

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 21 - UNDERWRITING EXPENSES, UNDERWRITER'S WARRANTS, SELLING EXPENSES, AND SELLING SECURITY HOLDERS

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.

001.03 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.

~~002~~ ~~LIMITATION ON UNDERWRITING EXPENSES AND SELLING SECURITIES.~~ An offer or sale of securities may be disallowed if the direct and indirect selling expenses related to the public offering exceed:

~~002.01~~ Seventeen percent (17%) of the gross proceeds on public offerings of \$7,500,000 or less;

~~002.02~~ Fifteen percent (15%) of the gross proceeds on public offerings that exceed \$7,500,000.

~~002.03~~ Selling expenses include but are not limited to:

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

~~002.03B~~ Non-accountable fees or expenses to be paid to the underwriter or broker-dealer;

~~002.03C~~ Underwriter's warrants, which shall be valued at twenty percent (20%) of the public offering price, unless a public market exists for the issuer's warrants;

~~002.03D~~ Future registration rights of underwriter's options, warrants, or shares at the issuer's expense, which shall be valued at one percent (1%) of the public offering;

~~002.03E~~ Rights of first refusal, which shall be valued at one percent (1%) of the public offering;

~~002.03F~~ Solicitation fees, which shall be valued at the lesser of actual cost or one percent (1%) if the fees are payable within one year of the offering;

~~002.03G~~ Financial consulting or financial advisory agreements or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;

~~002.03H~~ Due diligence expenses;

~~002.03I~~ Attorneys' fees for services in connection with the issue and sale of the securities and their qualification for sale under applicable laws and regulations;

~~002.03J~~ Auditors' and accountants' fees;

~~002.03K~~ The cost of printing prospectuses, circulars and other documents required to comply with securities laws and regulations;

~~002.03L~~ Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers and other experts;

~~002.03M~~ The cost of authorizing and preparing the securities, including issue taxes and stamps; and

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

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

002.01 Selling expenses include, but are not limited to:

002.01A Commissions to underwriters or broker-dealers;

002.01B Non-accountable fees or expenses to be paid to the underwriter or broker-dealer;

002.01C Underwriter's warrants, which shall be valued at twenty percent of the public offering price, unless a public market exists for the issuer's warrants;

002.01D Future registration rights of underwriter's options, warrants, or shares at the issuer's expense, which shall be valued at one percent of the public offering;

002.01E Rights of first refusal, which shall be valued at one percent of the public offering;

002.01F Solicitation fees, which shall be valued at the lesser of actual cost or one percent if the fees are payable within one year of the offering;

002.01G Financial consulting or financial advisory agreements or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;

002.01H Due diligence expenses;

002.01I Attorneys' fees for services in connection with the issuance and sale of the securities and their qualification for sale under applicable laws and regulations;

002.01J Auditors' and accountants' fees;

002.01K The cost of printing offering documents, circulars and other documents required to comply with securities laws and regulations;

002.01L Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers and other experts;

002.01M The cost of authorizing and preparing the securities, including issue taxes and stamps; and

002.01N Other expenses incurred in connection with the public offering of securities as determined by the Director.

002.02 Selling security holders means persons currently owning securities of the issuer and who will offer all or a portion of those securities for sale as a part of the offering being registered.

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;

~~003.03C~~ ~~The selling securities holders have held their securities for at least two years prior to the filing of the public offering.~~

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

004-008 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.