

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 29 - DEBT SECURITIES

~~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 public offering of debt 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.

~~001.05~~—Federal statutes and rules of the Securities and Exchange Commission (“SEC”) or the Financial Industry Regulatory Authority (“FINRA”) referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

~~002 - DEFINITIONS~~. For purposes of this Rule, the following additional definitions shall apply:

~~002.01~~—Adjusted cash flow means the issuer’s cash flow adjusted on a pro forma basis to reflect:

~~002.01A~~—The elimination of interest and fees on debt or debt securities and of cash dividends on preferred stock that are to be retired with the proceeds derived from the public offering;

~~002.01B~~—The effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or which are proposed or required for the current fiscal year, which materially affect the issuer’s cash flow;

~~002.01C~~—The effect of interest and fees on debt or debt securities and of cash dividends paid after the issuer’s last fiscal year;

~~002.01D~~—The effect of any interest and fees on debt or debt securities and of cash dividends on preferred stock or common stock that were issued during the issuer’s last fiscal year, but which were outstanding for only a portion of such fiscal year, as if such debt, debt securities, preferred stock or common stock had been outstanding for the issuer’s entire fiscal year;

~~002.01E—The effect of imputed or deferred charges of zero coupon debt or debt securities for the issuer’s last fiscal year and any additional charges on such debt or debt securities issued after the issuer’s last fiscal year;~~

~~002.01F—The effect of accrued dividends on preferred stock for the issuer’s last fiscal year and any additional dividends on such preferred stock issued after the issuer’s last fiscal year; and~~

~~002.01G—The effect of any other material changes to the issuer’s future cash flow.~~

~~002.01H—Notwithstanding 002.01F above, accrued dividends of cumulative preferred stock having a stated interest rate may be excluded from adjusted cash flow at the discretion of the Director.~~

~~002.02—Cash flow means the issuer’s after-tax earnings that are derived from its normal operations, exclusive of extraordinary and nonrecurring items, less interest and dividends, plus certain noncash charges against earnings such as depreciation, depletion and amortization, determined according to generally accepted accounting principles, consistently applied.~~

~~003—CASH FLOW REQUIREMENTS.~~

~~003.01—A public offering of debt securities may be disallowed if the issuer’s adjusted cash flow for the last fiscal year or its average adjusted cash flow for the last three fiscal years prior to the public offering was insufficient to cover its fixed charges, meet its debt obligations as they became due, and service the debt securities being offered.~~

~~003.02—The Director, in his or her discretion, may waive the requirement in Section 003.01 above for public offerings of convertible debt securities that are superior in right of payment of interest and liquidation proceeds to any convertible debt that is or may be legally or beneficially, directly or indirectly, owned by promoters, provided:~~

~~003.02A—The risks of failure to meet debt service obligations and the equity characteristics of such securities must be disclosed in the prospectus; and~~

~~003.02B—The offering of such securities is reviewed using the Rules for equity offerings in 48 NAC 21 through 28 and 48 NAC 30 through 31, as applicable.~~

~~003.03—If the issuer’s cash flow is subject to cyclical fluctuations or if the Director deems it necessary for investor protection, the Director may require that the issuer establish a sinking fund or redemption requirements.~~

~~004—TRUST INDENTURE. Unless the Director permits otherwise, public offerings of debt securities shall be offered and sold pursuant to a trust indenture (“indenture”) which adequately protects the rights of the purchasers. Such protections shall include, but shall not be limited to, the following:~~

~~004.01—The indenture shall comply with the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa, et. seq., which shall be disclosed in the offering document;~~

~~004.02—The events of default of the indenture shall be disclosed in the offering document;~~

~~004.03—The trustee shall be provided with adequate reports, including any compliance reports from independent auditors, to allow the trustee to ensure compliance with the indenture;~~

~~004.04—Neither the trustee nor its promoters may be major creditors of the issuer or its affiliates;~~

~~004.05—The indenture shall provide that upon any consolidation, merger, recapitalization, reorganization, pledge foreclosure, equity or share exchange, conveyance or transfer of the properties and assets of the issuer substantially as an entirety, or any other transaction having a substantially equivalent effect, the successor person shall expressly assume the payment obligations on the debt securities and the performance of the covenants of the indenture; and~~

~~004.06—The indenture shall provide that interest will accrue and be paid to the date(s) of redemption or conversion of the debt securities.~~

~~005—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.~~