

AN ACT

ENTITLED, An Act to create a higher education savings plan.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act mean:

- (1) "Account," an account established as prescribed in this Act;
- (2) "Account owner," the person who, under this Act or rules promulgated by the council pursuant to chapter 1-26, is entitled to select or change the designated beneficiary of an account, to designate any person other than the designated beneficiary to whom funds may be paid from the account, or to receive distributions from the account if no such other person is designated;
- (3) "Contribution," any payment directly allocated to an account for the benefit of a designated beneficiary or used to pay late fees or administrative fees associated with an account, and that portion of any rollover amount treated as a contribution under section 529 of the Internal Revenue Code and related regulations;
- (4) "Contributor," any person making a contribution to an account;
- (5) "Council," the South Dakota Investment Council;
- (6) "Designated beneficiary," except as provided in section 25 of this Act, the individual designated at the time the account is opened as the individual whose higher education expenses are expected to be paid from the account or, if this designated beneficiary is replaced in accordance with section 12, 13, or 14 of this Act, the replacement beneficiary;
- (7) "Eligible education institution," an institution that is eligible to participate in any financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended through January 1, 2001, and that is any of the following as permitted by section 529 of the Internal Revenue Code and related regulations:

- (a) An institution described in the Higher Education Act of 1965 (P.L. 89-329, 79 stat. 1219; 20 United States code sections 1001 through 1150);
 - (b) An area vocational educational school as defined in section 521(3), subparagraph (C) or (D) of the Carl D. Perkins Vocational Education Act (P.L. 98-524; 98 stat. 2435; 20 United States code sections 2301 through 2471);
 - (c) An institution accredited for private postsecondary education;
- (8) "Financial institution," any bank, commercial bank, national bank, savings bank, savings and loan association, credit union, an insurance company, brokerage firm, or other similar entity that is authorized to do business in this state;
- (9) "Member of the family," any of the following:
- (a) A son or daughter of an individual or a descendant of the son or daughter of the individual;
 - (b) A stepson or stepdaughter of an individual;
 - (c) A brother, sister, stepbrother, or stepsister of an individual. For purposes of this subsection, the terms, brother and sister, include a brother or sister by the half-blood;
 - (d) The father or mother of an individual or an ancestor of the father or mother of an individual;
 - (e) A stepfather or stepmother of an individual;
 - (f) A son or daughter of an individual's brother or sister. For purposes of this subsection, the terms, brother and sister, include a brother or sister by the half-blood;
 - (g) A brother or sister of an individual's father or mother. For purposes of this subsection, the terms, brother and sister, include a brother or sister by the half-

- blood;
- (h) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of an individual;
 - (i) The spouse of an individual or the spouse of an individual described in this subdivision;
 - (j) Any individual who meets the criteria to be a member of the family as described in this subdivision as a result of legal adoption;
 - (k) Any other individual who is considered a member of the family under section 529 of the Internal Revenue Code and related regulations;
- (10) "Nonqualified withdrawal," a withdrawal from an account other than one of the following:
- (a) A qualified withdrawal;
 - (b) A withdrawal made as the result of the death or disability of the designated beneficiary of an account;
 - (c) Withdrawal that is made on the account of a scholarship, or the allowance or payment described in section 135(d)(1)(B) or (C) of the Internal Revenue Code and related regulations, and that is received by the designated beneficiary, but only to the extent of the amount of this scholarship, allowance, or payment; or
 - (d) A rollover or change of designated beneficiary;
- (11) "Person," as defined in the regulations to section 529 of the Internal Revenue Code;
- (12) "Program," the higher education savings program established under this Act;
- (13) "Qualified higher education expenses," tuition, fees, books, supplies, and equipment required for enrollment or attendance and room and board of a designated beneficiary at an eligible education institution, and any other expenses qualifying as qualified higher education expenses under section 529 of the Internal Revenue Code and related

regulations; provided that room and board expenses qualify only if the beneficiary enrolls at least half time and only if the expenses do not exceed the minimum room and board allowance determined in calculating costs of attendance for federal financial aid programs;

- (14) "Qualified withdrawal," a withdrawal from an account to pay the qualified higher education expenses of the designated beneficiary of the account, but only if the withdrawal is made in accordance with this Act;
- (15) "Rollover," a disbursement or transfer from an account of a designated beneficiary that is transferred to or deposited within sixty days into an account of another individual who is a member of the family of the designated beneficiary, if the transferee account was created under this Act or under a qualified state tuition program maintained by another state in accordance with section 529 of the Internal Revenue Code and related regulations.

Section 2. The council shall:

- (1) Establish the program in the form of a trust to be declared by the council or in such other form as the council may determine;
- (2) Develop and implement the program in a manner consistent with this Act through the adoption of rules, guidelines, and procedures;
- (3) Retain professional services, if necessary, including accountants, auditors, consultants, and other experts;
- (4) Seek rulings and other guidance from the United States Department of the Treasury and the Internal Revenue Service relating to the program;
- (5) Make changes to the program required for the participants in the program to obtain the federal income tax benefits or treatment provided by section 529 of the Internal Revenue Code and related regulations;
- (6) Interpret, in rules, policies, guidelines, and procedures, the provisions of this Act broadly

in light of its purpose and objectives;

- (7) Charge, impose, and collect administrative fees and service charges in connection with any agreement, contract, or transaction relating to the program;
- (8) Select any financial institution or institutions to act as a depository and manager of the program in accordance with this Act.

Section 3. The council may implement the program through the use of one or more financial institutions to act as the depositories and managers. Under the program, persons may establish accounts through the program at a depository. The council may solicit proposals from financial institutions to act as the depositories and managers of the program. Financial institutions that submit proposals must describe the financial instruments that will be held in accounts. Any program depositories and managers selected by the council shall be selected from among bidding financial institutions that demonstrate the most advantageous combination, both to potential program participants and this state, of the following factors:

- (1) Financial stability and integrity;
- (2) The safety of the investment instruments being offered, taking into account any insurance provided with respect to these instruments;
- (3) The ability of the financial institution to track estimated costs of higher education as calculated by the council;
- (4) The ability of the financial institutions, directly or through a subcontract, to satisfy record-keeping and reporting requirements;
- (5) The financial institution's plan for promoting the program and the investment it is willing to make to promote the program;
- (6) The fees, if any, proposed to be charged to persons for maintaining accounts;
- (7) The minimum initial deposit and minimum contributions that the financial institution will

require and the willingness of the financial institution to accept contributions through payroll deduction plans and other deposit plans; and

- (8) Any other benefits to this state or its residents included in the proposal, including an account opening fee payable to the council by the account owner and an additional fee from the financial institution for statewide program marketing by the council.

Section 4. The council shall enter into a contract with any financial institution engaged to serve as a program manager and depository. The council may select more than one financial institution if both of the following conditions exist:

- (1) The United States Internal Revenue Service has provided guidance that giving a contributor such a choice will not cause the program to fail to qualify for favorable tax treatment under section 529 of the Internal Revenue Code and related regulations; and
- (2) The council concludes that the choice of financial institutions is in the best interest of program beneficiaries and will not interfere with the promotion of the program.

Section 5. A program manager shall:

- (1) Take all action required to keep the program in compliance with the requirements of this Act, the rules promulgated by the council pursuant to chapter 1-26, and any contract with the council to manage the program so that the program is treated as a qualified state tuition plan under section 529 of the Internal Revenue Code and related regulations;
- (2) Keep adequate records of each account, keep each account segregated from each other account and provide the council with the information necessary to prepare statements required by sections 22, 23, and 24 of this Act or file these statements on behalf of the council;
- (3) Compile and total information contained in statements required to be prepared under sections 22, 23, and 24 of this Act and provide these compilations to the council;

- (4) Provide the council with this information to assist the council to determine compliance with section 21 of this Act;
- (5) Provide representatives of the council, including other contractors or other state agencies, access to the books and records of the program manager to the extent needed to determine compliance with the contract; and
- (6) Hold all accounts in trust for the benefit of this state and the account owner.

Section 6. Any contract executed between the council and a financial institution pursuant to this Act shall be for a term of at least three years and not more than seven years.

Section 7. If a contract executed between the council and a financial institution pursuant to this Act is not renewed, all of the following conditions apply at the end of the term of the nonrenewed contract:

- (1) Accounts previously established and held in investment instruments at the financial institution may not be terminated;
- (2) Additional contributions may be made to the accounts; and
- (3) No new accounts may be placed with that financial institution.

Section 8. The council may terminate a contract with a financial institution at any time for good cause. If a contract is terminated, the council shall take custody of accounts held at that financial institution and shall seek to promptly transfer the accounts to another financial institution that is selected as a program manager and into investment instruments as similar to the original investments as possible.

Section 9. The program shall be operated through the use of accounts. An account may be opened by any person who desires to save to pay the qualified higher education expenses of an individual by satisfying each of the following requirements:

- (1) Completing an application in the form prescribed by the council. The application shall

include the following information:

- (a) The name, address, and social security number or employer identification number of the contributor;
 - (b) The name, address, and social security number or employer identification number of the account owner if the account owner is not the contributor;
 - (c) The name, address, and social security number of the designated beneficiary;
 - (d) The certification relating to no excess contributions required by section 21 of this Act; and
 - (e) Any other information that the council may require;
- (2) Paying the one-time application fee established by the council;
 - (3) Making the minimum contribution required by the council;
 - (4) Designating the type of account to be opened if more than one type of account is offered.

Section 10. Any person may make contributions to an account after the account is opened.

Contributions to accounts may be made only in cash.

Section 11. Account owners may withdraw all or part of the balance from an account on sixty days' notice, or a shorter period as may be authorized by the council, under rules promulgated by the council pursuant to chapter 1-26. These rules shall include provisions that will generally enable the council or program manager to determine if a withdrawal is a nonqualified withdrawal. The rules may require one or more of the following:

- (1) Account owners seeking to make a withdrawal other than a nonqualified withdrawal shall provide certifications, copies of bills for qualified higher education expenses, or other supporting material;
- (2) Qualified withdrawals from an account shall be made only by a check payable jointly to the designated beneficiary and a higher education institution as designated by the account

owner, except as expressly otherwise permitted by section 529 of the Internal Revenue Code and related regulations;

- (3) Withdrawals not meeting requirements established by the council shall be treated as nonqualified withdrawals by the program manager, and if these withdrawals are not nonqualified withdrawals, the account owner must seek refunds of penalties directly from the council.

Section 12. An account owner may change the designated beneficiary of an account to an individual who is a member of the family of the former designated beneficiary or to any other individual in accordance with procedures established by the council by rules promulgated pursuant to chapter 1-26.

Section 13. On the direction of an account owner, all or a portion of an account may be transferred to another account of which the designated beneficiary is a member of the family of the designated beneficiary of the transferee account, if the transferee account was created by this Act or under a qualified state tuition program maintained by another state in accordance with section 529 of the Internal Revenue Code and related regulations.

Section 14. Changes in designated beneficiaries and rollovers are not permitted if the changes or rollovers would violate either of the following:

- (1) Section 21 of this Act relating to excess contributions; or
- (2) Section 18 of this Act relating to investment choice.

Section 15. In the case of any nonqualified withdrawal from an account, an amount equal to ten percent of the portion of the proposed withdrawal that would constitute earnings as determined in accordance with section 529 of the Internal Revenue Code and related regulations shall be withheld as a penalty and paid to the council for use in operating and marketing the program and for state student financial aid.

The council, by rule promulgated pursuant to chapter 1-26, shall increase the percentage of the penalty or change the basis of this penalty if the council determines that the amount of the penalty must be increased to constitute a penalty that is more than a de minimis penalty for purposes of qualifying the program as a qualified state tuition program under section 529 of the Internal Revenue Code and related regulations.

The council may decrease the percentage of the penalty if it determines that the penalty is greater than is required to constitute a penalty that is more than a de minimis penalty for purposes of qualifying the program as a qualified state tuition program under section 529 of the Internal Revenue Code and related regulations.

Section 16. If an account owner makes a nonqualified withdrawal and no penalty amount is withheld pursuant to section 15 of this Act or the amount withheld was less than the amount required to be withheld under section 15 of this Act for nonqualified withdrawals, the account owner shall pay the unpaid portion of the penalty to the council on or before April fifteenth of the following calendar year.

Section 17. Each account shall be maintained separately from each other account under the program. Separate records and accounting shall be maintained for each account for each designated beneficiary.

Section 18. No contributor to, account owner of, or designated beneficiary of, any account may direct the investment of any contributions to an account or the earnings from the account.

Section 19. If the council terminates the authority of a financial institution to hold accounts and accounts must be moved from that financial institution to another financial institution, the council shall select the financial institution and type of investment to which the balance of the account is moved unless the Internal Revenue Service provides guidance stating that allowing the account owner to select among several financial institutions that are then program managers and depositories would

not cause the program to cease to be a qualified state tuition plan.

Section 20. Neither an account owner nor a designated beneficiary may use an interest in an account as security for a loan. Any pledge of an interest in an account is of no force and effect.

Section 21. The council shall adopt rules pursuant to chapter 1-26 to prevent contributions on behalf of a designated beneficiary in excess of those necessary to pay the qualified higher education expenses of the designated beneficiaries and to satisfy the safe harbor requirements under section 529 of the Internal Revenue Code and related regulations.

Section 22. If there is any distribution from an account to any person or for the benefit of any person during a calendar year, the distribution shall be reported to the Internal Revenue Service and the account owner or the designated beneficiary to the extent required by federal law.

Section 23. The financial institution shall provide statements to each account owner at least once each year within thirty-one days after the twelve-month period to which they relate. The statement shall identify the contributions made during a preceding twelve-month period, the total contributions made through the end of the period, the value of the account as of the end of this period, distribution made during this period, and any other matters that the council requires be reported to the account owner.

Section 24. Statements and information returns relating to accounts shall be prepared and filed to the extent required by federal or state tax law.

Section 25. A state or local government or organizations described in section 501(c)(3) of the Internal Revenue Code and related regulations may open and become the account owner of an account to fund scholarships for persons whose identity will be determined after an account is opened. In this case, the requirement that a designated beneficiary be designated when an account is opened does not apply and each person who receives an interest in the account as a scholarship shall be treated as a designated beneficiary with respect to the interest.

Section 26. Any social security numbers, taxpayer identification numbers, addresses, or telephone numbers of account holders and designated beneficiaries that come into the possession of the council are confidential, are not public records, and may not be released by the council except as required by federal law.

Section 27. Any student loan program, student grant program, or other financial assistance program established or administered by this state or by a state supported educational institution shall treat the balance in an account of which the student is a designated beneficiary as if it were an asset of the parent of the designated beneficiary and not as a scholarship or grant or as an asset of the student for determining a student's or parent's income, assets, or financial need.

However, this section does not apply if any of the following conditions exist:

- (1) Federal law requires all or a portion of the amount in an account to be taken into account in a different manner;
- (2) Federal benefits could be lost if all or a portion of the amount in an account is not taken into account in a different manner; or
- (3) A specific grant establishing a financial assistance program requires that all or a portion of the amount in an account be taken into account.

Section 28. Nothing in this Act:

- (1) Gives any designated beneficiary any rights or legal interest with respect to an account unless the designated beneficiary is the account owner;
- (2) Guarantees that a designated beneficiary will be admitted to an eligible education institution or be allowed to continue enrollment at or graduate from an eligible education institution after admission;
- (3) Establishes state residency for an individual merely because the individual is a designated beneficiary; or

- (4) Guarantees that amounts saved pursuant to the program will be sufficient to cover the qualified higher education expenses of a designated beneficiary.

Section 29. Nothing in this Act establishes any obligation of this state or any agency or instrumentality of this state to guarantee for the benefit of any account owner, contributor to an account, or designated beneficiary any of the following:

- (1) The return of any amounts contributed to an account;
- (2) The rate of interest or other return on any account;
- (3) The payment of interest or other return on any account; or
- (4) Tuition rates or the cost of related higher education expenditures.

Section 30. Every contract, application, deposit slip, or other similar document that may be used in connection with a contribution to an account shall clearly indicate that the account is not insured by this state and neither the principal deposited nor the investment return is guaranteed by this state.

Section 31. The council shall submit an annual report to the speaker of the House of Representatives, the president pro tem of the Senate, and the Governor by February first that summarizes the council's findings and recommendations concerning the program established by this Act.

An Act to create a higher education savings plan.

I certify that the attached Act
originated in the

SENATE as Bill No. 248

Secretary of the Senate

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 248

File No. _____

Chapter No. _____

Received at this Executive Office
this ____ day of _____ ,

20__ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20__

Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State