ARIZONA CORPORATION COMMISSION

RAISING CAPITAL:
OVERVIEW OF REGISTRATION OF SECURITIES OFFERINGS IN ARIZONA AND EXEMPTIONS FROM REGISTRATION

August 2023

This document is an overview and is not intended to be a comprehensive analysis of securities offerings, registration, or exemptions from registration.

This document is not intended to be legal advice and is not a substitute for competent legal counsel. It does not address factors specific to companies issuing securities ("issuers"). Issuers should consult with professionals regarding the specifics of various alternative methods of raising capital, and the application of those methods to the specific facts and circumstances of the issuer.

The Securities Division of the Arizona Corporation Commission ("Division") is available to answer questions of a general nature regarding the registration process or exemptions from registration. The Division cannot, however, provide legal counsel.

The statutes and rules referenced herein may have changed since the publication of this document. Although every effort has been made to present the most accurate and current information possible, we cannot and do not warrant that the information in this overview is absolutely current and accurate. Inadvertent mistakes can occur. Issuers should not rely on the accuracy of this document but should carefully review all applicable statutes and regulations.

Explanations and citations in footnotes should be reviewed in connection with the main text.

For additional information about raising capital and a discussion of federal law, see "Q&A: Small Business and the SEC" on the Securities and Exchange Commission website at https://www.sec.gov/education/capitalraising

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I. Introduction.

This overview discusses in general terms several of the commonly used methods of issuing securities to raise capital in Arizona. Along with several factors outside the scope of this overview that influence the structure of a company's securities offering—such as company structure, the amount of capital required, the stage of development of the company, tax considerations, the necessity for liquidity, costs, and timing—the issuer must satisfy the requirements of federal and state law.

The Arizona Securities Act governs the sale or offer for sale of securities within or from

Arizona,[1] dictating registration and antifraud provisions. Securities sold or offered for sale within or from Arizona must be registered with the Division or be subject to an exemption from such registration.[2] Registration or an exemption therefrom must also occur on the federal level[3] and in any other state in which the issuer wants to offer the securities.

In several instances, registration or exemption at the federal level will satisfy Arizona registration requirements. For example, Arizona and federal private offering exemptions are identical and Arizona courts often use federal law to interpret the Arizona statute. Additionally, the Arizona Securities Act exempts "federal covered securities"[4] from registration requirements. Federal covered securities include offerings pursuant to Regulation D safe harbors,[5] and Regulation A Tier 2 offerings.[6] For preemption to occur, the issuer must fully satisfy the federal requirements; attempted satisfaction is insufficient.[7] For some of these offerings, such as Reg D 504 and 506, Arizona requires the filing of notice and the accompanying fee in Arizona.[8] Others, like the private offering exemption, are self-executing and require no notice or fee in Arizona. If the issuer does not meet a federal exemption that preempts Arizona registration, the issuer must satisfy an Arizona exemption or register the offering. Many state exemptions correspond with federal exemptions, but the requirements of state exemptions are not necessarily identical to those of federal exemptions.

If an issuer does not register the offering, failure to meet the requirements of an exemption results in an unregistered offering and the accompanying penalties and liabilities, including potential criminal liability.[9]

The question of whether the offerors and sellers of securities are required to be registered with the Division is distinct from the issue of registration or exemption of the securities themselves. A.R.S. § 44-1842 requires registration or exemption of any dealer or salesperson offering or selling securities within or from Arizona.[10] In several instances, dealers and salespersons must be registered with the Division even if the securities are exempt from registration.[11] For example, Commission Rule R14-4-104 lists several exemptions where if a dealer/salesperson is frequently engaged in certain exempt transactions, that dealer/salesperson will need to be registered. And under A.R.S. § 44-1843.02(D), federal covered securities transactions—including Reg D offerings—are subject to Section 44-1842's dealer/salesperson registration requirements unless another exemption is available under the Securities Act. Although

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[1] Offers for sale of securities placed on the Internet in compliance with A.A.C. R14-4-142 are exempt from the provisions of A.R.S §§ 44-1841, 44-1842, and 44-3321, except offers for sale from Arizona or involving securities that will be sold in Arizona.
[2] A.R.S. § 44-1841. Violation of either of this section is a class 4 felony.
[3] 15 U.S.C. § 77a, et seq.
[4] A.R.S. § 44-1801(13); 15 U.S.C. § 77r.
[5] 15 U.S.C. § 77r(b)(4)(F).
[6] 15 U.S.C. § 77r(b)(3).
[7] *See* Brown v. Earthboard Sports USA, Inc., 481 F.3d 901, 909-12 (6th Cir. 2007)
[8] 15 U.S.C. § 77r(c)(2).
[9] *See* Arizona Securities Act, Articles 14 and 16. See also A.R.S. §§ 13-601, et seq., regarding Arizona criminal penalties and liabilities. These are not exclusive remedies.
[10] The definitions of dealer and salesperson (the statute uses the term "salesman"; this overview replaces that with "salesperson") are found in § 44-1801; "dealer" is defined to include an issuer.
[11] A.R.S. § 44-1844 exempts specified transactions from securities and dealer/salesperson registration requirements; but as discussed in the next sentences of this paragraph, in several circumstances, including those described in R14-4-104 and A.R.S. § 44-1843.02(D), dealers/salespersons will still be subject to Section 44-1842's registration requirements unless another exemption is available to them under the Securities Act.

this overview focuses on the registration and exemption requirements for securities, it notes the impact that some securities exemptions might have on registration of dealers and salespersons when the relevant rule or statute includes an exemption for dealers and salespersons.

II. Securities and Exemptions from Registration.

"Security" is defined in A.R.S. § 44-1801(27).[12] Judicial interpretation and tests supplement the statutory definition. The definition includes several recognizable securities like stocks, bonds, and notes. It also includes "investment contracts," a more flexible instrument defined primarily by court decisions. These decisions have found that a wide variety of transactions are investment contracts including sales of tracts of land in orange groves,[13] limited liability company membership interests,[14] and limited partnership interests.[15] To determine whether an instrument falls within the statutory definition of security, including investment contracts, the Division considers the substance rather than the form of the instrument.[16] In general, if the purchaser will be a passive owner—relying primarily on someone else's efforts or conduct to make money on the investment—the instrument is probably a security that needs to be registered or exempt from registration to be offered and sold in Arizona.[17]

Exemptions from registration for transactions and securities are created by statute. This overview discusses several of the most-used exemptions for offerings by an *issuer* and includes discussion of several federal covered securities[18]; it does not discuss non-issuer exemptions.

A. Statutory Private Placement Exemption.

Section 4(a)(2) of the federal Securities Act of 1933 (the "1933 Act") provides an exemption from the registration provisions of section 5 of the 1933 Act for "transactions by an issuer not involving any public offering." Section 44-1844(A)(1) of the Arizona Securities Act provides an identical exemption and Arizona courts generally rely on federal case law to interpret the exemption. This exemption is referred to as a "statutory private offering exemption." The statutory private offering exemption has developed over the years through interpretations by the Securities and Exchange Commission (the "SEC") and court cases.[19]

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[12] "'Security' means any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, real property investment contract or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. A virtual coin shall not be construed more broadly than the term security is construed in the securities act of 1933, the securities exchange act of 1934 or any federal regulations relating to either act."

[13] S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946).

[14] Nutek Information Systems, Inc. v. Ariz. Corp. Com'n, 977 P.2d 826 (1998).

[15] S.E.C. v. Telecom Marketing, Inc., 888 F.Supp. 1160, 1166 (N.D.Ga.1995).

[16] Nutek Information Systems, Inc. v. Ariz. Corp. Com'n, 977 P.2d 826, 830, ¶17 (1998).

[17] A.R.S. § 44-1841.

[18] *See* Arizona Revised Statutes §§ 44-1843 and 44-1844. See also 15 U.S.C. 77r for "covered securities" as defined by that act that are exempted from state regulation regarding securities registration.

[19] Arizona looks to federal interpretations of securities law for guidance. Vairo v. Clayden, 153 Ariz. 13, 734 P.2d 110 (Ct. App. 1987).

The SEC and judicial interpretations[20] require that in order to satisfy the statutory private offering exemption, sales of securities can only be made without advertising or general solicitation to a limited number of "sophisticated persons"[21] with "access to the information that would be included in a registration statement."[22] An offer of securities to even one unsophisticated person can result in the loss of the exemption.[23] If an issuer intends to rely upon the statutory private placement exemption, the Division recommends that the issuer obtain legal counsel to understand and comply with the requirements of the exemption, as expressed in case law and SEC interpretations. The statutory private placement exemption is self-executing, i.e. has no filing requirement.

B. Federal Regulation D and Arizona Rule 126 Limited Offering Exemptions.

To introduce certainty into the area of private placements, the SEC adopted Reg D—SEC Rules 501 through 508—as a "safe harbor" for three types of private offerings: Rules 504, 506(b), and 506(c). (Arizona's equivalent of Reg D is Arizona Administrative Code ("A.A.C.") R14-4-126, sections A through H.[24]) If an issuer complies with the requirements of Reg D, the issuer will be deemed to have met the requirements for the section 4(a)(2) private placement exemption.

Offerings under Reg D are federal covered securities.[25] With respect to registration requirements, federal law preserves the Division's authority to impose notice filing and fees. Therefore, issuers relying on Reg D for an exemption from registration on the federal level need only file in Arizona a copy of Form D no later than 15 days after the first sale of securities in or from Arizona and the initial filing fee.[26] And, as discussed above, under A.R.S. § 44-1843.02(D), Reg D transactions are subject to Section 44-1842's dealer/salesperson registration requirements unless another exemption is available under the Securities Act.

Reg D's first three provisions provide definitions and requirements for all three Reg D offerings. Rule 501[27] defines or explains several terms and related matters under Reg D, including accredited investor, affiliate, aggregate offering price, business combinations, calculation of number of purchasers, executive officer, issuer, and purchaser representative. Rule 502[28] sets forth the requirements regarding the information that an issuer must provide a prospective purchaser under each of the exemptions. Rule 503[29] describes the notice filing requirement that is applicable to each of the exemptions.

An issuer could be disqualified from using Reg D if it or its affiliates or other persons

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[20] The Ninth Circuit Court of Appeals has adopted a four-part test to analyze the validity of an asserted private offering exemption, which focuses on the number and sophistication of offerees, the size and manner of the offering, and the relationship of the offerees to the issuer. See SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980).

[21] "Sophisticated" purchasers are purchasers who either alone or with their purchaser representatives have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment. 17 C.F.R. § 230.506(b)(2)(ii).

[22] The issuer should provide the offeree with an offering document that discloses the pertinent information, unless offeree occupies a privileged position relative to the issuer that affords the offeree actual access to the information.

[23] *See* Mark v. FSC Securities Corporation, 870 F.2d 331 (6th Cir. 1989).

[24] Arizona Rule 126 is substantially similar to Reg D, and compliance with Reg D for Rule 506(b) offering requirements generally will result in compliance with Rule 126(E) and (F) when proper filings are made in Arizona. Arizona does not have an equivalent rule for an offering under Rule 506(c).

[25] 15 U.S.C. 77r.

[26] A.R.S. § 44-1843.02(D); *see also* 15 U.S.C. 77r(c)(2) and A.R.S. § 44-1961.

[27] 17 C.F.R. § 230.501; Arizona's similar rule is A.A.C. R14-4-126(B).

[28] 17 C.F.R. § 230.502; Arizona's similar rule is A.A.C. R14-4-126(C).

[29] 17 C.F.R. § 230.503; Arizona's similar rule is A.A.C. R14-4-126(D), which also provides the filing fee amount.

associated with the offering were the subject of certain administrative, civil, or criminal actions (so called "bad actor" provisions).[30]

Except as provided in § 230.504(b)(1), Reg D securities are "restricted securities" and may not be resold without registration or an exemption from registration.[31]

1. **Rule 504 Private Placements**

Rule 504 provides an exemption from registration for limited offerings and sales not exceeding $10 million. Offerings by nonreporting companies (i.e., companies without a class of equity securities registered under the federal Securities Exchange Act of 1934 (the "1934 Act") and not subject to the reporting requirements of the 1934 Act) of not more than $10 million in a 12-month period are exempt from federal registration under Rule 504, provided that an appropriate federal filing is made. To use Rule 504, an issuer cannot be an investment company or a "blank check" company i.e., a company in the development stage[32] with no specific business plan or purpose or a plan to merge with an unidentified company or companies.

Rule 504 allows general solicitation and the securities sold are transferable without restriction under federal law if the offering is made in one of the two following methods:

a. The securities are sold exclusively in one or more states that provide for the registration of the securities and require the public filing and delivery to investors of a substantive disclosure document before the sale, or

b. The securities are sold exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to accredited investors.[33]

To attain allowance of general solicitation and transferability in Arizona, Rule 504 issuers can consider several Arizona exemptions and registrations. Sales of Rule 504 securities that comply with Rule 504(b)(i), (ii), or (iii), may rely on A.R.S. 44-1844(A)(21); issuers should note that this Arizona exemption requires waiver from the Division Director ("Director") for general advertising.[34] Issuers may also use the Arizona accredited investor exemption, or register in Arizona as a ULOR, or special offering. (See discussion of Rule 140, ULOR, and Special Registration offerings below.) Offerings under federal Rule 504 that do not comply with Rule 504(b)(1)(i), (ii), or (iii), may also consider registering or relying on Arizona Rule R14-4-101 for sales to existing securities holders or employees;[35] R14-4-102 for an exemption for restricted public offerings; or the Arizona equivalents

[30] 17 C.F.R. §§ 230.504(b)(30, 230.506(d), and 230.507.
[31] 17 C.F.R. § 230.502(d).
[32] "A company shall be considered to be in the development stage if it is devoting substantially all of its efforts to establishing a new business and either of the following conditions exists: (1) Planned principal operations have not commenced. (2) Planned principal operations have commenced, but there has been no significant revenue therefrom." Definition of Terms Used in Regulation S-X 17 C.F.R. § 210.1-02(h).
[33] 17 C.F.R. § 230.504(b).
[34] A.R.S. § 44-1801(21)(c).
[35] A.A.C. R14-4-101 adds to the class of transactions exempt from registration under A.R.S. § 44-1844 offerings of securities made exclusively to employees and/or existing securities holders of the issuer or its subsidiaries. Such offerings are limited to an aggregate of $500,000 over the lifetime of the issuer. No commissions or remuneration of any kind, other than transfer agents' fees may be paid by the issuer in connection with the distribution or sale of such securities. To use the Rule 101 exemption from registration, ten business days prior to making an offer an issuer must file:

of (former) Rule 505 or Rule 506, which are Rules 126(E) and 126(F), for an exemption from registration in Arizona.

Rule 505 has been repealed due to the changes of Rule 504. However, Rule 126(E), Arizona's Rule 505 equivalent, provides issuers with an exemption from registration for an offering not exceeding $5 million in a 12-month period to an unlimited number of "accredited investors"[36] plus 35 additional persons (the non-accredited persons must receive disclosures as specified in Rule 126).[37] An issuer could be disqualified from using the rule if it or its affiliates or certain other persons associated with the offering are subject to "bad actor" provisions.[38] Investment companies are precluded from relying upon Rule 126(E). Rule 126(E) prohibits the use of general solicitation or advertising. Securities sold under Rule 126(E) are "restricted securities" and may not be resold without registration or an exemption from registration. Such restrictions may be stated in a legend printed on the certificate that represents the security.[39]

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1. a notice filed in duplicate prepared in the format outlined in Rule 101,
2. a fee pursuant to A.R.S. § 44-1861(G),
3. financial statements consisting of a balance sheet as of a date within 90 days of the date of the petition and statements of operations, stockholders' equity and retained earnings, and changes in financial position for the preceding three years or such lesser period as the issuer has been in business, prepared in accordance with generally accepted accounting principles, and either audited by an independent public or certified independent public accountant or verified under oath by an officer, general partner, joint venturer, trustee, or sole proprietor, and,
4. if the issuer is not organized under the laws of or domiciled in Arizona, a consent to service of process.

[36] Federal Rule 501 and Arizona Rule 126(B)(1) set forth their respective definitions of accredited investor. Rule 501 includes thirteen categories of investors; Rule 126(B)(1) has eight categories of investors which are substantially similar to categories 1 – 8 in Rule 501, except that the Arizona provision for natural persons does not exclude the person's primary residence. The introductory language in both rules provides that any person who falls within one of the categories, or who the issuer reasonably believes falls within one of the categories, is an accredited investor "at the time of the sale of securities to that person," regardless of a later change in status of the person after the sale of securities. Categories 4 – 6 are some of the more-relevant categories of accredited investors in Rule 501 and 126(B)(1) and relate to individuals:

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds $1,000,000;

(i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):

(A) The person's primary residence shall not be included as an asset; [Note: the Arizona definition does not have this exclusion]

(B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(C) The person held securities of the same issuer, other than such right, on July 20, 2010.

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse or spousal equivalent in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

[37] *See* A.A.C. R14-4-126(E).

[38] A.A.C. R14-4-126(G) "bad actor" provisions apply to both 126(E) and 126(F) offerings.

[39] *See* 17 C.F.R. 230.144.

2. **Rule 506 Private Placements.**

Rule 506 provides for two classifications of offerings, one subject to limitations on the manner of the offering, and one not subject to limitations on the manner of the offering.

a. Rule 506(b) (Rule 126(F) Arizona equivalent) provides an exemption for offerings of any amount by any issuer to an unlimited number of accredited investors plus 35 "sophisticated" persons.[40] Rule 506(b) prohibits use of general solicitation or general advertising.

b. Rule 506(c) (no Arizona equivalent) provides an exemption for offerings of any amount and allows general solicitation or general advertising, provided sales are only made to accredited investors. An issuer is required to take reasonable steps to verify that purchasers of securities sold under 506(c) are accredited investors.

Reliance on a particular exemption in Reg D does not act as an exclusive election. An issuer may always claim the availability of any other applicable exemption. Reg D is available only to an issuer and not to its affiliates or others for resale. Thus, Reg D is not available for firm underwritings (as opposed to best-effort offerings)[41] because securities are resold in a firm underwriting of securities. Even though there may be technical compliance with the Reg D, if an offering is part of a plan or scheme to evade the registration requirements, the Reg D exemption is not available.

If an issuer sells securities to accredited investors, no specific disclosure to the investors by the issuer is mandated. If securities are sold under Rule 506(b) to nonaccredited investors, the type of information to be furnished depends on the size of the offering and whether the issuer is subject to the reporting requirements of the 1934 Act.

To take advantage of the exemption from registration offered by the Arizona Securities Act Rule 126, an issuer must file one copy of Form D[42] no later than 15 days after the first sale of securities in or from Arizona and an amended Form D no later than 30 days after the termination of an offering under this rule. If the offering is completed within 15 days after the first sale, then only one notice need be filed.[43] Again, if the transaction is exempt from federal registration under Rule 506, no Arizona exemption is required, only the notice filing under A.R.S. § 44-1843.02(C) and fee.

The issuer shall pay the fees prescribed by A.R.S. § 44-1861(E), currently $250 with the first filing and $100 with the final filing, if the final filing is made separately from the first filing. The issuer should indicate at the top of the Form D filed in Arizona the exemption upon which it is relying. Reg D requires that Form D be filed with the SEC electronically via the SEC's EDGAR system no later than 15 days after the first sale of securities.[44]

As discussed above, under A.R.S. § 44-1843.02(D), Reg D transactions are subject to Section 44-1842's dealer/salesperson registration requirements unless another exemption is

[40] *See* A.A.C. R14-4-126(F).
[41] "Firm underwriting" - an underwriter purchases all the securities offered by the issuer to the public and resells the securities to the public. "Best-efforts" - either the issuer or its agents do their best to sell the offered securities to the public.
[42] Form D filings can be submitted by mail or through the Division's online portal here: https://efiling.azcc.gov/. Manual or facsimile signatures accepted. A.A.C. R14-4-126(D)(3).
[43] A.A.C. R14-4-126(D).
[44] 17 C.F.R. §§ 230.503, 239.500.

available under the Securities Act.

A dealer or salesperson (as defined in A.R.S. § 44-1801) engaged in an offering under Rule 126 must be registered in Arizona if the dealer or salesperson is engaged principally and primarily in the business of making a series of private offerings.[45] "Series" means in excess of four private offerings in any consecutive 12-month period made anywhere in the United States, not just in Arizona.

C. Regulation A Tier 2 Offerings ("Reg A+")

Regulation A Tier 2 was created as part of the JOBS Act of 2015, which added section 77c(b)(2) of the 1933 Federal Securities Act – Federal Regulation A. Pursuant to that statute, the SEC produced rules creating a second tier to Regulation A.[46] The SEC's rules were adopted in June 2015. The statute and rules for the Reg A Tier 2 offering initially allowed sales up to $50 million. In December 2020, the SEC amended the rules to allow sales up to $75 million annually. To qualify for a Tier 2 offering, the issuer must be organized under U.S., State, or Canadian law and have its place of business in the U.S., Canada, or a U.S. territory. The issuer cannot be an investment company, a development stage company, or subject to "bad actor" restrictions.[47] The issuer must make specified filings with the SEC and provide certain documents to offerees/investors.[48] If the Tier 2 offering is not listed on a registered exchange upon qualification, the issuer can only sell to "qualified purchasers" as defined in Reg A: accredited investors (as defined in Rule 501) or a person whose purchase price is limited to 10% of that investor's net worth or annual income.[49]

Reg A Tier 2 offerings to qualified purchasers are covered securities and thus preempt state registration and qualification requirements. **Currently, Arizona, along with a handful of other states, does not require notice filing or a fee for covered Reg A Tier 2 offerings.** Thus, an offering that fully complies with the requirements of Reg A Tier 2 is self-executing in Arizona. An issuer should check the notice and fee requirements of every other state where they are offering securities under Reg A Tier 2.

Transactions by the issuer, its parent or subsidiary companies, and their respective directors, managers, general partners, officers, and employees acting as such to offer or sale the issuer's securities pursuant to Reg A Tier 2 offering need not be registered as dealers/salespersons with the Division.[50]

D. Federal Rule 147 and Rule 147A Intrastate Offerings.

Section 3(a)(11) of the 1933 Act provides an exemption from the federal registration requirements for any offer or sale of securities to residents of a single state by an issuer who resides in or is incorporated in the same state and carries out a significant amount of its business in that state. The intrastate exemption is self-executing, i.e. no federal filing requirement exists to claim the exemption. It does not, however, exempt an offering from registration in Arizona or qualify for an Arizona exemption. The issuer must satisfy state registration or exemption requirements. The federal intrastate exemption can also be used in connection with a registered offering in Arizona. See *infra*

[45] A.A.C. R14-4-104(4).
[46] 17 C.F.R. 230.251 – 230.263.
[47] 17 C.F.R. 230.251(b).
[48] 17 C.F.R. 230.251(d).
[49] 15 U.S.C. § 77r(b)(4)(D); 17 C.F.R. 230.251(d)(2)(C).
[50] *See* A.R.S. § 44-1844(A)(23).

Section III for a discussion of Registration by Qualification and Special Registration in Arizona.

To provide some certainty for those who wished to rely on the statutory intrastate exemption, the SEC adopted the "safe harbor" of Rule 147. To qualify under Rule 147, the issuer must at the time of any offers and sales, be a person residing and doing business within the state. Under the rule, an issuer will be deemed to be doing business within a state if the issuer derives at least 80 percent of its gross revenues from doing business within the state, has 80 percent of its assets within the state, uses at least 80 percent of the net proceeds of the offering within the state, or has a majority of the issuer's employees based in the state.[51] To rely on Rule 147 the issuer must be either incorporated in the state and have its principal place of business in the state, or if an individual, have a principal residence in the state.[52] Rule 147 also requires that the offerees and purchasers be residents of the state of the offering.[53] No resales may be made outside the state for a period of at least six months after the date of the sale.[54]

Rule 147A is a relatively new intrastate offering exemption adopted by the SEC in October 2016. It is substantially similar to Rule 147 except that Rule 147A allows offers to be accessible to out-of-state residents (sales can only be to in-state residents) and under Rule 147A, a company can be incorporated or organized out of state, as long as its principal place of business is in-state and it satisfies at least one of the "doing business" requirements that demonstrates the in-state nature of the company's business.[55]

E. A.R.S. § 44-1844(A)(22) Exemption for Intrastate Crowdfunding Offerings

A.R.S. § 44-1844(A)(22) provides a statutory exemption from registration for small offerings that raise capital from a large pool of investors contributing limited amounts of money in exchange for equity in an enterprise. Commonly referred to as "crowdfunding," this form of capital formation can be used pursuant to A.R.S. § 44-1844(A)(22). Following is a partial list of the exemption requirements.

1. The issuer of the security is authorized to do business in Arizona.

2. The transaction meets the requirements of the federal exemption for intrastate offerings pursuant to Section 77c(a)(11) of the Securities Act of 1933, Federal Rule 147, or Federal Rule 147A (described above).

3. The issuer obtains from each prospective purchaser evidence that they are a resident of this state and, if applicable, are an accredited investor.

4. The issuer informs all purchasers that the securities have not been registered and that the securities are subject to limitations for resales contained in Rule 147 or Rule 147A.

5. Before an offer is made, the issuer provides the Division with a notice filing that contains the information specified in A.R.S. § 44-1844(A)(22)(e) and pays the filing fee. The notice filing form is available at http://www.azcc.gov/securities/forms.

[51] 17 C.F.R. 230.147(c)(2).
[52] 17 C.F.R. 230.147(c)(1).
[53] 17 C.F.R. 230.147(d).
[54] 17 C.F.R. 230.147(e).
[55] 17 C.F.R. 230.147A.

6. The issuer updates the Division of any changes to the information contained in the notice filing within 30 days.

7. All monies received from investors are deposited into a bank or depository institution authorized to do business in Arizona, and all such monies are used in accordance with representations made to investors.

8. The sum of all cash and other consideration to be received as a result of an offering under this exemption does not exceed $5,000,000 in a twelve-month period.

9. The issuer and any persons affiliated with the issuer or offering are not subject to disqualification pursuant to this chapter, a rule or order of the director, 15 U.S.C. § 77(c)(a)(11), or 17 C.F.R. § 230.262.

10. The issuer does not accept more than $10,000 from any single purchaser unless the purchaser is an accredited investor.[56]

F. Arizona Rule 139 Qualified Purchaser Public Offering Exemption.

Rule 139 is designed to assist small businesses in capital formation in a manner that does not impose unnecessary expenses. Securities sold in reliance on Rule 139 are restricted securities.[57]

Rule 139 allows issuers to offer and sell, without registration of the offering in Arizona, up to $5 million of securities during any 12-month period to qualified persons, as defined in Rule 139 (which differs from the definition of "qualified persons" in federal rules for Reg A Tier 2 offerings), provided certain conditions are met. In addition, issuers may sell their own securities without registering as a dealer under the Arizona Securities Act. Officers, directors, and employees of the issuer not retained for the primary purpose of making offers of securities may sell the issuer's securities in a Rule 139 offering without registration as salespersons. Of course, issuers can use a registered dealer to sell their securities if they so desire. For an issuer to take advantage of Rule 139, the sale of securities may not exceed $5 million in any 12-month period.[58] In addition, the offers of securities must specify that sales will be made only to qualified purchasers, and sales of securities must be made to qualified persons or to persons who the issuer reasonably believes to be qualified purchasers.[59] At least five days before a sale, the issuer must provide disclosure to the prospective purchaser as described in A.A.C. R14-4-126(C)(2).[60]

Certain issuers are ineligible to use Rule 139. Under the rule, the issuer cannot be offering a blind pool or securities in a business planning to engage in a merger or acquisition of an unidentified entity.[61] Additionally, the issuer, or any of its predecessors, affiliates, directors, officers, general partners, or beneficial owners of 10 percent or more of any class of its equity securities, or any underwriter of the securities, cannot fall within the disqualification provisions of Rule 139, which relate to prior securities violations.

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[56] A.R.S. § 44-1844(A)(21)(a) - (j).
[57] See the discussion regarding restricted securities in Section II.B of this paper.
[58] A.A.C. R14-4-139(G).
[59] A.A.C. R14-4-139(M).
[60] A.A.C. R14-4-139(L).
[61] A.A.C. R14-4-139(C).

The issuer must file a notice, consent to service of process, and fee at least ten business days in advance of either the initial offering of securities or the publication of a general announcement of the offering, whichever occurs first.[62] The offering documents or subscription agreement must contain a legend warning that the securities may only be sold to qualified purchasers. The certificate representing the security issued in accordance with the rule must have a similar legend.[63]

The Director may revoke the availability of Rule 139 with respect to a particular issuer, seller, or transaction if the Director determines that there is a reasonable likelihood that the sale of the securities would work or tend to work a fraud or deceit upon the purchasers thereof. If the Director makes such a determination, the seller of the securities may request a hearing in accordance with the provisions of article 11 of the Arizona Securities Act.[64]

G. Arizona Rule 140 Accredited Investor Public Offering Exemption.

A.A.C. R14-4-140 ("Rule 140") is also designed to assist small businesses in capital formation in a manner that does not impose unnecessary expenses. Rule 140 allows issuers to seek capital from accredited investors without registration of the transaction and in a more cost-effective manner than that of an offering of securities registered under federal securities laws or the Arizona Securities Act. At the same time, since initial offers and sales of securities are limited to accredited investors, the risk of substantial harm to the general investing public is limited.

Rule 140 allows issuers who rely on and comply with federal Rule 504 to offer and sell without registration of the offering in Arizona securities to accredited investors, as defined in Rule 126, provided certain conditions are met. In addition, issuers may sell their own securities without registering as a dealer under the Arizona Securities Act. Officers, directors, and employees of the issuer not retained for the primary purpose of making offers of securities may sell the issuer's securities in a Rule 140 offering without registration as salespersons. Of course, issuers can use a registered dealer to sell their securities if they so desire.

For an issuer to take advantage of Rule 140, the issuer must comply with federal Rule 504, including Rule 504(b)(iii). In addition, the offers of securities must specify that sales will be made only to accredited investors, and sales of securities must be made exclusively to accredited investors.[65] There is no "reasonable belief" defense for a failure to limit sales to accredited investors. Since initial sales of securities can only be made to accredited investors, no specific information is required to be furnished by the issuer to investors. A legend is required on any offering documents or subscription documents.[66] Rule 140 is limited to $1 million, as it references Rule 504 (1999) and specifically states, "[t]he incorporated material contains no later editions or amendments."

Certain issuers are ineligible to use Rule 140. Under federal Rule 504, the issuer may not be a development stage company[67] with no business plan or with a plan to engage in a merger or acquisition of an unidentified entity, may not be subject to the reporting requirements of section 13

[62] A.A.C. R14-4-139(N).
[63] A.A.C. R14-4-139(M).
[64] A.A.C. R14-4-139(P).
[65] A.A.C. R14-4-140(D).
[66] A.A.C. R14-4-140(J).
[67] *See* supra note 32.

or 15(d) of the Securities Exchange Act of 1934, and may not be an investment company under the Investment Company Act of 1940. Additionally, under Rule 140, the issuer may not be offering a blind pool[68] and the issuer, or any of its predecessors, affiliates, directors, officers, general partners, or beneficial owners of 10 percent or more of any class of its equity securities, or any underwriter of the securities, cannot fall within the disqualification provisions, which relate to prior securities violations.[69]

Issuers must file a copy of Form D within 15 calendar days after the first sale within or from Arizona, a consent to service of process, a copy of the general announcement of the offering, and the fee in A.R.S. § 44-1861(G).[70]

The issuer must reasonably believe that each purchaser is buying the securities for investment purposes and not to resell. Resales of securities issued in accordance with this rule are limited to accredited investors for 12 months or until the issuer registers the securities or qualifies for another exemption.[71]

H. Listed Securities Exemption.

Federal law makes securities that are listed on designated exchanges "federal covered securities," preempting state registration, notice filing, and fee requirements.[72] The covered securities under this exemption are securities listed or authorized for listing, or securities of the same issuer that are equal or senior in seniority of those listed, on the New York Stock Exchange, the NYSE American LLC, the National Market System of the Nasdaq Stock Market, Tier I of the NYSE Arca, Inc., Tier I of the Nasdaq PHLX LLC, the Chicago Board Options Exchange Inc., Options listed on Nasdaq ISE, LLC, the Nasdaq Capital Market, Tier I and Tier II of Bats BZX Exchange, and Investors Exchange, LLC.

Arizona has a similar exemption for certain listed securities. A.R.S. § 44-1843(A)(7), as supplemented by A.A.C. R14-4-115, provides that securities listed or approved for listing on the New York Stock Exchange, the American Stock Exchange, the Chicago Stock Exchange, the Pacific Exchange, the Philadelphia Stock Exchange, or the Chicago Board Options Exchange, or approved for quotation on the Nasdaq National Market System, and all securities senior or equal in rank and any warrant or right to purchase or subscribe to any of the foregoing, are exempt from registration in Arizona.

Dealers or salespersons who engage in transactions involving securities exempt from registration pursuant to A.R.S. § 44-1843(A)(7) must be registered in Arizona unless the offer or sale is directed to securities holders or employees of the issuer or the dealer or the salesperson is acting without compensation other than a standby charge relating to any balance of the offering remaining unsubscribed by existing securities holders or employees of the issuer, or through another available exemption.[73]

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[68] A.A.C. R14-4-140(C).
[69] A.A.C. R14-4-140(M).
[70] A.A.C. R14-4-140(L).
[71] A.A.C. R14-4-140(E).
[72] 15 U.S.C. 77r(c)(2)(D); 17 C.F.R. § 230.146.
[73] A.A.C. R14-4-104(2).

I. Arizona Rule 141 Solicitation of Interest Exemption.

Rule 141 provides an exemption from registration of offers by an issuer, or a registered dealer on behalf of the issuer, made solely to solicit an indication of interest in the issuer's securities. To use the exemption, the issuer must be, or will be, organized under the laws of a state of the United States or Mexico or a province or territory of Canada and must not be conducting a blind pool offering.[74] To use Rule 141, the issuer, its predecessors, affiliates, directors, officers, general partners, or beneficial owners of 10 percent or more of any class of equity securities must not be in violation of the "bad actor" provisions contained in subsection (D) of Rule 141.

Ten business days before its initial solicitation under Rule 141, the issuer must file with the Division a Solicitation of Interest Form[75] along with any other items to be used in the solicitation of interest. Any amendments to these items, or any additional items, must be filed with the Division five business days before they are used.[76] The filing fee is $100, under A.R.S. § 44-1861(G).[77]

The issuer must give a copy of the Solicitation of Interest Form to an offeree within five business days of a communication with the offeree, unless the communication is made by scripted broadcasts or published notices or advertisements.[78] All communications made under Rule 141 are subject to the antifraud provisions of the Arizona Securities Act.[79] While soliciting interest, an issuer may not solicit or accept money or a commitment to purchase securities.[80] All solicitations under Rule 141 must stop after a registration statement is filed in Arizona.[81] An issuer may not make a private offering in reliance on an exemption from registration under A.R.S § 44-1844(A)(1) or Rule 126 until six months after the last Rule 141 communication with a prospective investor.[82]

III. Registration.

If an issuer cannot or elects not to meet the requirements to qualify for an exemption from registration for its offering of securities and is not making offers solely to solicit interest under the provisions of Rule 141, the issuer must register the offering prior to making any sales or offers for sale in Arizona. Some types of offerings may be exempt from federal registration, but still require registration in Arizona and other states in which offers or sales will be made. For instance, Rule 147 or 147A (discussed above) provide an exemption from federal registration for intrastate offerings and Regulation A Tier 1 provides an exemption for offerings up to $20 million.[83] Absent any other exemption, these types of offerings must be registered in Arizona.

The Arizona Securities Act provides for two primary methods of registration—qualification and description. The Arizona Securities Act does not provide for registration by coordination with SEC registration. Certain securities may be registered by qualification pursuant to modified

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[74] A.A.C. R14-4-141(B)(1). "Blind pool offering" is defined in A.R.S. § 44-1801(1).
[75] *See* A.A.C. R14-4-141(J) for the format of and information that must be contained in a Solicitation of Interest Form.
[76] A.A.C. R14-4-141(B)(3) and (4).
[77] A.A.C. R14-4-141(B)(3).
[78] A.A.C. R14-4-141(C).
[79] A.A.C. R14-4-141(H).
[80] A.A.C. R14-4-141(B)(6).
[81] A.A.C. R14-4-141(B)(8).
[82] A.A.C. R14-4-141(G).
[83] Under Reg A, offerings up to $20 million conducted under Tier 1 may be subject to state securities registration requirements. As discussed above, state securities registration requirements are preempted for offerings up to $75 million to qualified purchasers conducted under Tier 2.

requirements—those that qualify to be registered by definition, those that qualify to be registered by the Uniform Limited Offering Registration, those that qualify to be registered through Special Registration, and those that qualify to be registered by Coordinated Equity Review.

A. Regulation A Tier 1 Offerings.

Federal Regulation A Tier 1 allows sales up to $20 million annually of securities in a manner like that of a registered offering. State securities registration requirements are not preempted for Tier 1 offerings. Tier 1 offerings must either register or find an exemption from registration. Reg A Tier 1 includes several conditions regarding issuer eligibility, offering circular contents, "testing the waters" guidelines, and "bad actor" disqualifications.

In Arizona, a Regulation A Tier 1 offering is made under the statute providing for registration by qualification. Thus, audited financial statements are required. Special Registration may be available. See discussion below. "Testing the waters," or solicitations of interest, may be made in Arizona pursuant to the provisions of Rule 141, discussed above.

B. Registration by Qualification.

Applications for registration of securities offerings by qualification[84] are reviewed by two general methods.

The SEC and some states review registration documents for disclosure issues only (disclosure review). Disclosure review means that the documents are reviewed to ensure that the issuer clearly and adequately discloses all material information. Some states, including Arizona, also give registration documents a merit review. Merit review requires that the offering not be "unfair or inequitable"[85] and requires, among other things, compliance with the statute and rules listed below. Offerings that place the expense and risk of establishing a company on the general public without commensurate investment and risk on the part of the promoters likely are "unfair and inequitable" to the investing public and may have difficulty complying with the rules listed below.

Issuers should review each of the following requirements (as well as the Arizona Securities Act in its entirety), paying particular heed to § 44-1894(A)(7), A.A.C. R14-4-105, R14-4-106, and R14-4-107. If an issuer has a unique circumstance or mitigating facts that prevent full compliance with a statute or rule, the issuer should discuss its situation with the Division so that the statutes and rules may be imposed as appropriate to those facts and circumstances.

1. Section 44-1894(A)(7) (use of proceeds). This statute requires that the issuer explain in the offering document the specific uses to which the offering proceeds will be applied and the approximate amount to be devoted to each use. Generally, no more than 10 to 15 percent of the net offering proceeds should be allocated to working capital or general corporate purposes. Additionally, no more than 5 percent of the offering proceeds should be allocated for payment to a promoter or affiliate for any purpose. If the issuer wishes to reserve the right to reallocate the offering proceeds, it should explain the circumstances under which it would reallocate the proceeds and the categories among which the proceeds may be reallocated. If the issuer is allocating a portion of the proceeds to use for the acquisition of additional unidentified businesses, it should explain the explicit criteria it will review in selecting an acquisition target.

[84] A.R.S. §§ 44-1891 through 44-1898.
[85] *See* A.R.S. § 44-1921 providing for denial of registration.

In the event an issuer is in a unique position that prevents full compliance with the statute, the issuer should explain to the Division the issuer's position, why the position is unique, and why the issuer cannot fully comply with the statute.

2. R14-4-103 (advertising and sales literature). Any advertising, communication, prospectus, or sales literature must meet the several requirements of this rule. Additionally, such literature must be filed with the Division at least three days prior to its proposed use.

3. R14-4-105 (promotional securities). This rule applies to corporations that have no or thin public markets for their shares and have no significant earnings. Securities held by promoters of these corporations in excess of 15 percent of the total securities to be outstanding at the completion of the proposed offering that have been issued for less than the following consideration must be subject to a restrictive sales agreement for a period of up to three years: if issued within one year prior to the public offering, 85 percent of the proposed public offering price; if issued within two years but not less than one year prior, 75 percent; if issued within three years but not less than two years prior, 65 percent.

4. R14-4-106 (options, warrants, and rights to purchase). Rule 106 requires the justification of all grants of options, warrants, and rights to purchase. "Grants" include all the securities that the company has authorized for issuance to officers, directors, and other employees, whether issued or vested at the time of the offering. The grant of these securities that qualify as incentive securities in accordance with section 422A of the Internal Revenue Code of 1986 is considered justified. All nonqualified securities must conform to the requirements of Rule 106(B)(1) through (5) to be deemed justified.

5. R14-4-107 (promoter's equity). The organizers and promoters of a company must have paid or contributed capital to the corporation in cash or other tangibles an amount equal to the following percentages of the total proposed public offering: 10 percent of the first $200,000, 5 percent of the second $200,000, and 1 percent of the balance. For example, the organizers and promoters must have contributed capital to the corporation in cash or other tangibles in the total amount of $76,000 in order to raise $5 million from the public.

6. R14-4-108 (sales commission and expenses). Generally, the issuer is deemed to have complied with sales commission and expenses requirements if an offering meets the requirements of the Financial Industry Regulatory Authority ("FINRA") with respect to the payment of sales commissions and expenses.

7. R14-4-110 (installment sales). Marginal sales of securities are permitted on an installment basis with approximately 50 percent paid at the time of subscription and the balance payable within ten months.

8. R14-4-111 (commissions to officers and directors). An issuer selling its own securities may not pay a commission or sales fee to its officers, directors, or promoters for the sale of such securities unless they receive no other salary or remuneration from the issuer and do not sell securities in more than one issue at the same time.

9. R14-4-112 (impoundment of funds). Funds held as a condition to registration shall be deposited with an entity prescribed in Rule 112.

10. R14-4-113 (impound dates). Ordinarily, an issuer may only attempt for a maximum of one year to raise the minimum funds necessary to finance its proposed enterprise.

11. R14-4-116 (statements of policy). Securities or transactions that fall within the enumerated North American Securities Administrators Association ("NASAA") statements of policy must meet the requirements contained in those statements.

12. R14-4-117 (requirements for debt). An issuer offering debt instruments must demonstrate its ability to service its debt obligations as they become due. Such demonstration mustinclude components outlined in Rule 117.

13. R14-4-118 (statement required in prospectuses). Rule 118 requires a cover legend essentially stating that the Division has not approved the offered securities. Additionally, Rule 118 requires a cover legend in six specified instances that states that the securities are speculative.

14. R14-4-119 (requirements for preferred stock). The Commission may deny registration of preferred stock if the issuer's previous adjusted net earnings would not have been sufficient to pay the issuer's fixed charges and the dividends and any redemption requirements, if applicable, ofthe preferred stock being offered.

15. R14-4-120 (financial statements). Rule 120 prescribes the requirements for audited financial statements. Additionally, the rule requires that an issuer file a consent from any accountant or other professional expert who has prepared or audited any report or opinion for use inconnection with the application for registration or an exemption from registration.

In addition to the foregoing requirements, the application for registration, prospectus, financial statements, and any exhibit or amendment thereto must be complete, accurate, and sufficient for a true appraisal of the securities.[86]

The Corporation Commission may, after a hearing or notice and opportunity for hearing as provided by article 11 of the Arizona Securities Act, enter an order denying registration of an offering on any of the following grounds:[87]

1. The application for registration or documents filed therewith are incomplete, inaccurate, or misleading, or the information contained therein is insufficient for a true appraisal of the securities.

2. The issuer or any dealer or salesperson designated to engage in the sale of the securities has violated any provision of the Arizona Securities Act.

3. The sale of the securities works or would tend to work a fraud or deceit upon the purchasers or is or would be unfair or inequitable to the purchasers.

4. The issuer is insolvent or is in an unsound financial condition.

5. The issuer has refused to permit the Corporation Commission to examine its affairs or to furnish information required by the Arizona Securities Act or any rule or order of the Corporation

[86] A.R.S. § 44-1921(1).
[87] A.R.S. § 44-1921.

Commission.

6. The issuer or any officer, director, trustee, partner, or other fiduciary or controlling person of the issuer or person controlled by or in common control with the issuer has been convicted within the last five years of a felony or misdemeanor involving a transaction in securities or of which fraud is an essential element or is subject to an order, judgment, or decree entered within the past three years enjoining or restraining the person from engaging in or continuing any conduct or practice in connection with the sale or purchase of securities.[88]

Registration by qualification requires the filing of the following documents and a nonrefundable filing fee:[89]

1. Form U-1 – Uniform Application for Registration of Securities[90] with attachments that include the issuer's organizational documents; the underwriting agreement, if any; the indenture, if any; opinion of counsel as to the validity of issuance of the securities and consent;[91] and a specimen certificate of the security to be registered.

2. If the issuer is not domiciled in and organized under the laws of Arizona, Form U-2 - Uniform Consent to Service of Process;[92]

3. Form U-2A – Uniform Corporate Resolution;[93] and

4. Prospectus containing the information set forth in A.R.S. § 44-1894.[94]

If the securities are being registered under the 1933 Act, the Director may allow an issuer to file the same prospectus with the Division as that filed with the SEC.[95] Generally, an issuer will file with the Division the registration statement that has been filed with the SEC.[96]

After the appropriate documents and fee have been filed with the Division, the file is assigned to an examiner for review.[97] The examiner may issue a comment letter to the issuer asking for additional information or explanation regarding the offering. The issuer needs to reply to the comment letter. The most common impediment to expeditious registration of an offering is an issuer's failure to provide a prompt and adequate response to the comment letter. The Division encourages issuers to discuss a comment letter with the reviewing examiner. Every offering registered in Arizona must be sold by a dealer registered in Arizona. This requirement may be satisfied by one of two means. An offering may be sold by a dealer registered with FINRA and Arizona. If this method of distribution is to be utilized, the offering document must be filed with FINRA for review. The filing should be made simultaneously with the filing of the registration

[88] The "bad actor" provision applicable to offerings applying for registration by qualification.
[89] A.R.S. § 44-1892(3). The registration fee is one-tenth of 1 percent of the aggregate offering price of the securities to be sold in Arizona, but the fee shall not be less than $200 nor more than $2,000.
[90] A.R.S. § 44-1892(1). *See also* A.R.S. § 44-1893.
[91] A.R.S. § 44-1893(B). *See also* A.A.C. R14-4-120(D), which requires the filing of a consent from the professional that the opinion or report may be used in connection with the filing.
[92] A.R.S. § 44-1892(4). *See also* A.R.S. § 44-1862.
[93] A.R.S. § 44-1893(D).
[94] *See* A.R.S. §§ 44-1894(A)(9) and (10), 44-1895, and A.A.C. R14-4-120 regarding financial statements.
[95] A.R.S. § 44-1896.
[96] The Director shall determine that the nature and scope of the information disclosed is substantially equivalent in informative value to that prescribed under § 44-1894. A.R.S. § 44-1896(B).
[97] A.R.S. § 44-1898.

statement with the SEC or, in the event no filing is made with the SEC, with the filing of the application for registration in Arizona.

Alternatively, the issuing company may register with the Division as a dealer in its own issue.[98] Under this type of registration, the issuer becomes the dealer for the purpose of selling this one particular offering. The individuals selling the securities are either company employees or individuals hired by the company to sell the securities. The Division charges a fee[99] for issuer-dealer registration and the individuals selling the securities may be subject to registration and testing requirements. For additional information on issuer-dealer registration, please contact the Division and request an issuer-dealer registration information package or review the information on the Division's website.

C. Registration by Definition.

An issuer that meets specific criteria, as set forth in A.R.S. § 44-1901, may take advantage of the "fast-track" registration by qualification process. Registration under § 44-1901 becomes effective the latter of:

1. Twenty business days after filing the documents, except that if an application is filed with the Division more than ten days after the initial registration statement is filed with the SEC, this period is extended by the number of days between ten days after the filing of the initial registration statement with the SEC and the filing of an application with the Division;

2. In the case of an offering of limited partnership interests, ten business days after filing any amendment containing such material changes to the registration statement that recirculation of the prospectus would be required if a preliminary prospectus was circulated;

3. Concurrently with effectiveness of the registration statement under the 1933 Act; or

4. A later date as the issuer requests.[100]

To qualify to use the fast-track registration procedure, the offering must be a firm-commitment underwriting by a dealer that is a member of FINRA, registered in Arizona, and not an affiliate of the issuer; if the offering is of shares, or units consisting of shares and rights to purchase, the initial offering price of the shares must not be less than $5 and the exercise or conversion price for any rights to purchase shares not less than $5; the total amount of securities offered and sold must not be less than $3 million; the issuer must provide certain undertakings required by statute; and the issuer's most recent audit report cannot express reservations about its ability to continue as a going concern or show both negative shareholders' equity and negative working capital.[101] Fast-track registration is not available if the issuer or any of its predecessors, affiliates, directors, officers, general partners, or beneficial owners of 10 percent or more of any of its equity securities, or the managing underwriter of the securities has violated the "bad actor" provisions found in § 44- 1901(G).

If qualified to register under § 44-1901, an issuer files with the Division the same documents

[98] *See* A.R.S. § 44-1801(9)(b).
[99] A.R.S. § 44-1861(B).
[100] A.R.S. § 44-1901(K).
[101] A.R.S. § 44-1901(B). *See also* § 44-1901(D); the Division may prescribe greater income and net worth requirements.

and nonrefundable filing fee as required for general qualification registration, one copy of the prospectus on file with the SEC in its most recent form, one copy of all amendments or supplements to the prospectus, and a final prospectus.[102] The front cover or a sticker attached to the front cover or the inside front cover of the prospectus must contain the legend prescribed in § 44-1901(F).

Dealer and salesperson registration requirements are the same as for general qualification registration.

D. Uniform Limited Offering Registration ("ULOR") Offerings.

Recognizing the need for a less expensive registration avenue for small offerings, § 44-1902 of the Arizona Securities Act provides that offerings not exceeding $5 million[103] in any 12-month period may be registered under the Arizona Securities Act's uniform limited offering registration pursuant to a modified registration by qualification process.[104] Arizona participates with ten other states to provide issuers with a coordinated review process for ULOR offerings for concurrent registration in two or more of the participating states.[105] Issuers engaging in these types of offerings generally rely upon Reg D Rule 504, on the federal level. To register securities under § 44-1902, an issuer must satisfy the following criteria:

1. The offering may not be a blind pool offering. A blind pool offering is defined under A.R.S. § 44-1801(1) as an offering in which either the offering materials do not describe specific operational plans, or 80 percent or more of the net offering proceeds are not specifically allocated for the purchase, construction, or development of identified property or products, for the payment of indebtedness or overhead expenses, or for other activities set forth in the issuer's business plan.

2. The issuer must not be an investment company subject to the Investment Company Act of 1940.

3. The issuer must not be subject to the reporting requirements of section 13 or 15(d) of the 1934 Act.

4. The issuer of debt offerings must demonstrate ability to service the debt on the basis of historical financial information. The ability to meet the requirements of federal Regulation S-K, Item 503(d) will be deemed to be a sufficient demonstration of ability to service debt. The Division will require an issuer of preferred stock to make the same demonstration regarding the ability to pay the

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[102] A.R.S. § 44-1901(E).

[103] The aggregate offering price for an offering of securities under Rule 504 is limited to $10 million less the aggregate offering price for all securities sold within a 12-month period in reliance on any federal exemption adopted pursuant to section 3(b) or in violation of section 5(a) of the Securities Act of 1933.

[104] A.R.S. § 44-1902 and A.A.C. R14-4-134.

[105] Also known as SCOR or ULEO in some states and on the coordinated review website: http://www.coordinatedreview.org/cr-scor/west/. Arizona, Alaska, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming participate in the Western Regional Review program that provides coordinated review for small corporate offering registration or uniform limited offering registration and Regulation A Tier 1 offerings. California participates in the program for Regulation A Tier 1offerings. To register an offering in more than one of the participating states, an issuer may simultaneously submit its application for registration to the states in which it wishes to register along with a Western Regional Review Application Form, CR-SCOR-West-1, requesting regional review. The states will coordinate their comments with a lead state (the state in which the corporation is located) and the lead state will comment to and work with the issuer. Registration will occur in all the applied to states when the application is cleared by the lead state. For more information, please contact the Division.

preference.

5. The issuer must pay a nonrefundable fee of $250.[106]

A.A.C. R14-4-134 provides that an issuer that files an application to register securities by qualification under A.R.S. § 44-1902 shall file a disclosure document on Form U-7 with the required exhibits and other required documents set forth in the instructions for use of Form U-7.[107] Form U-7 is a question and answer form that may reduce legal expenses because the typical issuer should be able to prepare a first draft for review by counsel. Alternatively, the Division will allow the use of a more traditional disclosure document if it provides disclosure of all the material information required by Form U-7. The documents required to be filed with the Division include:

1. Financial Statements. An issuer seeking to raise over $500,000 in a ULOR offering is required to submit audited financial statements. If the issuer is selling up to $500,000 in securities, then reviewed financial statements are acceptable. The issuer must provide an audited (or reviewed, if applicable) balance sheet as of the end of the most recent fiscal year. If the company has been in existence less than one fiscal year, then a balance sheet as of the date within 135 days of the date of filing the registration statement is required. If the first effective date of state registration is within 45 days after the company's fiscal year-end, and financial statements for the most recent fiscal year- end are not available, the balance sheet may be as of the end of the preceding fiscal year and an unaudited balance sheet as of an interim date at least as current as the end of the company's third fiscal quarter of the most recently completed fiscal year must be provided. Also, the issuer must provide audited statements of income and cash flows and statements of changes in stockholders' equity for the last fiscal year preceding the date of the most recent balance sheet or such shorter period as the company has been in existence. In addition, the issuer must provide statements of income and cash flows for any interim period between the latest audited balance sheet and interim balance sheet provided.[108]

2. Form of selling agency agreement.

3. Company's articles of incorporation and all amendments thereto.

4. Company's by-laws as amended to date.

5. Copy of any resolutions by directors setting forth terms and provisions of capital stock to be issued.

6. Any indenture, form of note, or other contractual provision containing terms of notes or other debt, or of options, warrants, or rights to be offered.

7. Form of escrow agreement for escrow of proceeds.

8. Consent to inclusion in the Form U-7 (or other offering document) of the accountant's report.

9. Consent to inclusion in the Form U-7 (or other offering document) of the tax advisor's

[106] A.R.S. § 44-1902(B)(7) and § 44-1861(M).
[107] Form U-7 and instructions thereto may be obtained by request from the Division.
[108] A.A.C. R14-4-134(E).

opinion or description of tax consequences, if applicable.

10. Consent to inclusion in the Form U-7 (or other offering document) of any evaluation of litigation or administrative action by counsel, if applicable.

11. Form of any subscription agreement to be used in connection with the distribution of the securities.

12. Schedule of residence street addresses of officers, directors, and principal stockholders.

13. Work sheets showing computations of responses to questions 6, 7(a), 8(a), 8(b), and 17(b) of Form U-7.

14. Opinion of counsel that the securities to be sold in the offering have been duly authorized and when issued upon payment of the offering price will be legally and validly issued, fully paid and nonassessable, and binding on the Company in accordance with their terms.

15. A copy of the Form D filed with the SEC.

16. Additionally the issuer must file the following Uniform Forms with the Division:

a. Form U-1, Uniform Application to Register Securities;

b. If the issuer is not domiciled in and organized under the laws of Arizona, Form U-2, Uniform Consent to Service of Process; and

c. Form U-2A, Uniform Corporate Resolution.

The Division applies a "modified" merit review approach to ULOR offerings. The following rules relating to registration of securities apply to a ULOR offering:[109]

1. R14-4-103 (advertising and sales literature). All advertising and sales materials must be cleared by the Division prior to use. All advertising must be filed with the Division at least threebusiness days prior to the date of its intended use.

2. R14-4-105 (promotional securities). "60%" shall be substituted for "15%" in subsection C of Rule 105.

3. R14-4-106 (options, warrants, and rights to purchase).

4. R14-4-107 (promoter's equity).

5. R14-4-108 (sales commission and expenses). In Rule 108, subsection 5, "20%" shall be substituted for "15%."

6. R14-4-110 (installment sales).

7. R14-4-111 (commissions to officers and directors).

[109] *See* A.A.C. R14-4-134(I).

8. R14-4-112 (impoundment of funds) and R14-4-113 (impound dates).

9. R14-4-117 (debt offerings).

10. R14-4-118 (statement required on prospectus cover).

11. R14-4-119 (preferred stock).

As explained above in section III.A, every offering registered in Arizona (including ULOR offerings) must be sold by a dealer registered in Arizona. If a ULOR offering is sold by an issuer-dealer, the issuer can request a issuer-dealer registration package from the Division or review the Division's website.

After the appropriate documents and fee have been filed with the Division, the file will be assigned to an examiner for review. The examiner may issue a comment letter to the issuer asking for additional information or explanation regarding the offering. The issuer will then need to reply to the comment letter. The most common impediments to expeditious registration of ULOR offerings are the issuer's failure to thoroughly read the requirements set forth in § 44-1902, A.A.C. R14-4-134, and the instructions to Form U-7, and the issuer's failure to provide a prompt and adequate response to the comment letter. The Division encourages issuers to discuss the comment letter with the reviewing examiner.

After effectiveness of registration has been granted by the Division,[110] the issuer must provide the following reports to the Division (failure to provide the following reports is deemed to be a violation of the issuer's registration that may result in revocation of the issuer's registration):

1. Within ten days following every 90-day period and on completion of the offering:

a. a report stating the number of purchases and the dollar amount of securities sold; statement to the effect that no changes in or amendments to the Form U-7 or sales and advertising materials provided to the Division have been made, other than those filed with and cleared by the Division.

2. Within ten days after every six-month period following the effective date of registration and at such time as the proceeds have been completely used, a report stating in reasonable detail the application of the proceeds.

3. As long as any securities sold in the offering are outstanding, any reports required by the Form U-7 or under the 1934 Act to be furnished to investors, unless there are ten or fewer shareholders and all of such shareholders consent in writing to the cessation of such reporting.

4. Any other reports, brochures, letters, or such similar documents furnished, through any medium, to investors or such other materials as the Division may determine.

E. Special Registration.

[110] The Corporation Commission has authority to deny the registration pursuant to § 44-1921 as discussed in III.A herein.

A.A.C. R14-4-144 provides that issuers engaging in Rule 504, intrastate, and Reg A Tier 1 offerings may apply for a special registration in Arizona. Such issuers apply for registration under Article 7 of the Arizona Securities Act and, additionally, apply to use the suitability standards set forth in Rule 144 in lieu of the conditions and standards prescribed under A.R.S. §§ 44-1876, 44-1877, 44-1878, and 44-1921(1), (3), and (4), and the rules under those sections.[111] "Bad actors" under the provisions of A.R.S. § 44-1901(G)(1) through (6) may not use special registration.[112]

Rule 144 provides that suitability standards are imposed on the purchasers of an offering instead of imposing certain merit standards on the offering. The dealer, or the issuer if it is engaging in the sale of its securities, must have a reasonable belief that the purchasers meet the suitability standards[113] and the issuer must include a conspicuous legend on all offering documents that describes the suitability standards.[114] The suitability standards are prescribed by Rule 144 and depend upon whether the offering is listed on the Nasdaq SmallCap℠ Market.[115]

Applicants must file the same forms, documents, and fees as described in Section III.A above. The Corporation Commission may, after a hearing or notice and opportunity for hearing as provided by article 11 of the Arizona Securities Act, enter an order denying registration of an offering on any of the following grounds:[116]

1. The issuer or any dealer or salesperson designated to engage in the sale of the securities has violated any provision of the Arizona Securities Act.

2. The issuer has refused to permit the Corporation Commission to examine its affairs or to furnish information required by the Arizona Securities Act or any rule or order of the Corporation Commission.

3. The issuer or any officer, director, trustee, partner, or other fiduciary or controlling person of the issuer or person controlled by or in common control with the issuer has been convicted within the last five years of a felony or misdemeanor involving a transaction in securities or of which fraud is an essential element or is subject to an order, judgment, or decree entered within the past three years enjoining or restraining the person from engaging in or continuing any conduct or practice in connection with the sale or purchase of securities.

With the exceptions of the inapplicability of the imposition of certain merit requirements, the process for a special registration is the same as described in Section III.A. Again, **every** offering registered in Arizona (including special registration offerings) must be sold by a dealer registered in

[111] A.A.C. R14-4-144(A). The subject rules are Rules 105, 106, 107, 108, 110, 111, 116, 117, 118, and 119.
[112] A.A.C. R14-4-144(E).
[113] A.A.C. R14-4-144(B).
[114] A.A.C. R14-4-144(I).
[115] Now called the Nasdaq Capital Market. A.A.C. R14-4-144(B) and (C). If the offering is listed, the dealer, or the issuer if engaging in the sale of its securities, must have a reasonable belief that the purchaser has a minimum of $100,000, or $150,000 when combined with spouse, in gross income during the prior year and a reasonable expectation of the same income in the current year or a minimum net worth of $250,000, or $300,000 when combined with spouse, exclusive of home, home furnishings, and automobiles, with the investment not exceeding 10 percent of the net worth. If the offering is not listed, the dealer, or the issuer if engaging in the sale of its securities, must have a reasonable belief that the purchaser has a minimum of $150,000, or $200,000 when combined with spouse, in gross income during the prior year and a reasonable expectation of the same income in the current year or a minimum net worth of $350,000, or $400,000 when combined with spouse, exclusive of home, home furnishings, and automobiles, with the investment not exceeding 10 percent of the net worth.
[116] A.A.C. R14-4-144(A) and A.R.S. § 44-1921.

Arizona. For further information regarding issuer registration as a dealer, please request an issuer-dealer registration package from the Division or review the Division's website.

F. Registration by Coordinated Equity Review.

As authorized by A.R.S. § 44-1894(E), to reduce the regulatory burden and expense of registering public offerings in multiple states, Arizona participates with other states and the North American Securities Administrators Association, Inc. ("NASAA") in the coordinated review of equity, debt and other classes of securities. An issuer of common stock, preferred stock, warrants, rights, and units comprised of equity securities desiring to participate in the coordinated review process must submit a Form CR-EQUITY-1 to the Pennsylvania Securities Commission[117] in addition to making the requisite filings in the states in which it wishes to register. An issuer of Regulation A offerings in multiple U.S. jurisdictions must complete Form CR-3(b) and submit it together with the Form 1-A and exhibits to Washington State by email.[118] After submitting the forms, a lead merit and lead disclosure examiner will be appointed. States in which the issuer is seeking registration will submit their comments regarding the offering to two lead states (one merit state and one disclosure state) based on guidelines and standards established by the NASAA rather than on each state's own statutes and rules.[119] The two lead states will issue one comment letter to the issuer, and work with the issuer to resolve those comments. Coordinated equity review is not available for registration of blank check or blind pool offerings. Additional instructions, forms, and more details of how to use coordinated review are available at NASAA's coordinated review website, https://www.coordinatedreview.org.

G. Registration by Description.

Registration of offerings of securities that meet the criteria of § 44-1871 through § 44-1878 is effective when the appropriate documents and filing fee are filed with the Division.[120] The offering is not subjected to a merit review. Registration by description is rare because issuers that meet the financial criteria typically qualify for an exchange listing exemption from registration.[121]

Registration by description is available for securities, other than real property investment contracts, that either:

1. Are commodity investment contracts or commodity option contracts and the financial condition of the party filing the registration statement meets the requirements of A.A.C. R14-4-124;[122]

2. Are of an issuer that has been in continuous operation for not less than three years and has shown for a period of not less than three years during the five years prior to the date of registration average annual net income adjusted by adding back interest expenses net of applicable income tax benefits arising therefrom of securities to be retired out of the proceeds of sale as follows:

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[117] Pennsylvania Securities Commission, Market Square Plaza, 17 N. Second Street, Suite 1300, Harrisburg, Pennsylvania 17101.

[118] Filers should use the following email address when submitting registration materials: securitiesregistration@dfi.wa.gov.

[119] Contact the Division for copies of the guidelines that are utilized in the coordinated equity review process.

[120] A.R.S. § 44-1873(A). *See also* § 44-1875. If the information filed is insufficient to establish the fact that the securities are entitled to registration by description, the Division may require additional information.

[121] *See* A.R.S. § 44-1843(A)(7) and A.A.C. R14-4-115.

[122] A.R.S. § 44-1871(A)(1).

a. In the case of interest-bearing securities, not less than one and one-half times the annual interest charges on such securities and all other outstanding equal rank interest-bearing securities.

b. In the case of securities having a specified dividend rate, not less than one and one-half times the annual dividend requirements on such securities and on all outstanding securities of equal rank.

c. In the case of securities without a specified dividend rate, not less than 5 percent upon all outstanding (after the close of the offering) securities of equal rank, based on the maximum offering price.[123]

To register a securities offering by description, the issuer shall pay a nonrefundable registration fee [124] and file the following documentation: Form U-1 - Uniform Application to Register Securities;[125] a copy of the prospectus;[126] a statement of the facts showing that the securities are entitled to be registered by description;[127] financial statements meeting the standards of § 44-1871(A);[128] and ff the person registering the securities is not a registered dealer or a corporation organized under the laws of this state, a Form U-2, Uniform Consent to Service of Process.[129]

Offerings registered by description must be sold by a dealer registered in Arizona.

IV. Conclusion.

Federal and state securities laws provide several alternatives for companies seeking to access capital. This outline has provided only a brief introduction as to these varied approaches to raising funds. Issuers seeking to sell securities should consult with knowledgeable professionals to determine the alternatives that are best suited to their situations. The Division is available to answer general questions issuers may have about particular registration forms or the registration process in Arizona. The Division cannot provide legal counsel and recommends that issuers discuss their particular circumstances with their attorneys, accountants, and investment bankers.

[123] A.R.S. § 44-1871(A)(2).
[124] *See* A.R.S. § 44-1861(C). The fee is one-tenth of 1 percent of the aggregate offering price of the securities to be sold in Arizona, but not less than $200 nor more than $2,000.
[125] Form U-1 contains the information required by §§ 44-1872(1)(a) through (d).
[126] A.R.S. § 44-1872(1)(e).
[127] A.R.S. § 44-1872(1)(f).
[128] A.R.S. § 44-1872(1(f).
[129] A.R.S. § 44-1872(2).