

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 30 - PREFERRED STOCK

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 preferred stock 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 CONDITIONS. ~~A public offering of preferred stock may be disallowed if the issuer's adjusted net earnings for the last fiscal year or its average adjusted net earnings for the last three fiscal years prior to the public offering were insufficient to pay its fixed charges and preferred stock dividends, whether or not accrued, and to meet the redemption requirements, if applicable, of the preferred stock being offered.~~ GROUNDS FOR DENIAL OF SECURITIES REGISTRATION RELATING TO PAYMENT ABILITY. The Director may deny the offer or sale of preferred stock based on the issuer's adjusted net earnings or a cash analysis. The issuer must have enough cash to pay the dividend, if any, on the preferred stock being offered, whether or not declared.

002.01 The Director may deny the offer and sale of preferred stock if either the issuer's adjusted net earnings for its last fiscal year or the issuer's average adjusted net earnings for its last three fiscal years were insufficient to pay the issuer's:

002.01A Fixed charges;

002.01B Preferred stock dividends, whether or not accrued; and

002.01C The redemption requirements, if any, of the preferred stock being offered to investors.

002.02 The Director may deny the offer or sale of preferred stock unless the issuer's statement of cash flows shows that net cash provided by operating activities was positive for the issuer's last fiscal year.

002.02A The Director may require the issuer to submit a financial statement that is presented in conformity with generally accepted accounting principles and demonstrates that the issuer had an average positive net cash provided by operating activities for the last three fiscal years.

002.03 This Section shall not apply to public offerings of:

002.03A Convertible preferred stock that ranks ahead of any convertible debt relating to payment of dividends, interest, and liquidation proceeds; or

002.03B Preferred stock that is, or may be, legally or beneficially, directly or indirectly, owned by promoters.

003 CONVERTIBLE PREFERRED STOCK. ~~The Director, in his or her discretion, may choose to not apply this Rule to public offerings of convertible preferred stock that are superior in right to payment of dividends, interest, and liquidation proceeds to any convertible debt and preferred stock that are, or may be, legally or beneficially, directly or indirectly, owned by promoters, provided:~~ GROUNDS FOR DENIAL OF SECURITIES REGISTRATION RELATING TO SHAREHOLDER APPROVAL. ~~The Director may deny the offer or sale of equity securities if the issuer's articles of incorporation authorize the board of directors to issue preferred stock without a vote by the common shareholders.~~

003.01 The risks of failure to declare or pay dividends and the equity characteristics of the convertible preferred stock must be disclosed in the prospectus; and This Section shall not apply to public offerings if:

003.01A The offering document states that the issuer will not offer preferred stock to promoters except on the same terms as it is offered to all other existing or new shareholders; or

003.01B A majority of the issuer's independent directors that do not have an interest in the transaction:

003.01B1 Approve any offering of preferred stock; and

003.01B2 Have access, at the issuer's expense, to issuer's legal counsel or independent counsel.

003.02 An offering of such securities is reviewed by using the Rules for equity offerings in 48 NAC 21 through 28 and 48 NAC 31 as applicable.

004 REDEMPTION REQUIREMENTS. ~~If the issuer's net earnings are subject to cyclical fluctuations or if the Director deems it necessary for investor protection, the Director may require that the issuer establish redemption requirements.~~ DISCLOSURE REQUIREMENTS. The issuer's offering document relating to an offering of preferred stock must disclose:

004.01 Whether dividends on the preferred stock are cumulative;

004.02 The risks of failure to declare or pay dividends on the preferred stock; and

004.03 The equity characteristics of any convertible preferred stock being offered to investors.

~~005~~ EQUITY SECURITIES. A public offering of equity securities may be disallowed by the Director if the issuer's articles of incorporation authorize its board of directors to issue preferred stock in the future without a vote of the common shareholders unless:

~~005.01~~ The issuer represents in its prospectus or offering document that it will not offer preferred stock to promoters except on the same terms as it is offered to all other existing shareholders or to new shareholders; or

~~005.02~~ The issuance of preferred stock is approved by a majority of the issuer's independent directors who do not have an interest in the transaction and who have access, at the issuer's expense, to issuer's or independent legal counsel.

~~006-0075~~ 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.