

# 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.

**15 U.S.C.**

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Title 15 - COMMERCE AND TRADE

CHAPTER 2A - SECURITIES AND TRUST INDENTURES

SUBCHAPTER I - DOMESTIC SECURITIES

Sec. 77r - Exemption from State regulation of securities offerings

From the U.S. Government Publishing Office, [www.gpo.gov](http://www.gpo.gov)**§77r. Exemption from State regulation of securities offerings****(a) Scope of exemption**

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

(A) with respect to a covered security described in subsection (b) of this section, any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 78o-3 of this title, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

**(b) Covered securities**

For purposes of this section, the following are covered securities:

**(1) Exclusive Federal registration of nationally traded securities**

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

**(2) Exclusive Federal registration of investment companies**

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.].

**(3) Sales to qualified purchasers**

A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

**(4) Exemption in connection with certain exempt offerings**

A security is a covered security with respect to a transaction that is exempt from registration under this subchapter pursuant to—

- (A) paragraph (1) or (3) of section 77d<sup>1</sup> of this title, and the issuer of such security files reports with the Commission pursuant to section 78m or 78o(d) of this title;
- (B) section 77d(4)<sup>1</sup> of this title;
- (C) section 77d(6)<sup>1</sup> of this title;
- (D)<sup>2</sup> a rule or regulation adopted pursuant to section 77c(b)(2) of this title and such security is—
  - (i) offered or sold on a national securities exchange; or
  - (ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale;

(D)<sup>2</sup> section 77c(a) of this title, other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located; or

(E) Commission rules or regulations issued under section 77d(2)<sup>1</sup> of this title, except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 77d(2)<sup>1</sup> of this title that are in effect on September 1, 1996.

**(c) Preservation of authority**

**(1) Fraud authority**

Consistent with this section, the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions<sup>3</sup>

- (A) with respect to—
  - (i) fraud or deceit; or
  - (ii) unlawful conduct by a broker, dealer, or funding portal; and

(B) in connection to<sup>4</sup> a transaction described under section 77d(6)<sup>1</sup> of this title, with respect to—

- (i) fraud or deceit; or
- (ii) unlawful conduct by a broker, dealer, funding portal, or issuer.

**(2) Preservation of filing requirements**

**(A) Notice filings permitted**

Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this subchapter, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

**(B) Preservation of fees****(i) In general**

Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof, adopted after October 11, 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before October 11, 1996.

**(ii) Schedule**

The fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a) of this section.

**(C) Availability of preemption contingent on payment of fees****(i) In general**

During the period beginning on October 11, 1996, and ending 3 years after October 11, 1996, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

**(ii) Delays**

For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

**(D) Fees not permitted on listed securities**

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1) of this section, or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1) of this section.

**(F) <sup>5</sup> Fees not permitted on crowdfunded securities**

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B), or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term "State" includes the District of Columbia and the territories of the United States.

**(3) Enforcement of requirements**

Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of the failure to submit any filing or fee required under law and permitted under this section.

**(d) Definitions**

For purposes of this section, the following definitions shall apply:

**(1) Offering document**

The term "offering document"—

(A) has the meaning given the term "prospectus" in section 77b(a)(10) of this title, but without regard to the provisions of subparagraphs (a) and (b) of that section; and

(B) includes a communication that is not deemed to offer a security pursuant to a rule of the Commission.

**(2) Prepared by or on behalf of the issuer**

Not later than 6 months after October 11, 1996, the Commission shall, by rule, define the term "prepared by or on behalf of the issuer" for purposes of this section.

**(3) State**

The term "State" has the same meaning as in section 78c of this title.

**(4) Senior security**

The term "senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.

(May 27, 1933, ch. 38, title I, §18, 48 Stat. 85; Pub. L. 104–290, title I, §102(a), Oct. 11, 1996, 110 Stat. 3417; Pub. L. 105–353, title III, §§301(a)(4), 302, Nov. 3, 1998, 112 Stat. 3235, 3237; Pub. L. 111–203, title IX, §985(a)(2), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title III, §305(a), (b) (2), (c), (d)(2), title IV, §401(b), Apr. 5, 2012, 126 Stat. 322, 323, 325.)

**REFERENCES IN TEXT**

The Investment Company Act of 1940, referred to in subsec. (b)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 77d(1), (2), (3), (4), and (6) of this title, referred to in subsecs. (b)(4)(A) to (C), (E) and (c)(1)(B), were redesignated section 77d(a)(1), (2), (3), (4), and (6), respectively, of this title by Pub. L. 112–106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

**AMENDMENTS**

**2012**—Subsec. (b)(4)(C). Pub. L. 112–106, §305(a)(2), added subpar. (C). Former subpar. (C) redesignated (D).

Subsec. (b)(4)(D). Pub. L. 112–106, §401(b), added subpar. (D) relating to section 77c(b)(2) of this title.

Pub. L. 112–106, §305(a)(1), redesignated subpar. (C), relating to section 77c(a) of this title, as (D). Former subpar (D) redesignated (E).

Subsec. (b)(4)(E). Pub. L. 112–106, §305(a)(1), redesignated subpar. (D) as (E).

Subsec. (c)(1). Pub. L. 112–106, §305(b)(2), substituted ", in connection with securities or securities transactions" for "with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." and added subpars. (A) and (B).

Subsec. (c)(1)(A)(ii). Pub. L. 112–106, §305(d)(2), which directed amendment of subsec. (c)(1) by substituting ", dealer, or funding portal" for "or dealer", was executed by making the substitution in subpar. (A)(ii) as added by Pub. L. 112–106, §305(b)(2).

Subsec. (c)(2)(F). Pub. L. 112–106, §305(c), added subpar. (F).

**2010**—Subsec. (b)(1)(C). Pub. L. 111–203, §985(a)(2)(A), substituted "(C) a security" for "(C) is a security".

Subsec. (c)(2)(B)(i). Pub. L. 111–203, §985(a)(2)(B), substituted "State or" for "State, or".

**1998**—Subsec. (b)(1)(A). Pub. L. 105–353, §301(a)(4)(A), inserted ", or authorized for listing," after "Exchange, or listed".

Subsec. (b)(4)(C). Pub. L. 105–353, §302, substituted "paragraph (4), (10), or (11)" for "paragraph (4) or (11)".

Subsec. (c)(2)(B)(i), (C)(i). Pub. L. 105–353, §301(a)(4)(B), (C), made technical amendments to references in original act which appear in text as references to October 11, 1996.

Subsec. (d)(1)(A). Pub. L. 105–353, §301(a)(4)(D), substituted "section 77b(a)(10)" for "section 77b(10)" and "subparagraphs (a) and (b)" for "subparagraphs (A) and (B)".

Subsec. (d)(2). Pub. L. 105–353, §301(a)(4)(E), made technical amendment to reference in original act which appears in text as reference to October 11, 1996.

Subsec. (d)(4). Pub. L. 105–353, §301(a)(4)(F), substituted "The term" for "For purposes of this paragraph, the term".