

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 25 - IMPOUNDMENT OF PROCEEDS

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 impoundment of proceeds 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 DENIAL OF SECURITIES REGISTRATION. If an underwriter has not firmly underwritten an offering, the Director may deny a registration unless the issuer has impounded the proceeds.

003 DEPOSIT OF PROCEEDS. If the Director has not denied the registration under Section 002, above, the issuer or any other person that receives the proceeds from the sale of the securities must deposit the proceeds from the sale of the securities in an interest-bearing escrow or trust account with an impoundment agent.

003.01 The following are not eligible to act as an impoundment agent:

003.01A The issuer;

003.01B The issuer's officers and directors;

003.01C The underwriter;

003.01D Any promoter; or

003.01E An affiliate of any of the above.

004 AGREEMENT.

004.01 The impoundment agreement shall be in a form acceptable to the Director and shall include the following:

004.01A A provision that impounded proceeds ("proceeds") are not subject to claims by creditors of the issuer, affiliates, or associates, or the underwriters until the proceeds have been released to the issuer pursuant to the terms of the impoundment agreement.

004.01B A provision that the Director has the right to inspect and make copies of the records of the impoundment agent at any reasonable time wherever the records are located or to require the impoundment agent to provide copies of such records to the Director at the offices of the Department.

004.01C A provision that the proceeds may be released to the issuer five business days after:

004.01C1 The impoundment agent has provided to the Director an affidavit which states that all of the conditions of the impoundment agreement have been met; and

004.01C2 The issuer has provided to the Director an affidavit which states:

004.01C2a There have been no material omissions or changes in the financial condition of the issuer, or other changes of circumstances, that would render the amount of proceeds inadequate to finance the issuer's proposed plan of operations, business, or enterprise; and

004.01C2b There have been no material omissions or changes that would render the representations in the registration statement fraudulent, false, or misleading.

004.02 A copy of the impoundment agreement, signed by an officer of the issuer, an officer of the underwriter, if applicable, and an officer of the impoundment agent, each with the authority to sign such documents, must be filed with the Department and shall become part of the registration statement.

005 **INSUFFICIENT PROCEEDS.** If the proceeds are insufficient to meet the minimum requirements within the time prescribed by the impoundment agreement, the impoundment agent shall notify the Director in writing.

005.01 The impoundment agent must release and return the proceeds directly to the investors; and

005.02 The proceeds shall be returned to the investors with interest, and without deduction for expenses, including impoundment agent fees.

006 **AFFILIATE PURCHASES.** If an underwriter or an officer, director, promoter, affiliate, or an associate of the issuer, purchases securities that are a part of the public offering being sold pursuant to the offering document, and if the proceeds from that purchase are used to complete the impoundment requirements imposed under this Rule, the purchase shall be presumed to be a fraud or a deceit upon the public purchasers of the issuer's securities, unless:

006.01 The person purchases the securities with investment intent and on the same terms as unaffiliated public investors. If a person purchases the securities necessary to complete the impoundment requirements and holds the securities for two years or more, it may be presumed that investment intent has been met.

006.02 The offering document discloses the intent to purchase securities necessary to complete the impoundment requirements and the maximum amount of the issuer's securities that the person(s) would own upon completion of the purchase.

006.02A If the offering document does not disclose the intent to purchase the securities necessary to complete the impoundment requirements, the issuer must file an amended offering document and disclose the same to investors who have purchased pursuant to the issuer's registration statement.

006.02B The public investors must be given a reasonable opportunity after disclosure of the purchase of securities by one or more of the aforesaid persons to complete the impoundment requirements and the filing of an amended offering document to rescind their purchases.

006.02C If the issuer fails to make a reasonable rescission offer, the Director may treat such an act as a fraud or deceit upon the investors who purchased the issuer's securities pursuant to the public offering.

006.03 Any repurchase, within two years of the completion of the public offering, by the issuer of the securities sold to any of the aforesaid persons to complete the impoundment requirements shall be presumed to be a fraud or deceit upon investors.

007 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.