

18 NCAC 06A .1307 COMMISSIONS AND EXPENSES

(a) The aggregate amount of all payments including commissions, compensation, discounts, fees, remuneration, mark-ups, and service charges paid or to be paid, directly or indirectly, to underwriters, dealers, salesmen and finders with respect to the public offering of securities shall not exceed ten percent of the aggregate selling price of the securities. For the purposes of this Paragraph (a), the aggregate amount of all payments shall exclude payments related to justifiable due diligence investigation of the issuer.

(b) The aggregate amount of all payments including commissions, discounts, fees, remuneration, mark-ups, and service charges as computed in Paragraph (a) of this Rule and other selling expenses as described in Paragraph (d) of this Rule incurred or to be incurred in connection with the offer or sale of securities:

- (1) Twenty percent of the gross proceeds of the offering for public offerings of two million five hundred thousand dollars (\$2,500,000) or less;
- (2) Eighteen percent of the gross proceeds of the offering for public offerings over two million five hundred thousand dollars (\$2,500,000) and up to seven million five hundred thousand dollars (\$7,500,000); or
- (3) Fifteen percent of the gross proceeds of the offering for public offerings that exceed seven million five hundred thousand dollars (\$7,500,000).

(c) In an application to register securities where warrants, options or rights to purchase shares below the offering price are granted to underwriters, dealers and other persons with respect to the public offering of securities, there shall be included in the calculation pursuant to Paragraph (a) of this Rule an amount equal to the difference between the lowest price at which the warrants, options or rights may be exercised and the public offering price of the securities at the time of effectiveness of registration, less any amount paid for such warrants, options or rights. In cases where no market value for the warrants, options or rights exists, a presumed fair value of twenty percent of the public offering price of the shares to which the warrants, options or rights pertain shall be used for purposes of the calculation of payments pursuant to Paragraph (a) of this Rule, unless evidence indicates that a contrary valuation exists. For purposes of Paragraph (a) of this Rule, any future registration rights of underwriter's options, warrants, or shares at the issuer's expense shall be valued at one percent of the public offering, and any right of first refusal will be valued at one percent of the public offering. Payments as provided in Paragraph (a) of this Rule which are made or to be made in connection with the sale of securities by a person in which the issuer has an interest or which is controlled by or is under common control with the issuer shall be deemed to have been made by the issuer.

(d) Selling expenses as referred to in Paragraph (b) of this Rule may include, but are not limited to, the following:

- (1) Solicitation, conversion, or exercise 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;
- (2) Consulting or financial advisory agreements or any other type of agreement or fees, however designated, which shall be valued at actual cost;
- (3) Attorney's fees for services in connection with the issue and sale of the securities and their qualification for sale under applicable laws and regulations;
- (4) Auditors' and accountants' fees;
- (5) The cost of printing prospectuses, circulars and other documents required to comply with securities laws and regulations;
- (6) Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers, and other experts;
- (7) Cost of authorizing and preparing the securities, including issue taxes and stamps; and
- (8) Other expenses incurred in connection with the public offering of securities as determined by the administrator.

(e) The issuer shall file with the administrator, within 120 days after the termination of the public offering, a written report setting forth the actual amounts of selling expenses incurred in the public offering. The selling expenses are to be broken down by the categories as in Paragraphs (a), (c), and (d) of this Rule.

(f) A public offering or sale of securities that includes offers or sales by selling security holders may be disallowed by the administrator unless the following conditions are met:

- (1) Selling security holders shall pay a pro rata share of all additional selling expenses that are the result of the inclusion of their shares in the public offering;
- (2) The prospectus or offering document shall disclose the amount of selling expenses which the selling securities holders shall pay; and
- (3) With the exception of underwriter's or broker-dealer's compensation, the provisions of Paragraphs (f)(1) and (f)(2) of this Rule shall not apply:

- (A) if the security holders have a written agreement with the issuer that was entered into one year or more prior to the filing of the public offering, whereby the issuer has agreed to pay all of the selling security holders' selling expenses, and if the selling securities holders have held their securities for at least one year prior to the filing of the public offering; or
- (B) if the security holders have a written agreement with the issuer, whereby the issuer has agreed to pay all of the selling securities holders' selling expenses, and if the agreement was arrived at through arm's-length negotiations.

(g) In the event of noncompliance with Paragraph (a) of this Rule in reliance upon G.S. 78A-29(b)(1) the applicant shall provide the administrator the following:

- (1) A copy of the rule or rules, promulgated by a national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934, to which the offering or dealer is subject;
- (2) A demonstration that the rule or rules were promulgated to provide safeguards against unreasonable profits or unreasonable rates or commissions or other charges;
- (3) Evidence of the application of the rule or rules to the offering in question, including substantive guidelines, policy statements and interpretations utilized in determining compliance therewith; and
- (4) Such other evidence of compliance with such rules as the administrator so requires.

History Note: Authority G.S. 78A-29(a)(2)f.; 78A-29(b)(2); 78A-49(a); Eff. April 1, 1981; Amended Eff. October 1, 1990; October 1, 1988; January 1, 1984; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 6, 2016.