrow agent must release all securities in the escrow account.~~

~~004 — DISTRIBUTION OF THE ISSUER'S ASSETS OR SECURITIES. The depositors agree that, if any transaction or proceeding results in a distribution of the issuer's assets or securities ("distribution"), while the escrow agreement remains in effect, one of the following will occur:~~

~~004.01~~— If the transaction is with a person that is not a promoter:

~~004.01A~~— Holders of the issuer's equity securities initially share in the distribution on a pro rata basis, depending on the price the holders paid per share. This continues until the public shareholders are paid out in full. For the purpose of this Rule, the public shareholders are paid out in full when they have received, or have had irrevocably set aside for them, an amount equal to the price per share in the public offering times the number of shares the public shareholders purchased under the public offering and still hold at the time of the distribution.

~~004.01B~~— Once the public shareholders are paid out under Section 004.01A, above, holders of the issuer's equity securities participate on a pro rata basis, depending on the number of shares of equity securities they hold at the time of the distribution.

~~004.01C~~— A distribution may proceed on lesser terms and conditions than those stated in Sections 004.01A and 004.01B above, if the holders of a majority of the equity securities, not including securities held by promoters or their associates or affiliates, approve the lesser terms and conditions at a special meeting called for that specific purpose.

~~004.01D~~— The number of shares calculated for distribution under Sections 004.01A and 004.01B, above, may be adjusted if there is a stock split, stock dividend, recapitalization or similar transaction.

~~004.02~~— If the transaction is with a promoter, the depositors' promotional shares must remain in the escrow account subject to the terms of the escrow agreement.

~~005~~— DOCUMENTATION REGARDING THE TERMINATION OF THE ESCROW AGREEMENT AND/OR THE RELEASE OF PROMOTIONAL SHARES.

~~005.01~~— A request for the release of any of the promotional shares from the escrow account must be in writing and forwarded to the escrow agent.

~~005.02~~— The issuer must provide the documentation to the escrow agent, showing that the requirements of Section 003, above, have been met.

~~005.03~~— The escrow agent must terminate the escrow agreement and/or release all remaining promotional shares from the escrow account if all the applicable provisions of the escrow agreement have been satisfied. The escrow agent must maintain all records relating to the escrow agreement for a period of three years following the termination of the escrow agreement.

~~005.04~~— The escrow agent must forward copies of all retained records to the Director promptly upon written request.

~~006 — NON-EXCLUSIVE RESTRICTIONS ON THE TRANSFER, SALE, OR DISPOSAL OF PROMOTIONAL SHARES.~~

~~006.01 — A depositor must not transfer any promotional shares held in the escrow account or any interest in the promotional shares in the escrow account.~~

~~006.02 — Notwithstanding Section 006.01, above, a depositor may transfer promotional shares held in the escrow account to a family member by gift, if the family member agrees that the promotional shares will remain subject to the terms of the escrow agreement.~~

~~006.03 — For a self-underwritten offering, promoters must not sell any of their promotional shares during the time that the issuer is offering its securities to the public, even if the promotional shares are not subject to the escrow account or would otherwise be released from the escrow account.~~

~~007 — TERMS OF THE ESCROW ACCOUNT. A summary of the escrow agreement must be included in the offering document, annual reports to shareholders, proxy statements and other disclosure materials used to make investment decisions until the public offering ends.~~

~~008 — APPLICATION. This Rule shall apply to applications for registration of equity securities or securities convertible into equity securities. In the latter case, and in the absence of a public market for the equity securities, the conversion price shall be deemed to be the public offering price.~~

~~009 — 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.~~