

## NEBRASKA ADMINISTRATIVE CODE

### TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

#### Chapter 2 - DEFINITIONS

##### 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 definitions be applied to Title 48 of the Nebraska Administrative Code, unless otherwise specified therein. This Rule is consistent with investor protection and is in the public interest.

001.03 Federal statutes and rules of the Securities and Exchange Commission ("SEC") and of the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Chapter. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at <http://www.ndbf.ne.gov/legal/title48.shtml>.

002 DEFINITIONS. The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

002.01 Adjusted net earnings means the issuer's net earnings ~~and~~ after charges for interest and dividends, adjusted on a pro forma basis to reflect:

002.01A The elimination of any required charges for debt, debt securities, or preferred stock that are to be redeemed or retired from the proceeds derived from the public offering of preferred stock;

002.01B The effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or ~~which are that it proposes proposed or is required to be made~~ during the current fiscal year, which materially affect the issuer's net earnings;

002.01C The effect of charges or dividends on debt, debt securities, or preferred stock issued after the issuer's last fiscal year;

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

002.01E The effect of any other material changes to an issuer's future net earnings.

002.02 Affiliate means a person who, directly or indirectly, controls, is controlled by, or is under common control with the person specified herein.

002.03 Aggregate revenues means the aggregate amount of revenues a promotional or development stage company has received within the last three consecutive fiscal years immediately preceding the public offering plus revenues received during the period covered by any interim period financial information included in the prospectus, excluding revenues from interest and extraordinary items.

002.04 Associate, when used to indicate a relationship with a person, includes:

002.04A Corporations or legal entities, other than the issuer or majority-owned subsidiaries of the issuer, of which a person is an officer, director, partner, or a direct or indirect, legal or beneficial owner of five percent (5%) or more of any class of equity securities;

002.04B Trusts or other estates in which a person has a substantial beneficial interest or for which a person serves as a trustee or in a similar capacity; and

002.04C A person's spouse and relatives, by blood or by marriage, if the person is a promoter of the issuer, its subsidiaries, its affiliates, or its parent.

002.05 Average promotional price means the average per share price paid for promotional shares and other shares issued prior to the public offering ~~which that~~ are of the same class of shares being offered in the public offering as determined by reference to the audited financial statements of the issuer included in the prospectus.

002.06 Cash analysis means the issuer's "Net Cash Provided By Operating Activities" as reflected in the Statement of Cash Flows and ~~presented in conformity determined in accordance~~ with generally accepted accounting principles. ~~If the issuer will use the proceeds of the public offering to redeem or retire debt securities, are to be redeemed or retired from the proceeds from the public offering, the issuer must adjust, on a pro forma adjustment basis, for the elimination of the related interest charges, net of applicable income taxes, must be made.~~

002.07 Control means the power to direct or influence the direction of the management or policies of a person, directly or indirectly, through the ownership of voting securities, by contract or otherwise.

002.08 Director means the Director of Banking and Finance of the State of Nebraska, unless otherwise specified.

002.09 Equity securities include shares of common stock or similar securities and convertible securities, warrants, options or rights that may be converted into or exercised to purchase, shares of common stock or similar securities.

002.10 Escrow agent means:

002.10A A financial institution that is domiciled in, and whose principal place of business is located in, the United States and whose deposits are insured by the Federal Deposit Insurance Corporation ("FDIC").

~~002.10A~~002.10A1 An escrow agent may not be affiliated with the issuer, its promoters, or associates.

~~002.10B~~002.10A2 A financial institution may not be disallowed to act as an escrow agent merely because the issuer, its promoters or associates are customers thereof.

002.10B An attorney or certified public accountant, provided that the attorney or certified public accountant:

002.10B1 Is not affiliated with the issuer, its promoters, or associates of the issuer or promoters;

002.10B2 Is licensed to do business in the state in which the attorney or certified public accountant practices; and

002.10B3 Can demonstrate adequate insurance or can provide a fidelity bond in an amount satisfactory to the Director.

002.11 Impoundment agent means a financial institution that is domiciled in, and whose principal place of business is located in, the United States and whose deposits are insured by the FDIC.

002.12 Independent director means a member of an issuer's board of directors who:

~~002.12A Is not an officer or employee of the issuer, its subsidiaries, or their affiliates or associates and has not been an officer, or employee of the issuer, its subsidiaries, or their affiliates or associates within the last two years; and Does not receive, other than in his or her capacity as a member of the board of directors or a board committee, any consulting, advisory or other compensatory fee from the issuer, its subsidiaries, or their affiliates or associates;~~

~~002.12B Has not received, other than in his or her capacity as a member of the board of directors or a board committee, any consulting, advisory or other compensatory fee from the issuer, its subsidiaries, or their affiliates or associates within the last two years;~~

~~002.12B~~002.12C Other than serving as a director of the issuer, is ~~is~~ not a promoter as defined in Sections 002.16A, 002.16B, 002.16C2 or 002.16C3, below; and

~~002.12C~~002.12D Does not have a material business or professional relationship with the issuer or any of its affiliates or associates. For purposes of determining whether or not a business or professional relationship is material, the gross revenue ~~derived by the independent director that the independent director derives~~ from the issuer, its affiliates and associates shall be deemed material per se if it exceeds five percent (~~5%~~) of the independent director's:

002.12C1002.12D1 Annual gross revenue, derived from all sources, during either of the last two years; or

002.12C2002.12D2 Net worth, on a fair market value basis.

002.13 Lock-in agreement means an agreement between an issuer and a persons who hold promotional shares wherein these persons agree, as a condition of registration, not to sell, pledge, hypothecate, assign, grant any option for the sale of, or otherwise transfer or in which the person agrees not to dispose of, whether or not for consideration, directly or indirectly, promotional shares and all certificates representing stock dividends, stock splits, recapitalizations, and the like, that are granted to or received by the security holder for the period specified in the lock-in agreement. or otherwise transfer equity securities the person received from the issuer or that the issuer granted to the person.

002.14 Net earnings means the issuer's after-tax earnings, that are derived from its normal operations, exclusive of excluding extraordinary and nonrecurring items, determined according to in accordance with generally accepted accounting principles, consistently applied.

002.15 Person means an individual, a corporation, a limited liability company, a partnership, an association, a joint-stock company, a trust in which the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

002.16 Promoter includes:

002.16A A person who, alone or in conjunction with one or more persons, directly or indirectly, took the initiative in founding or organizing the issuer or controls the issuer;

002.16B A person who, directly or indirectly, receives, as consideration for property or for services and/or property rendered, five percent (5%) or more of any class of the issuer's equity securities or five percent (5%) or more of the proceeds from the sale of any class of the issuer's equity securities; or

002.16C A person who:

002.16C1 Is an officer or director for of the issuer;

002.16C2 Is the legal or beneficial owner, directly or indirectly, of five percent (5%) or more of any class of the issuer's equity securities; or

002.16C3 Is an affiliate or an associate of a person specified in this subsection~~Section 002.16~~ above.

002.16D Promoter does not include:

002.16D1 A person who receives securities or proceeds solely as underwriting compensation ~~if unless~~ that person falls outside ~~otherwise comes within~~ the definition of Section 002.16, above; or

002.16D2 An unaffiliated institutional investor, who purchased the issuer's equity securities more than one year prior to the filing date of the issuer's registration statement. An unaffiliated institutional investor, who purchased the issuer's equity securities on an arm's-length basis within one year prior to the filing date of the issuer's registration statement may, at the Director's discretion, be excluded from the definition of promoter.

002.17 Promoters' equity investment means the total of cash and ~~tangible assets that has been~~ contributed by the promoters to the issuer, provided that the Director accepts the value of the tangible or intangible assets, ~~is accepted by the Director~~.

~~002.17A Promoters' contributions of intangible assets may be considered as promoters' equity investment, provided that the value thereof has been accepted by the Director.~~

~~002.17AB~~002.17A Promoters' The Director may require the issuer to adjust promoters' equity investment may be adjusted by the issuer's earned surplus immediately prior to the public offering.

002.18 A promotional or development stage company includes an issuer; ~~who is not listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market System, or whose annual net earnings for each of the last two consecutive fiscal years or whose average, annual net earnings for the last five fiscal years prior to the public offering have been less than five percent of the aggregate public offering.~~

002.18A That is not listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq Global Market or a securities exchange that the Securities and Exchange Commission determines under Section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. §77r(b)(1)) has substantially similar listing standards;

002.18B That has had annual net earnings in each of the two fiscal years immediately preceding the public offering which do not exceed five percent of the aggregate public offering; or

002.18C That has had average, annual net earnings for the five fiscal years immediately preceding the public offering which do not exceed five percent of the aggregate public offering.

002.19 Promotional shares means equity securities that; ~~are to be issued or were issued;~~

002.19A By an issuer, which is a A promotional or development stage company has issued within five years before filing of the registration

~~statement or will issue, to promoters for cash or other consideration, including services rendered, patents, copyrights, and other intangibles; (provided that the value thereof has been accepted by the Director), that will be or was less than eighty-five percent (85%) of the proposed public offering price; or~~

~~002.19B Within three years prior to the filing of the registration statement by an An issuer, which is not a promotional or development stage company, has issued within three years before the filing of the registration statement or will issue to promoters for cash or other consideration, including services rendered, patents, copyrights and other intangibles, (provided that the value thereof has been accepted by the Director), that will be or was less than eighty-five percent (85%) of the proposed public offering price.~~

002.20 Public offering price means the per share price at which a promotional or development stage company proposes to offer equity securities to the public.

002.21 ~~Unaffiliated institutional investor means:~~

~~002.21A An unaffiliated bank or unaffiliated savings and loan company;~~

~~002.21B An unaffiliated investment company registered under the Investment Company Act of 1940;~~

~~002.21C An unaffiliated business development Company as defined in Section 2(a)(48) of the Investment Company Act of 1940;~~

~~002.21D An unaffiliated small business investment company licensed by the U.S. Small Business Administration under Section 301 of the Small Business Investment Act of 1958;~~

~~002.21E An unaffiliated employee benefit plan, within the meaning of Title I of the Employee Retirement Income Security Act of 1974, and state and local government employees retirement and pension plans;~~

~~002.21F An unaffiliated insurance company;~~

~~002.21G An unaffiliated trust company;~~

~~002.21H An unaffiliated private business development company, as defined in Section 202(a)(22) of the Investment Advisors Act of 1940, or a comparable business entity, that is engaged as a substantial part of its business in the purchase and sale of securities, and which will own less than twenty percent (20%) of the issuer's securities upon completion of the public offering; or~~

~~002.21I An unaffiliated qualified purchaser to be defined under the National Securities Markets Improvement Act of 1996.~~

002.21 Unaffiliated institutional investor means the following investors if not affiliated with the issuer:

002.21A A depository institution or international banking institution;

002.21B An insurance company;

002.21C A separate account of an insurance company;

002.21D An investment company as defined in the Investment Company Act of 1940;

002.21E A broker-dealer registered under the Securities Exchange Act of 1934;

002.21F An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars (\$10,000,000.00) or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Act, a depository institution, or an insurance company;

002.21G A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars (\$10,000,000.00) or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Act, a depository institution, or an insurance company;

002.21H A trust, if it has total assets in excess of ten million dollars (\$10,000,000.00), its trustee is a depository institution, and its participants are exclusively plans of the types identified in subsections 002.21F and 002.21G, above, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

002.21I An organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars (\$10,000,000.00);

002.21J A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. § 681(c)) with total assets in excess of ten million dollars (\$10,000,000.00);

002.21K A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(22)) with total assets in excess of ten million dollars (\$10,000,000.00);

002.21L A federal covered investment adviser acting for its own account;

002.21M A “qualified institutional buyer” as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);

002.21N A “major U.S. institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);

002.21O Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars (\$10,000,000.00) not organized for the specific purpose of evading the Act; and

002.21P A business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. § 80a-2(a)(48)).

002.22 Underwriter means any person who has agreed with the issuer or other person on whose behalf a distribution is to be made:

002.22A To purchase securities for distribution;

002.22B To distribute securities for or on behalf of the issuer or other person; or

002.22C To manage or supervise a distribution of securities for or on behalf of the issuer or other person.