

## NOTICES OF EXEMPT RULEMAKING

The Administrative Procedure Act requires the *Register* publication of the rules adopted by the state's agencies under an exemption from all or part of the Administrative Procedure Act. Some of these rules are exempted by A.R.S. §§ 41-1005 or 41-1057; other rules are exempted by other statutes; rules of the Corporation Commission are exempt from Attorney General review pursuant to a court decision as determined by the Corporation Commission.

### NOTICE OF EXEMPT RULEMAKING

#### TITLE 7. EDUCATION

#### CHAPTER 3. COMMISSION FOR POSTSECONDARY EDUCATION

#### PREAMBLE

1. **Sections Affected**

R7-3-501	<b><u>Rulemaking Action</u></b>
R7-3-504	Amend
R7-3-505	Amend
R7-3-506	Amend
R7-3-507	New Section
	New Section
2. **The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statute: A.R.S. § 15-1852(C)  
Implementing statute: A.R.S. § 15-1873 *et. seq.*
3. **The effective date of the rules:**

December 21, 1998
4. **A list of all previous notices appearing in the Register addressing the final rule:**

Notice of Rulemaking Docket Opening: 4 A.A.R. 1018, May 1, 1998.  
Notice of Proposed Rulemaking: 4 A.A.R. 1837, July 17, 1998.  
Notice of Supplemental Proposed Rulemaking: 4 A.A.R. 3880, November 20, 1998.
5. **The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name: Verna Allen, Executive Director  
Address: Commission for Postsecondary Education  
2020 North Central Avenue, Suite 275  
Phoenix, Arizona 85004  
Telephone: (602) 229-2595  
Fax: (602) 229-2599
6. **An explanation of the rule, including the agency's reason's for initiating the rule, including the statutory citation to the exemption from the regular rulemaking procedures:**

R7-3-501 through R7-3-505 will provide procedures for implementing the Arizona Family College Savings Program through financial institutions as a public-private partnership. These rules will establish a uniform and consistent manner in implementing the Arizona Family College Savings Program. Pursuant to A.R.S. § 15-1852(C), the Commission is exempt from the regular rulemaking procedures.
7. **A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.
8. **The summary of the economic, small business, and consumer impact:**
  - a. **An identification of the proposed rulemaking:** Arizona Family College Savings Program, R7-3-501 through R7-3-505, adopted pursuant to A.R.S. § 15-1873 *et. seq.*
  - b. **An identification of the persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rulemaking:** Persons directly affected are account holders, beneficiaries, and financial institutions. Account holders will bear costs in paying an application fee and a potential maintenance fee. Account holders will benefit from the Program as the interest is tax deferred and taxed at the income bracket of the beneficiary. Beneficiaries will directly benefit from the Program as having money available to attain a college education. Financial institutions will bear the cost of paying a marketing fee and will benefit by increasing the deposits into their financial institutions.

- c. An analysis of the probable costs and benefits from the implementation and enforcement of the proposed rulemaking on the Commission, and on any political subdivision or business directly affected by the proposed rulemaking: The Commission will bear administrative costs in keeping track of the information received from the financial institutions and enforcing the penalties for non-qualified withdrawals.
- d. The probable impact of the proposed rulemaking on employment in business, agencies, and political subdivisions of this state affected by the proposed rulemaking: Financial institutions will bear the cost of paying a marketing fee. The Office of Administrative Hearings will hear any causes which involve an appeal from the Commission.
- e. A statement of the probable impact of the proposed rulemaking on small business: Some financial institutions are small businesses and will need to bear administrative costs in implementing and maintaining the Program.
- f. A statement of the probable effect on state revenues: Additional funding for the Commission will be needed to implement the program.
- g. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rulemaking: Due to the nature of the various statutory requirements, less intrusive or less costly alternatives were not available.

9. A description of the changes between the proposed rules, including supplemental notices, and final rules:

The Commission submitted its Notice of Proposed Rulemaking to the Secretary of State's Office on June 26, 1998. On July 15, 1998, the Commission was notified by the Secretary of State's Office that the information was inadequately provided, which resulted in the inaccurate publication of the Commission's proposed rules on July 17, 1998. Subsequently, the Commission made the appropriate corrections, and made additional changes to the proposed rules as well; those changes are described here-with.

R7-3-501 has minor changes. A new definition for R7-3-501(A) has been added, and the remaining subsections were relabeled accordingly. Also, new language has been added to the definition of "cash." The entire definition of "certification" has been stricken. R7-3-501(F) has had clarifying language added, with previous language stricken to conform to the additions.

The Preamble was published showing R7-3-505 as a new section. R7-3-505 is not new. The confusion was the result of the Commission not providing the original language for that section. The language for that section is shown in the supplement (October 29, 1998) by stricken language, followed by the new language, which is underlined. R7-3-505(A) has been changed so that the aggregated deposit amount is no longer a sum certain, but rather, a formula. R7-3-505(B) is a new subsection addressing the issue of excess account balances. R7-3-505(D) is a new subsection referring to a contributor's certification that to the best of his or her knowledge, the contribution that he or she is making will not cause the designated beneficiary's aggregate account balances to exceed the established limit.

R7-3-506 has minor changes. The amount of the penalty on a non-qualified withdrawal has been lowered from 15% to 10%, and an Internal Revenue Code reference has been changed to reflect a recent change to the Internal Revenue Code itself.

R7-3-507(B) is a new subsection which prohibits account owners from directing the investment of funds in accounts after the initial account opening. R7-3-507(C) has received minor changes for clarification purposes.

10. A summary of the principal comments and the agency response to them:

On December 21, 1998, the Commission held a public hearing to consider comments regarding the proposed rules. Prior to the December 21 public hearing, the Commission received substantial input from interested third parties, the three financial institutions contracted to implement the Arizona Family College Savings Program, the Oversight Committee, the Internal Revenue Service, and the Commission. Staff from the Commission had public meetings with the financial institutions and Oversight Committee regarding the rules on April 21, 1998, and again on October 1, 1998. Input from both the financial institutions and the Oversight Committee was considered and used in drafting the proposed and supplemental rules. The Commission also discussed the proposed rules at its regular meetings on May 27, 1998, June 10, 1998, June 23, 1998, August 18, 1998, October 7, 1998 and again on October 28, 1998.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable.

12. Incorporation by reference and their location in the rules:

Not applicable.

13. Was this rule previously adopted as an emergency rule?

No.

14. The full text of the rules follows:

TITLE 7. EDUCATION

CHAPTER 3. COMMISSION FOR POSTSECONDARY EDUCATION

ARTICLE 5. ARIZONA FAMILY COLLEGE SAVINGS PROGRAM

Section	
R7-3-501.	Definitions
R7-3-504.	Changing Designated Beneficiary

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- R7-3-505. Contribution Limitations  
R7-3-506. Withdrawals; Reporting of Non-qualified Withdrawals; Penalties  
R7-3-507. Oversight of Financial Institutions

**ARTICLE 5. ARIZONA FAMILY COLLEGE SAVINGS PROGRAM**

**R7-3-501. Definitions**

- A.** "A.R.S." means Arizona Revised Statutes.  
**AB.** "Cash" means currency, bills and coin in circulation, or converting a negotiable instrument to cash by endorsing and presenting to a financial institution for deposit. An automatic transfer, cashier's check, certified check, money order, payroll deposit, traveler's check, personal check, and wire transfer will be treated as cash.  
**B.** "Certification" means ~~a signed, written statement by an account owner authorizing withdrawal for specific educational item(s) or services(s). If the account owner has a guardian, conservator, or another person appointed to manage the account owner's his/her, or an individual granted power of attorney, such individual shall have the power to sign the certification.~~  
**C.** "Code" means the Internal Revenue Code.  
**CD.** "Commission" means the Commission for Postsecondary Education as defined in A.R.S. § 15-1871.  
**DE.** "Committee" means the Family College Savings Program Oversight Committee as defined in A.R.S. § 15-1871.  
**F.** "Direct the investment" means specifying or attempting to specify the individual business entities particular financial instruments (such as certificates of deposit) or ownership interests (such as stock certificates or interests in mutual funds) either individually, or within a fund family or other group of business entities financial instruments or ownership interests held as an investment group, into which the account holder's contributions or earnings will be invested. Direct the investment does not mean selecting an initial type of investment program if more than 1 program is offered.  
**EG.** "Negotiable instrument" means negotiable instrument as defined in A.R.S. § 47-3104.

**R7-3-504. ~~Set up and Maintenance of Accounts—Reporting of Non-qualified Withdrawals; Penalties~~ Changing Designated Beneficiary**

- A.** Pursuant to A.R.S. §§ 15-1875 (H), (I), and (J), the Commission has authority to assess penalties for non-qualified withdrawals. In order to make a withdrawal, the account holder or the account holder's designee must complete a certification, on a form approved by the Commission, declaring that the funds will be used for the purposes set forth in A.R.S. § 15-1871. If a financial institution has reason to believe that a non-qualified withdrawal has been made, the financial institution shall report that fact to the Commission within 3 business days, in writing, including identification of the account holder, beneficiary, date of withdrawal, amount of withdrawal, and a brief description as to why the financial institution believes the withdrawal to be non-qualified. The financial institution may, but shall not be required to, notify the account holder and beneficiary of any such communication to the Commission.  
**B.** If the Commission determines that a withdrawal is non-qualified, the Commission shall assess a 10% penalty on the amount of the non-qualified withdrawal. Within 3 business days, the Commission shall give written notification to the financial institution and the account holder that the withdrawal has been determined to be non-qualified and that a

10% penalty will be assessed. The account holder may dispute the Commission's determination by submitting written notice, to the Commission, within 30 days from the date of the notice. The Commission shall make a written determination regarding the dispute within 30 days of the receipt of its notice from the account holder. If the account holder disagrees with the Commission's determination, the matter shall be adjudicated in accordance with A.R.S. § 41-1092 et seq.

An account owner may change the designated beneficiary so long as the new designated beneficiary is a member of the family, as defined in A.R.S. § 15-1871(8), of the previously named designated beneficiary. The account owner must certify and provide to the financial institution the name, address, social security number, and relationship of the new designated beneficiary to the previously named designated beneficiary. The change shall be effective upon the financial institution's receipt of such certification.

**R7-3-505. Oversight of Financial Institutions Account Balance Limitations**

**A. Disclaimer of State liability**

Every document pertaining to the Family College Savings Program shall clearly indicate that "The account is not insured by this state and neither the principal deposited nor the investment return is guaranteed." A rubber stamp may be used to imprint this language on deposit slips, account statements, payroll stubs, or other documents pertaining to the Family College Savings Program. This language may also be handwritten or typed or provided by any other method to facilitate compliance.

**B. Reporting Requirements**

**1. To account holders**

Each calendar quarter, every financial institution shall provide each account holder with a statement. The statement shall list a beginning balance, all activity during the quarter, including any interest paid or dividends earned and any penalties charged, and an ending balance. Additionally, the statement for the 4th calendar quarter shall include the following information: an annual beginning balance, an annual total of the interest earned or dividends paid, an annual total of any penalties charged, and a year-end balance.

**2. To Commission**

A copy of the statement described in R7-3-505(B)(1) above shall be sent to the Commission. Additionally, each financial institution shall provide the Commission with the information required by A.R.S. § 15-1874(F).

**C. Access to books and records**

No contractor shall have access to the books and records of a financial institution or Program Manager unless the Commission or its designee 1st approves with or without modification such request for access.

**D. Non-renewal**

The Commission's failure to renew a contract with a financial institution shall not be construed as "good cause" as referred to in A.R.S. § 15-1874(I).

**E. Marketing programs**

- 1.** Any financial institution or group of financial institutions that wishes to engage in its own marketing program may do so provided that any proposed marketing program is first submitted to the Commission for review. If, within 30 days, the Commission does not notify the financial institution or group of financial institutions, in writing, that the proposed marketing program is rejected or requires modifications, the proposed marketing program shall be deemed approved.

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2. Any financial institution or group of financial institutions that chooses to engage in its own marketing program may petition the Commission for a credit against future marketing fees.

- A.** For each designated beneficiary, the balance in all qualified state tuition programs, as defined in § 529 of the Code, shall not exceed the lesser of:
1. The product (rounded down to the nearest multiple of (\$1000) of 7 and the average one year's undergraduate tuition, fees, room and board at independent four year higher education institutions as measured and last published by the College Board's Independent College 500 Index; or
  2. The cost in current dollars of qualified higher education expenses the account holder reasonably anticipates the designated beneficiary will incur.
- B.** Any excess balances with respect to a designated beneficiary shall be promptly withdrawn as a non-qualified withdrawal or transferred to another account in accordance with A.R.S. § 15-1875(F).
- C.** Each year, the Commission shall review the amount set forth in R7-3-505(A), above.
- D.** Persons making contributions to accounts shall certify, that as to the account's designated beneficiary, and to the best of the contributor's knowledge, the balances in all qualified state tuition programs, as defined in § 529 of the Code, do not exceed the account balance limitations described in R7-3-505(A), above.

**R7-3-506. Withdrawals: Reporting of Non-qualified Withdrawals: Penalties**

- A.** An account owner may withdraw funds from an account at any time. The designated beneficiary of an account shall not have any authority to withdraw funds from an account unless the account is structured to give the designated beneficiary such right of withdrawal upon matriculation or upon incurring qualified higher education expenses.
- B.** Pursuant to A.R.S. §§ 15-1875 (H), (I), and (J), the Commission has authority to assess penalties for non-qualified withdrawals. In order to make a withdrawal, the account holder or the account holder's designee must complete a certification, on a form approved by the Commission, declaring that the funds will be used for the purposes set forth in A.R.S. § 15-1871. If an account holder fails to certify that a withdrawal is qualified, or if a financial institution has reason to believe that a withdrawal is non-qualified, the financial institution shall withhold from such withdrawal an amount equal to 10% of that portion of that withdrawal which constitutes income under § 72 of the Code. The amount of said withholding shall be remitted to the Commission within 7 calendar days from the date of the withholding. The financial institution shall report any such withholding, in writing, to the Commission within 3 business days, including identification of the account holder, beneficiary, date of withdrawal, amount of withdrawal, and a brief description as to why the financial institution believes the withdrawal to be non-qualified. The financial institution shall notify the account holder and beneficiary, in writing, of any such withholding.
- C.** The account holder may dispute any withholding made by a financial institution under R7-3-506(B) by submitting written notice, to the Commission, within 30 days from the date of such withholding. The Commission shall make a written determination regarding the dispute within 30 days of the receipt of its notice from the account holder. If the account

holder disagrees with the Commission's determination, the matter shall be adjudicated in accordance with A.R.S. § 41-1092 et. seq.

**R7-3-507. Oversight of Financial Institutions**

- A. Disclaimer of State liability**  
Every document pertaining to the Family College Savings Program shall clearly indicate that "The account is not insured by the State of Arizona and neither the principal deposited nor the investment return is guaranteed by the State of Arizona." A rubber stamp may be used to imprint this language on deposit slips, account statements, payroll stubs, or other documents pertaining to the Family College Savings Program. This language may also be handwritten or typed or provided by any other method to facilitate compliance.
- B. No Investment Direction**  
A financial institution shall not permit an account holder to move funds, once deposited, that in any way would result in investment direction under § 529(b)(5) of the Code or R7-3-501(F), above.
- C. Reporting Requirements**
1. **To account holders**
    - a. At least quarterly, every financial institution shall provide each account holder with a statement. The statement shall list a beginning balance, all activity during the quarter, including any interest paid or dividends earned and any penalties charged, and an ending balance. Additionally, the statement for the 4th quarter shall include the following information: an annual beginning balance, an annual total of the interest earned or dividends paid, an annual total of any penalties charged, and a year-end balance.
    - b. Within the time-frames established by the Code, financial institutions shall provide Form 1099G to account holders.
  2. **To Commission**  
A copy of the statement described in R7-3-507(C)(1) above shall be sent to the Commission. Additionally, each financial institution shall provide the Commission with the information required by A.R.S. § 15-1874(F).
- D. Access to books and records**  
No contractor shall have access to the books and records of a financial institution or Program Manager unless the Commission or its designee 1st approves, with or without modification, such request for access.
- E. Non-renewal**  
The Commission's failure to renew a contract with a financial institution shall not be construed as "good cause" as referred to in A.R.S. § 15-1874(I).
- F. Marketing programs**
1. Any financial institution or group of financial institutions that wishes to engage in its own marketing program may do so provided that any proposed marketing program is first submitted to the Commission for review. If, within 30 days, the Commission does not notify the financial institution or group of financial institutions, in writing, that the proposed marketing program is rejected or requires modifications, the proposed marketing program shall be deemed approved.
  2. Any financial institution or group of financial institutions that chooses to engage in its own marketing program may petition the Commission for a credit against future marketing fees.