

## TITLE 18 – DEPARTMENT OF THE SECRETARY OF STATE

**Rulemaking Agency:** *Department of the Secretary of State*

**Rule Citations:** *18 NCAC 06A .2001-.2048*

**Proposed Effective Date:** *March 1, 2017*

**Public Hearing:**

**Date:** *February 15, 2017*

**Time:** *10:00 a.m.*

**Location:** *4701 Atlantic Avenue, Suite 116, Conference Room 115, Raleigh, NC 27604*

*Note: In the event of inclement weather, the hearing may be cancelled. Notice of cancellation will be posted on the Secretary of State's website: [www.sosnc.gov](http://www.sosnc.gov).*

**If the hearing on Wednesday, February 15, 2017 is cancelled due to inclement weather, the rescheduled hearing will be:**

**Date:** *February 24, 2017*

**Time:** *10:00 a.m.*

**Location:** *4701 Atlantic Avenue, Suite 116, Conference Room 115, Raleigh, NC 27604*

**Reason:** *In 2016, the North Carolina General Assembly enacted the North Carolina PACES Act, S.L. 2016-103, that created the Invest NC Exemption under the North Carolina Securities Act, Chapter 78A of the General Statutes. The PACES Act specifically delegates responsibility for adopting rules to the Secretary of State ("the Department"). The PACES Act also requires that the Department coordinate its interpretation and administration of the new crowdfunding law with related federal law and regulations.*

*The PACES Act creates an exemption from registration for intrastate offerings under North Carolina securities laws. In addition, the PACES Act coordinates the state exemption with an intrastate exemption in federal securities laws.*

*The PACES Act allows smaller enterprises in North Carolina to access capital needed to initiate new business ventures or grow existing ones. The Act permits raising money through small contributions from a large number of North Carolina investors using the internet if certain requirements are met and followed (also known as crowdfunding).*

*In developing these proposed rules, the Department has balanced the protection of the investing public with the need for direction and flexibility for the issuers, registered broker-dealers and Internet funding portals. These rules are necessary and appropriate for the public interest of facilitating investment by North Carolina residents in North Carolina businesses.*

*The Department has, to the extent necessary, coordinated these rules with the federal crowdfunding rules. However, the Department has proposed PACES Act rules that it believes are clearer and easier to comply with than the federal rules while providing robust investor protection. Because the PACES Act and the crowdfunding industry are new, the Department anticipates future*

*amendments to its rules. In order to facilitate such amendments, the Department has proposed short rules addressing discrete topics rather than a single, long, federal-style combined regulation. The Department has also reserved a few rule numbers for use in the future (if needed).*

*The Department has sought to propose rules that will allow an issuer to take the steps necessary to begin a crowdfunding offering while providing both the Department and the investing public with necessary disclosures.*

*Proposed rules 18 NCAC 06A .2001 through .2003, and .2043 are generally applicable rules.*

*Proposed rules 18 NCAC 06A .2004 through .2016 address the responsibilities of an issuer of crowd-funded securities, including escrow account requirements.*

*Proposed rules 18 NCAC 06A .2019 through .2026 address the responsibilities of a North Carolina Intrastate Funding Portal.*

*Proposed rules 18 NCAC 06A .2029 and .2030 address the requirements for use of a non-North Carolina bank or depository institution by a registered broker-dealer.*

*Proposed rules 18 NCAC 06A .2032 through .2035 address requirements related to advertising an intrastate crowd-funded securities offering.*

*Proposed rules 18 NCAC 06A .2037 through .2041 address investor rights related requirements.*

**Comment Procedures:** *Comments from the public shall be directed to: Ann B. Wall, General Counsel, NC Department of the Secretary of State, P.O. Box 29622, Raleigh, NC 27626-0622; By hand or express delivery only to; 2 S. Salisbury Street, Raleigh, NC 27601; phone (919) 807-2005; email [rules@sosnc.gov](mailto:rules@sosnc.gov); website <http://sosnc.gov/legal/ThePage.aspx>. The comment period begins February 7, 2017 and ends February 27, 2017.*

## **CHAPTER 06 – SECURITIES DIVISION**

### **SUBCHAPTER 06A – RECODIFIED RULES**

#### **SECTION .2000 - INVEST NC EXEMPTION (CROWDFUNDING)**

##### **18 NCAC 06A .2001 PURPOSE**

The purpose of the rules in this Section is to promote the overall economic health of North Carolina by:

- (1) Facilitating responsible and competitive intrastate capital formation by North Carolina companies through increased availability of financial resources to businesses that might not otherwise have access to capital;
- (2) Facilitating opportunities for North Carolinians to invest in local businesses;
- (3) Facilitating open, full, direct and public communication using the Internet as a means of leveraging the wisdom of the crowd; and

- (4) Protecting the investing public.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2002 SCOPE**

(a) The rules in this Section execute the authority granted to the Secretary of State by the North Carolina PACES Act, S.L. 2016-103, with regard to the Invest NC Exemption under Chapter 78A of the North Carolina General Statutes, the North Carolina Securities Act.

(b) The rules in this Section shall not be construed to, in any manner, relieve any person from the full disclosure requirements of G.S. 78A-8.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a)*

### **18 NCAC 06A .2003 DEFINITIONS**

Except as otherwise provided, the following definitions apply to G.S. 78A-17.1 and this Section:

- (1) The definitions in:
  - (a) G.S. 78A-2;
  - (b) Rule .1104 of this Subchapter; and
  - (c) Rule 18 NCAC 06B .0102.
- (2) "Bank" means:
  - (a) A banking institution organized under the laws of the United States;
  - (b) A member bank of the Federal Reserve System;
  - (c) Any other banking institution, whether incorporated or not:
    - (i) doing business under laws of a State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section 15 of Public Law 87-722 (12 U.S.C. 92a); and
    - (ii) which is supervised and examined by a state or federal agency having supervision over banks; and
    - (iii) which is not operated for the purpose of evading the North Carolina Securities Act.
- (3) "Blank check company" means a development stage company that has no specific business plan or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.
- (4) "Depository institution" means a bank, savings institution, trust company or credit union that is:
  - (a) organized or chartered under the laws of a State or of the United States;
  - (b) authorized to receive deposits; and

- (c) supervised and examined by an official or agency of a State or the United States if its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law.
- (5) The term “Exemption” means the exemption allowed by G.S. 78A-17(20) in connection with an offering of a security made in reliance on a federal intrastate exemption in compliance with the Securities Act of 1933.
- (6) “Holding company” means an entity whose principal purpose is owning stock in, or supervising the management of, other companies.
- (7) For purposes of G.S.78A-17.1(a)(9) and (a)(11), “Internet Web site” means a “North Carolina Intrastate Funding Portal.”
- (8) “North Carolina Intrastate Funding Portal” or “funding portal” means any person that:
  - (a) is not a registered broker-dealer pursuant to G.S. 78A-36; and
  - (b) is in the business of acting as an intermediary in a transaction involving the offer or sale of securities for or on behalf of an issuer pursuant to the Exemption.
- (9) “Platform” means a program or application accessible via the Internet or other similar electronic communication medium through which prospective investors, investors and issuers publicly communicate with each other online.
- (10) “Registered with the Secretary of State” means:
  - (a) A domestic entity that is formed under North Carolina law and is in “current/active status” with the Department; or
  - (b) A foreign entity that has obtained:
    - (i) a Certificate of Authority to transact business in North Carolina from the Department and;
    - (ii) is “current/active” with the Department and in good standing in its state of formation.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2004 ISSUER FILING REQUIREMENTS**

As a condition of the availability of the Exemption, not less than 10 business days before commencement of a securities offering relying on the Exemption, an issuer shall file with the Administrator:

- (1) a Notice of Intrastate Claim of Exemption Form (“Form NCE”) that complies with Rules .2005 and .2006 of this Section;
- (2) a disclosure document that complies with Rules .2007 through .2011 of this Section;
- (3) an escrow agreement that complies with Rules .2013 through .2015, and Rules .2038 through .2041 of this Section; and
- (4) the nonrefundable statutory fee.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

## **18 NCAC 06A .2005 NOTICE OF INTRASTATE CLAIM OF EXEMPTION FORM REQUIREMENTS**

An issuer shall file with the Administrator an original, legibly signed Form NCE. The Form NCE shall include the issuer's attestation to:

- (1) The following:
  - (a) The issuer's identity;
  - (b) Its registration with the Secretary of State;
  - (c) The specific federal intrastate regulations relied upon;
  - (d) The offering minimum and maximum amounts and target dates;
  - (e) The issuer's commitment that it shall not accept more than five thousand dollars (\$5,000) from any single purchaser in any 12 month period, unless the issuer reasonably believes that the purchaser is an accredited investor;
  - (e) The issuer does not fit within the exclusions in G.S. 78A-17.1(a)(6);
  - (f) The issuer is not a holding company, blind pool, commodity pool, or a blank check company;
  - (g) The absence of disqualification pursuant to G.S. 78A-17.1(e) for the issuer or any person affiliated with the issuer or the offering;
  - (h) The issuer shall comply with Rules .2037 and .2048 of this Section regarding misrepresentations and omissions of material facts in its disclosures to prospective investors and investors; and
  - (i) The issuer's consent to personal jurisdiction of the Administrator and consent to service of process.
- (2) A copy of any agreement entered into between the issuer and its funding portal or registered broker-dealer.
- (3) For offerings that do not use a funding portal or a registered broker-dealer, the Form NCE shall also include names and titles of persons:
  - (a) involved in the offer or sale of the securities; and
  - (b) who will serve as the investor contact person(s) for the issuer.
- (4) A nonrefundable statutory filing fee.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

## **18 NCAC 06A .2006 SIGNING FORM NCE**

The Form NCE shall be legibly signed by:

- (1) the issuer's executive officers;
- (2) the issuer's managers for a limited liability company;
- (3) all persons managing the affairs of the issuer; or
- (4) all persons performing similar functions for the issuer.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s.4.(a).*

## **18 NCAC 06A .2007 FILING DISCLOSURE DOCUMENT WITH THE ADMINISTRATOR**

An issuer shall file a written disclosure document compliant with Rules .2008 through .2011 of this Section with the Administrator not less than 10 business day before the commencement of an offering.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2008 CONTENT OF DISCLOSURE DOCUMENT**

An issuer shall cover all material facts in its disclosure document, including:

- (1) Information required by G.S. 78A-17.1(a)(5)b. and 78A-17.1(a)(13), including:
  - (a) A description of the issuer's business;
  - (b) The type of the issuer's business entity, as recognized under North Carolina law. Note: Examples of types of business entities are limited partnerships, corporations and limited liability companies (LLCs);
  - (c) Its history that includes its three most recent years;
  - (d) The street address of the issuer's business and the mailing address of the issuer's business, if different;
  - (e) A description of how the issuer plans to use the funds raised by the offering:
    - (i) if the minimum offering amount is met, and
    - (ii) if the maximum offering amount is met;
  - (f) All forms and amounts of payment and compensation to any persons listed in G.S. 78A-17.1(a)(5)b.1 and consideration paid to any persons listed in G.S. 78A-17.1(a)(5)b.5;
  - (g) A description of the financial condition of the issuer that includes:
    - (i) for issuers with an operating history, liquidity; capital resources; historical results of operations; and whether historical results and cash flows are representative of what investors should expect in the future; or
    - (ii) for issuers with no operating history, planned financial milestones, and operational, liquidity and other challenges.
- (2) The statements required by G.S. 78A-17.1(a)(7) and 17 CFR 230.147(f)(3) and 230.147A(f)(3);
- (3) A statement that investors shall direct all payments to the escrow agent to be deposited into the escrow account for the offering; and
- (4) A statement that investors may cancel an investment for any reason prior to such time as the target minimum offering amount has been reached.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s.4.(a).*

### **18 NCAC 06A .2009 CIRCUMSTANCES WHEN ADDITIONAL DISCLOSURE DOCUMENT CONTENT REQUIRED**

If the issuer has chosen a maximum offering amount that exceeds one million dollars (\$1,000,000) and is no more than two million dollars (\$2,000,000), the issuer shall include in its disclosure document a copy of its financial statements for its most recent fiscal year that shall:

- (1) Have been reviewed or audited and prepared in accordance with generally accepted accounting principles; and

- (2) Include:
  - (a) balance sheets;
  - (b) statements of comprehensive income;
  - (c) statements of cash flows;
  - (d) statements of changes in stockholders' equity; and
  - (e) notes to the financial statements.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2010 REQUIRED STATEMENTS TO INCLUDE IN ISSUER DISCLOSURE DOCUMENT**

(a) An issuer shall include the legend required by G.S. 78A-17.1(a)(7) in its disclosure document as specified by this Rule.

(b) The text of the legend shall be separated into these paragraphs:

(1) "In making an investment decision, investors must rely on their own examination of the issuer and the terms of the offering, including the merits and risks involved. These securities have not been recommended by any federal or state securities commission or regulatory authority. Furthermore, the foregoing authorities have not confirmed the accuracy or determined the adequacy of this document. Any representation to the contrary is a criminal offense."

(2) "These securities are subject to restrictions on transferability and resale and may not be transferred or resold except as permitted under the Securities Act of 1933, as amended, and the applicable state securities laws, pursuant to registration or exemption therefrom. Investors should be aware that they will be required to bear the financial risks of this investment for an indefinite period of time."

NOTE: The numbers on the paragraphs above do not have to be included when the text of the legend is presented.

(c) The issuer shall present the legend conspicuously and in a readable form. For purposes of this Rule, "conspicuously and in a readable form" means:

(1) in a bold font that is at least 10 point in size; and

(2) uses at least one additional method of the issuer's choice to set the legend apart and emphasize it in comparison to other cover page information. NOTE: Examples of other ways of setting the legend apart include a different color font, white space around the legend, increased line spacing, and bordering the legend.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2011 PROVIDING DISCLOSURES TO PROSPECTIVE INVESTORS**

When an offer or sale of any security is made, an issuer shall provide a prospective investor or investor with the disclosure document that it filed with the Administrator.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2012 ISSUER SHALL REQUIRE INVESTOR ACTIONS**

(a) Before selling a security to an investor, an issuer relying on the Exemption shall require the investor to provide the issuer with:

- (1) A signed, dated document identifying the investor and containing the certifications required by G.S. 78A-17.1(a)(8);
- (2) A written, signed and dated declaration of the investor's North Carolina residency and, if applicable, accredited investor status. If the investor is an entity, its residence shall be the principal place of business where the officers, partners, or managers of the entity primarily direct, control and coordinate its activities; and
- (3) Evidence supporting the declaration made pursuant to Subparagraph (2) of this Paragraph.

(b) The certifications required by this Rule may be combined in a single document.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2013 ISSUER TO ESTABLISH ESCROW ACCOUNT**

An issuer shall establish an escrow account for investor fund deposits with a bank or depository institution that shall:

- (1) Have a main office or a permanent branch (with permanent physical facilities and not intermittent) located within the State of North Carolina; or
- (2) Be a bank or other depository institution that has been approved by the Administrator in accordance with G.S. 78A-17.1(a)(5)c. and Rules .2029 and .2030 of this Section.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2014 ISSUER TO PROVIDE INFORMATION TO THE BANK OR DEPOSITORY INSTITUTION**

An issuer shall provide accurate and timely information to the bank or depository institution in order to establish and maintain the escrow account and agreement, including the minimum target offering amount and the deadline set by the issuer in accordance with G.S. 78A-17.1(a)(5)c.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2015 TERMS OF ESCROW AGREEMENT**

An issuer that is not using a registered broker-dealer shall enter into an escrow agreement with a bank or depository institution for the deposit, holding and release of investor funds. The agreement shall include:

- (1) A requirement that the bank or depository institution release offering proceeds to the issuer only if:
  - (a) The aggregate capital raised from all investors is equal to or greater than the minimum target offering amount; and



- (b) The minimum target offering amount has been met by the deadline stated in the disclosure document.
- (2) A requirement that the bank or depository institution shall return funds to investors as required by G.S. 78A-17.1 and Rules .2037 through .2039 of this Section.
- (3) A requirement that the bank or depository institution shall comply with G.S. 78A-17.1 and Rules .2037 through .2039 of this Section.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2016 ISSUER THAT DOES NOT USE FUNDING PORTAL OR REGISTERED BROKER-DEALER**

(a) In addition to the other duties of an issuer as set out in G.S. 78A-17.1 and this Section, an issuer that chooses not to use a funding portal or a registered broker-dealer shall:

- (1) Provide a communication channel on its own website;
- (2) Identify itself as the issuer of the securities under discussion on its communication channel; and
- (3) Comply with Rules .2033 through .2035 of this Section when advertising the securities offering.

(b) Officers, employees, independent contractors and other associated persons of an issuer involved in the sale of the issuer's securities shall not be subject to registration as a broker-dealer if they comply with the safe harbor requirements set out in 17 CFR 240.3a4-1.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2017 RESERVED FOR FUTURE CODIFICATION**

#### **18 NCAC 06A .2018 RESERVED FOR FUTURE CODIFICATION**

#### **18 NCAC 06A .2019 FUNDING PORTAL REGISTRATION**

(a) A funding portal shall register with the Administrator by complying with Rules .2020 through .2024 of this Section.

(b) A funding portal's registration expires on December 31 unless renewed.

(c) A registration may be renewed within 30 days of expiration by filing a newly executed Form North Carolina Intrastate Funding Portal (Form NCFP).

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2020 FILING OF FUNDING PORTAL FORM (FORM NCFP)**

(a) A funding portal shall register with the Administrator by filing a Form NCFP at least 10 business days before the commencement of an issuer's offering relying on this Exemption.

(b) Within 30 days of any changes to information on the Form NCFP, a funding portal shall file an amended Form NCFP Form with the Administrator.

*Authority G.S. 78A-17.19a(1)(e), (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

## **18 NCAC 06A .2021 CONTENTS OF FORM NCFP**

The Form NCFP shall include:

- (1) All information that the funding portal is required to provide under G.S. 78A-17.1(a)(9)c., and:
  - (a) The portal's legal identity;
  - (b) Its physical location;
  - (c) The identity of the individual responsible for filing updates to the portal's Form NCFP; and
  - (d) The identity of its officers, directors or any persons occupying a similar status or performing a similar function;
- (2) A statement of the funding portal's "registration with the Secretary of State";
- (3) A statement that the funding portal is being used to offer and sell securities under G.S. 78A-17.1;
- (4) The funding portal's attesting to the statements in Rule .2023 of this Section; and
- (5) That the funding portal complies with Rules .2022 through .2026, and .2047 of this Section.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

## **18 NCAC 06A .2022 FUNDING PORTAL NOTICE TO ADMINISTRATOR OF ISSUER IDENTITY**

A funding portal shall provide notice to the Administrator of the identity of each issuer using the portal by:

- (1) Providing the issuer's identity on its Form NCFP;
- (2) Amending its Form NCFP to update the issuer's identity; or
- (3) Providing a separate written statement as to the identity of each issuer.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

## **18 NCAC 06A .2023 REQUIRED FUNDING PORTAL STATEMENTS**

A funding portal shall attest that:

- (1) it will not engage in the prohibited activities set out in G.S. 78A-17.1(a)(11);
- (2) it is not subject to disqualification pursuant to G.S. 78A-17.1(e);
- (3) its officers, directors or any person occupying a similar status or performing a similar function are not subject to disqualification pursuant to G.S. 78A-17.1(e);
- (4) it will not compensate any person for providing it with personally identifiable information of any investor or potential investor;
- (5) the portal complies with Rules .2024 through .2026 of this Section;
- (6) it does not require an issuer or investor who uses its services to agree to:
  - (a) A mandatory arbitration provision;
  - (b) A choice of law provision other than North Carolina law; or
  - (c) A venue outside of North Carolina; and
- (7) it agrees to comply with Rule .2025 of this Section regarding denying access to those it reasonably believes are subject to disqualification or potential for fraud or investor harm.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2024 FUNDING PORTAL FINANCIAL INTEREST IN ISSUER**

A funding portal shall not have a financial interest in an issuer that is offering or selling securities on its platform unless:

- (1) The funding portal receives the financial interest as compensation for the services provided to or for the benefit of the issuer;
- (2) The services are provided in connection with the offer or sale of securities in the intrastate offering; and
- (3) The financial interest consists of securities of the same class and having the same terms, conditions and rights as the securities being offered or sold in the intrastate offering through the funding portal's platform.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2025 FUNDING PORTAL DENIAL OF ACCESS**

A funding portal shall deny access to its platform to an issuer or entity if it has a reasonable basis for believing that:

- (1) Any of the following are subject to disqualification pursuant to G.S. 78A-17.1(e):
  - (a) The issuer;
  - (b) Any of the issuer's officers, directors or persons occupying a similar status or performing a similar function; or
  - (c) Holders of 10 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power.
- (2) The issuer presents the potential for fraud or raises other investor protection concerns.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2026 FUNDING PORTAL STANDARDS OF CONDUCT**

(a) A funding portal and all persons associated with it shall:

- (1) Observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business; and
- (2) Give particular attention to any conflicts of interest that may arise or exist.

(b) A funding portal and all persons associated with it who do not comply with the rules in this Section may be considered by the Administrator to be engaging in acts in violation of this Rule. Violations of this Rule may be grounds for denial, censure, suspension, or revocation of a funding portal's registration or other action authorized by G.S. Chapter 78A.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2027 RESERVED FOR FUTURE CODIFICATION**

### **18 NCAC 06A .2028 RESERVED FOR FUTURE CODIFICATION**

### **18 NCAC 06A .2029 OUT-OF-STATE BANK OR DEPOSITORY INSTITUTION**

(a) A broker-dealer seeking approval from the Administrator to use an out-of-state bank or other depository institution to hold investor funds in an escrow account shall submit a written document for approval in which the out-of-state bank or depository institution:

- (1) consents to service of process pursuant to G.S. 78A-63;
- (2) consents to personal jurisdiction of the Administrator;
- (3) identifies the person to whom and the address to which notices and process shall be directed in compliance with G.S. 1A-1, Rule 4;
- (4) provides a written agreement that, upon request or demand, it will provide certified records to the Administrator at no cost; and
- (5) provides an escrow agreement that shall not subject the investor to:
  - (A) a mandatory arbitration provision;
  - (B) a choice of law provision other than North Carolina law; or
  - (C) a venue outside of North Carolina.

(b) The documents from the out-of-state bank or depository institution shall be signed by a person having the authority to sign.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2030 ADMINISTRATOR APPROVAL OF OUT-OF-STATE BANK OR DEPOSITORY INSTITUTION**

The Administrator shall approve an application for use of an out-of-state bank or depository institution for an offering pursuant to the Exemption and Rule .2029 of this Section if:

- (1) The issuer is using a broker-dealer registered with the SEC and the Administrator to offer and sell the intrastate securities offering;
- (2) The registered broker-dealer is acting in compliance with 17 CFR 240.15c2-4 and 17 CFR 240.10b-9;
- (3) The investor funds are deposited and held with the bank or other depository institution in a segregated account;
- (4) The registered broker-dealer complies with Rules .2032 through .2034 and Rules .2038, .2039 and .2041 of this Section; and
- (5) An escrow agreement that shall not subject the investor to:
  - (a) a mandatory arbitration provision;
  - (b) a choice of law provision outside of North Carolina;
  - (c) a forum selection clause; or
  - (d) venue outside of the State of North Carolina.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2031 RESERVED FOR FUTURE CODIFICATION**

### **18 NCAC 06A .2032 PLATFORM**

(a) An issuer, funding portal or broker-dealer shall create a single open and public platform that:

- (1) facilitates the public sharing of information related to the offering through a communication channel, leveraging the “wisdom of the crowd”;
  - (2) provides the prospective investor or the investor with the issuer’s disclosure document(s); and
  - (3) may include the issuer’s quarterly reports.
- (b) All communications through a communication channel on a platform shall be preserved for a period of five years after an offering concludes.
- (c) A funding portal or broker-dealer shall only participate in the communication channels on its platform:
- (1) To establish and enforce guidelines for communication using the communication channels; and
  - (2) To remove abusive or potentially fraudulent communications.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2033 LIMITATIONS ON GENERAL SOLICITATION AND ADVERTISING**

An issuer relying on the Exemption and persons acting on behalf of the issuer may not engage in general solicitation or advertising except as permitted by Rules .2034 and .2035.

*Authority G.S. 78A-17.1(a)(11)e., (f); 78A-49(a); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2034 ADVERTISING NOTICE REQUIREMENTS**

A notice may advertise the terms of an issuer's offering made in reliance on the Exemption only if the notice:

- (1) Directs prospective investors to the issuer’s own website or funding portal’s or registered broker-dealer’s platform; and
- (2) Includes no more than the following information:
  - (a) A statement that the issuer is conducting an offering pursuant to the Exemption;
  - (b) The name of the escrow agent to which all investor funds must be directed;
  - (c) A link directing the potential investor to the disclosure document available on the issuer’s own website, or to a funding portal or a registered broker-dealer platform;
  - (d) The terms of the offering. For purposes of this Rule and Rules .2010 and .2035 of this Section, “terms of the offering” means:
    - (i) the amount of securities offered;
    - (ii) the nature of the securities;
    - (iii) the price of the securities; and
    - (iv) the closing date of the offering period;
  - (e) Factual information about the issuer of the security that shall be limited to:
    - (i) the legal identity and business location of the issuer;
    - (ii) the name of the issuer;
    - (iii) the address, phone number and website of the issuer;
    - (iv) the email address of a representative of the issuer; and
    - (v) a brief description of the business of the issuer.

*Authority G.S. 78A-17.1(f); 78A-49(a),(d); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2035 EXCEPTION TO ADVERTISING REQUIREMENTS**

(a) An issuer and persons acting on behalf of the issuer may communicate with investors and potential investors about the terms of the offering if:

- (1) Effected through communication channels provided by the issuer, funding portal or broker-dealer;
- (2) The issuer identifies itself as the issuer in all communications; and
- (3) Persons acting on behalf of the issuer identify their affiliation with the issuer in all communications.

(b) An issuer shall not be deemed to be engaging in general solicitation or advertising if the offering is conducted in accordance with restrictions placed on private offerings pursuant to SEC Regulation D, 17 C.F.R. 230.502(c) and 230.506(b).

*Authority G.S. 78A-17.1(f); 78A-49(a),(d); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2036 RESERVED FOR FUTURE CODIFICATION**

### **18 NCAC 06A .2037 ISSUER TO CEASE OFFERING AND TAKE CORRECTIVE ACTION**

(a) An issuer shall immediately cease the offer or sale of a security in the event of any material change in the security or offering or if the disclosure document becomes incomplete in any material respect or contains any statement which is, in the light of the circumstances under which it is made, false or misleading with respect to any material fact.

(b) The issuer shall not resume the sale or offer for sale until the issuer has:

- (1) prepared and provided amended disclosures to the Administrator and the investors; and
- (2) provided all investors with:
  - (A) the opportunity to cancel their investments if the minimum offering amount has not been reached; or
  - (B) rescission offers as may be required by G.S. 78A-56(g).

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

### **18 NCAC 06A .2038 INVESTOR CANCELLATION OF INVESTMENT COMMITMENT**

(a) If an investor notifies the issuer in writing, before the release of funds from escrow, an investor may:

- (1) Cancel the commitment to invest in an offering under the Exemption; and
- (2) Request that the investor's funds be returned to the investor.

(b) Within one business day of receipt of written notice from an investor pursuant to Paragraph (a) of this Rule, the issuer shall notify the bank or depository institution and the funding portal or broker-dealer, if applicable, in writing of the cancellation and the request for the return of funds.

(c) The bank or depository institution shall then be authorized to release the funds from the escrow and promptly return them to the investor. The funds shall be returned to the investor no later than 10 days from the bank's or depository institution's receipt from the issuer of the written notice and request.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2039 RELEASE OF FUNDS IN ESCROW ACCOUNT**

(a) A bank, depository institution or broker-dealer shall only release funds in the escrow account:

- (1) To the issuer if the minimum offering amount has been met by the date specified in the disclosure document; or
- (2) To an investor if:
  - (A) the minimum offering amount has not been met by the date specified in the disclosure document;
  - (B) upon request by an investor pursuant to Rule .2038 of this Section; or
  - (C) the issuer terminates the offering for any reason prior to the minimum offering amount being reached by the target date.

(b) A bank, depository institution or broker-dealer shall return investor funds in full and shall not reduce the funds returned by the amount of any fees, commissions or expenses.

(c) A bank, depository institution or broker-dealer shall provide notice to the Administrator of the release of funds in the escrow account in accordance with Rule .2041 of this Section.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2040 ISSUER NOTICE TO INVESTORS TARGET AMOUNT REACHED**

The issuer shall provide written notification to all investors and the Administrator of the date when the target minimum amount has been reached.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d); 78A-64; S.L. 2016-103, s. 4.(a).*

#### **18 NCAC 06A .2041 NOTICE TO ADMINISTRATOR OF FUNDS RELEASED FROM ESCROW**

(a) A bank, depository institution or broker-dealer shall provide written notice to the Administrator of the release of the funds in the escrow account within 30 days of the date of conclusion of the offering.

(b) The notice shall include:

- (1) The aggregate amount of securities sold during the offering, expressed as:
  - (A) Numbers of units of securities sold; and
  - (B) Dollars raised by the sale of securities;
- (2) The identity and residence of each investor; and
- (3) The date on which the funds were released to the issuer or returned to investors.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

**18 NCAC 06A .2042 RESERVED FOR FUTURE CODIFICATION**

**18 NCAC 06A .2043 PROCESS FOR AMENDING A DOCUMENT**

A filing may be amended by submitting to the Administrator a copy of the amended document with the amendments marked to show changes.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

**18 NCAC 06A .2044 RESERVED FOR FUTURE CODIFICATION**

**18 NCAC 06A .2045 RESERVED FOR FUTURE CODIFICATION**

**18 NCAC 06A .2046 ISSUER RECORDKEEPING REQUIREMENTS**

(a) Unless otherwise provided in this Section, an issuer relying on the Exemption shall retain copies of records related to the Exemption for a period of five years after the date on which the offering concludes.

(b) An issuer shall produce records to the Administrator upon request or demand.

(c) Failure to produce records pursuant to Paragraph (b) of this Rule may form the basis for an order denying or revoking the Exemption pursuant to G.S. 78A-18.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

**18 NCAC 06A .2047 FUNDING PORTAL RECORDKEEPING REQUIREMENTS**

(a) The funding portal shall make and preserve the following records for five years after an offering concludes:

- (1) All records related to an investor who purchases or attempts to purchase securities through the funding portal;
- (2) All records related to issuers who offer and sell or attempt to offer and sell securities through the funding portal and the control persons of such issuers;
- (3) Records of all communications that occur on or through its platform;
- (4) All records related to persons that use communication channels provided by a funding portal to promote an issuer's securities or communicate with potential investors;
- (5) All records to demonstrate compliance with the requirements set out in the Rules in this Section;
- (6) All notices provided by such funding portal to issuers and investors generally through the funding portal's platform or otherwise;
- (7) All written agreements (or copies thereof) entered into by such funding portal relating to its business as such;
- (8) All daily, monthly, and quarterly summaries of transactions effected through the funding portal; and



- (9) A log reflecting the progress of each issuer who offers or sells securities through the funding portal toward meeting the target offering amount.
- (b) The records required to be kept by the funding portal shall be kept in a location easily accessible in the State of North Carolina. The records are subject to inspection by representatives of the Administrator upon reasonable examinations from time to time, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors.
- (c) Failure to produce records upon request may subject the funding portal to administrative action pursuant to G.S. 78A-39.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*

**18 NCAC 06A .2048 PROTECTION OF INVESTORS AGAINST FRAUD AND OTHER MISCONDUCT**

An issuer relying on the Exemption shall not directly or indirectly engage in any activity that violates G.S. 78A-8 with regard to the issuer's offer or sale of securities.

*Authority G.S. 78A-17.1(a)(5); 78A-17.1(f); 78A-49(a); 78A-49(d);78A-64; S.L. 2016-103, s. 4.(a).*