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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

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COMMISSIONERS

JEFF HATCH-MILLER Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

DOCKETED BY	<i>AK</i>
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IN THE MATTER OF THE PROPOSED
RULEMAKING TO AMEND A.A.C. R14-4-149.

DOCKET NO. RS-00000A-05-0702

DECISION NO. 68510

OPINION AND ORDER

DATE OF HEARING: January 17, 2006

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Marc E. Stern

APPEARANCES: Ms. Cheryl Farson, General Counsel, on behalf of the Securities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

On October 20, 2005, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") forwarded a proposal recommending that the Commission amend A.A.C. R14-4-149 ("Rule 149").¹

On October 28, 2005, the Notice of Rulemaking Docket Opening was published in the Arizona Administrative Register ("Register").

On November 8, 2005, the Commission issued Decision No. 68271, which directed the Hearing Division to schedule a hearing on the Division's proposed amendment to Rule 149 for the purpose of taking public comment.

On November 9, 2005, by Procedural Order, a public comment hearing was scheduled for January 17, 2006.

On December 2, 2005, the Notice of Proposed Rulemaking was published in the Register.

¹ Rule 149 provides an exemption from registration for offers of securities made in accordance with the requirements under 17 C.F.R. 230.134 (2001) ("Rule 134"), 17 C.F.R. 230.255 (2001) ("Rule 255"), or 17 C.F.R. 230.430 (2001) ("Rule 430") and are incorporated into Rule 149 by reference in accordance with A.R.S. § 41-1028 and A.A.C. R1-1-414.

1 On January 17, 2006, a public comment hearing on Rule 149 was held before a duly
2 authorized Administrative Law Judge at the Commission's offices in Phoenix, Arizona. The Division
3 appeared through counsel. There were neither any formal comment letters received nor any members
4 of the public who appeared to make public comment on Rule 149 at the hearing following the Notice
5 of Proposed Rulemaking.

6 * * * * *

7 Having considered the entire record herein and being fully advised in the premises, the
8 Commission finds, concludes, and orders that:

9 **FINDINGS OF FACT**

10 1. On March 8, 2004, the Commission approved the adoption of Rule 149 to clarify and
11 replace a 1986 Commission policy statement, which permitted the issuers of securities to distribute
12 certain types of communications about upcoming offerings after an application for registration of the
13 securities had been filed with the Division.

14 2. Rule 149 provides an exemption from registration for offers that comply with one of
15 three federal rules adopted by the Securities and Exchange Commission ("S.E.C."), either Rule 134,
16 Rule 255 or Rule 430, and prohibits sales of securities until after the registration is effective in
17 Arizona.

18 3. Rules 134, 255 and 430 are incorporated into Rule 149 by reference in accordance
19 with A.R.S. § 41-1028 and A.A.C. R1-1-414.

20 4. The S.E.C. has amended Rule 134, effective December 1, 2005, and Rule 430,
21 effective June 1, 2002.

22 5. On October 20, 2005, the Division forwarded to the Commission a proposal
23 recommending that the Commission amend Rule 149.

24 6. On October 28, 2005, pursuant to law, the Notice of Rulemaking Docket Opening was
25 published in the Register.

26 7. On November 8, 2005, the Commission issued Decision No. 68271, which directed
27 that a hearing be scheduled regarding Rule 149 for the purpose of taking public comment.

28 8. On November 9, 2005, by Procedural Order, the Commission scheduled a public

1 comment hearing on January 17, 2006.

2 9. On December 2, 2005, the Notice of Proposed Rulemaking was published in the
3 Register.

4 10. On January 17, 2006, the public comment hearing was held as scheduled. After the
5 publication of the Notice of Proposed Rulemaking, no members of the public appeared to make
6 comment on the proposed amendment of Rule 149 and no formal written comments concerning the
7 amendment of Rule 149 were filed with the Commission.

8 11. The Division proposes the amendment to Rule 149 to incorporate the S.E.C.'s
9 amendments to Rules 134 and 430.

10 12. The S.E.C. amended Rule 134 to improve the registration, communications, and
11 offering processes pursuant to the federal Securities Act of 1933 by providing more timely
12 investment information to investors. Rule 134 permits the publication of an identifying statement,
13 commonly referred to as a tombstone ad, that can be used to identify persons who might be interested
14 in receiving a prospectus. Increased information about the issuer and its business, the terms of the
15 securities being offered and additional factual information about the procedures for transactions in
16 connection with the offering process are permitted by the modification of federal Rule 134.

17 13. The S.E.C. amendment to federal Rule 430 was a technical amendment to reflect the
18 use of a new S.E.C. registration form.

19 14. The approval of the Division's recommended amendments to Rule 149 by the
20 Commission will not endanger an Arizona investor's protection under Rule 149 which include the
21 following provisions:

- 22 • the requirement that an issuer file an application for registration of the
23 securities before offers can be made under the exemption;
- 24 • restrictions on content and manner of the exempted communications;
- 25 • prohibition on the use of the exemption by parties that fall within "bad boy"
26 provisions;
- 27 • prohibitions on the use of the exemption for offers of securities defined by the
28 Arizona Securities Act as blind pools or defined as speculative or high risk;

1 and

- 2 • prohibitions on the actual sale of any securities until registration of the offering
- 3 is effective.

4 15. The Division believes that the amendment of Rule 149 is in the public interest and is
 5 reasonably necessary to carry out the provisions of the Arizona Securities Act, and will benefit the
 6 public and investors by allowing issuers to provide the same information to Arizona investors that
 7 they may provide under federal laws.

8 16. Rule 149 is set forth in Appendix A, attached hereto and incorporated by reference.

9 17. Pursuant to A.R.S. § 41-1055(D), because there is expected to be a decrease in
 10 recordkeeping or reporting for the agency, businesses or persons with the amendment of Rule 149,
 11 the Commission is exempt from the requirement to prepare an Economic, Small Business and
 12 Consumer Impact Statement for this rulemaking.

13 **CONCLUSIONS OF LAW**

14 1. Pursuant to A.R.S. § 44-1821 and the Arizona Constitution, Article XV, §§ 4, 6 and
 15 13, the Commission has jurisdiction to amend Rule 149.

16 2. Notice of the hearing was given in the manner prescribed by law.

17 3. The proposed amendment to Rule 149 is in the public interest and is reasonably
 18 necessary to carry out the provisions of the Arizona Securities Act.

19 4. The amendment of Rule 149 as set forth in Appendix A should be adopted.

20 **ORDER**

21 IT IS THEREFORE ORDERED that A.A.C. R14-4-149, as set forth in Appendix A is hereby
 22 adopted.

23 IT IS FURTHER ORDERED that the Commission's Securities Division shall submit the
 24 amended Rule A.A.C. R14-4-149, as set forth in Appendix A, to the Attorney General's office for
 25 approval.

26 ...

27 ...

28 ...

1 IT IS FURTHER ORDERED that the Commission's Securities Division is authorized to
2 make non-substantive changes to the adopted rule, A.A.C. R14-4-149, in response to comments
3 received from the Attorney General's office during the approval process under A.R.S. § 41-1044
4 unless, after notification of those changes, the Commission requires otherwise.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

7

8
9 CHAIRMAN

COMMISSIONER

10

11 COMMISSIONER

COMMISSIONER

COMMISSIONER

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13 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
14 Director of the Arizona Corporation Commission, have
15 hereunto set my hand and caused the official seal of the
16 Commission to be affixed at the Capitol, in the City of Phoenix,
17 this 6th day of March, 2006.

18

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

19 DISSENT _____

20
21 DISSENT _____

22 MES:mj

1 SERVICE LIST FOR: RULEMAKING TO AMEND RULE 149

2 DOCKET NO.: RS-00000A-05-0702

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4 Matt Neubert
5 Securities Division
6 ARIZONA CORPORATION COMMISSION
7 1200 West Washington Street
8 Phoenix, AZ 85007
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1 R14-4-149. Exemption from registration for offers made in connection with a pending application.

2 A. If all of the following apply, offers made in accordance with the requirements under U.S.
3 Securities and Exchange Commission rule 134, 17 C.F.R. 230.134 (~~2001~~2006), rule 255, 17
4 C.F.R. 230.255 (~~2001~~2005), or rule 430, 17 C.F.R. 230.430 (~~2001~~2005), which are
5 incorporated by reference and contain no later editions or amendments, shall be added to the
6 class of transactions exempt under A.R.S. § 44-1844.

- 7 1. The issuer has applied for registration of the securities to which the offers relate under
8 the Securities Act of 1933, or the securities are exempt from registration under that act.
- 9 2. The issuer has filed with the Commission an application for registration of the securities
10 to which the offers relate, or the issuer has filed a notice under A.R.S. § 44-1843.01(B).
- 11 3. The issuer, or any of its predecessors, affiliates, directors, officers, general partners, or
12 individuals holding a similar position of leadership, or beneficial owners of ten percent or
13 more of any class of its equity securities do not fall within any of the disqualification
14 provisions of A.R.S. § 44-1901(G)(1) through (6).
- 15 4. The issuer is not applying for registration under A.R.S. § 44-1902.
- 16 5. The offering is not of a blind pool as defined in A.R.S. § 44-1801(1).
- 17 6. The offering is not of speculative or high risk securities as defined by A.A.C. R14-4-
18 118(C).
- 19 7. No part of the purchase price is received until the securities are registered in Arizona, or
20 the exemption under A.R.S. § 44-1843.01(B) is effective.
- 21 8. An indication of interest in response to an offer made under this Section involves no
22 obligation or commitment of any kind.

23 B. ~~The rules incorporated by reference are on file with the Office of the Secretary of State.~~

24 Copies of the incorporated material are available from the Commission and the
25 Superintendent of Documents, Government Printing Office, Washington, DC, 20402. Copies
26 are also available at <http://www.gpoaccess.gov/cfr/index.html>.