

Information/Action Item

California Student Aid Commission

Consideration of the amendment/extension of the Operating Agreement
between the Commission and its auxiliary organization, EdFund

California Education Code section 69522(d) requires the operations of EDFUND be conducted in conformity with an Operating Agreement approved annually by the Commission. The current Operating Agreement between the Commission and EDFUND is set to expire on June 30, 2011.

The proposed Operating Agreement (OA) is essentially a two-year extension of the previous OA. There are no new provisions or additional obligations being placed on either the Commission or EDFUND under the terms of the new OA.

Because of the transition of the Federal Family Education Loan Program guaranty and the fact that EDFUND no longer provides the types of services to the Commission that it used to, there were a significant number of the provisions in the previous agreement that were no longer necessary going forward. As a result, all irrelevant provisions have been removed from the proposed OA. All other provisions of the agreement remain substantially the same, with only minor changes, where needed, to maintain the continuity of the text.

A copy of the proposed Operating Agreement may be found at Tab 2.a.

Responsible Person(s): Keri Tippins
General Counsel

OPERATING AGREEMENT

This Agreement is effective the first day of July 2011 between the California Student Aid Commission (CSAC), a public agency of the State of California and EDFUND, a nonprofit public benefit corporation organized under the laws of the State of California.

ARTICLE I

Term

- 1.1 Term. The term of this Agreement shall be for a 2-year period from the effective date, unless sooner terminated under Article VII.

ARTICLE II

Definitions

- 2.1 Definitions. In this Agreement, the following words and terms shall have the following meanings:
- A. "Agreement" is the Operating Agreement between the California Student Aid Commission and EDFUND.
 - B. "California Student Aid Commission" or "CSAC" is the primary State agency responsible for the administration of State-aid programs, key among them the Cal Grant Program. For purposes of this definition CSAC does not include EDFUND.
 - C. "Commission" is the governing body of the California Student Aid Commission.
 - D. "EDFUND" is the auxiliary corporation of the California Student Aid Commission, founded on January 1, 1997, as a nonprofit 501(c)(3) public benefit corporation.
 - E. "EDFUND Board of Directors" or the "EDFUND Board" is the governing body of EDFUND.

ARTICLE III

FFEL Program and Governance Policies

- 3.1 The Commission is responsible for developing and approving policies for the governance of EDFUND. Nothing in this Agreement or within any policy shall be construed as delegating to EDFUND the Commission's fiduciary responsibilities as required under California statute.

ARTICLE IV EDFUND's Agreements

- 4.1 Status as Auxiliary. EDFUND agrees to be the auxiliary organization of CSAC and operate as a nonprofit public benefit corporation in good standing under California law. EDFUND further agrees to maintain its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.
- 4.2 Scope of Services. EDFUND agrees to provide CSAC with services pursuant to this Agreement. EDFUND further agrees not to engage in any activities, services or corporate actions outside the scope of services agreed to herein without approval of the Commission.
- 4.3 Compliance. EDFUND agrees to perform all services as agreed to by the Commission and the EDFUND Board in full compliance with applicable State law.
- 4.4 EDFUND Policies. EDFUND agrees to develop, implement and maintain written policies and procedures as are necessary for EDFUND to fully comply with this Agreement. Proposed policies relating directly or indirectly to, conflict of interest, procurements, contracts, travel, training, business expense reimbursement, corporate travel and purchasing cards shall be submitted to the Commission and the EDFUND Board for review and approval prior to implementation. The Commission recognizes the EDFUND Board of Directors' responsibilities to make business decisions pursuant to the California Corporations Code; however, all EDFUND policies and procedures shall be available for review by the Commission. EDFUND agrees to submit any new or revised policy to a designated individual on the CSAC staff and/or such other individual(s) identified by the Commission within ten (10) days of such policy's adoption.
- 4.5 Assets. EDFUND agrees and acknowledges that all of its assets, whether owned by EDFUND or in its control, are held for the benefit of CSAC. EDFUND agrees to manage such assets with the same duty of care as if the assets were owned by EDFUND, and to use and administer such assets only for purposes allowed herein and in conformance with State law. The Commission agrees to adopt a policy to provide an efficient, reasonable and cost-effective procedure for the disposal of EDFUND physical property with a de minimis value or located out-of-state, provided that such policy does not violate State law.
- 4.6 Insurance. EDFUND agrees to maintain in force during the term of this Agreement insurance as follows. To the extent that a specific coverage is not warranted by EDFUND's business operations, the requirement to maintain the coverage may be waived. Deletion of Directors and Officers Insurance may only be accomplished through formal action of the EDFUND Board of Directors.:
- A. GENERAL LIABILITY INSURANCE, including fidelity coverage, with limits of liability for each occurrence of not less than \$5,000,000 for bodily injury and property liability combined.
 - B. WORKERS COMPENSATION INSURANCE with limits as required by law.

- C. DIRECTORS AND OFFICERS INSURANCE with coverage of not less than \$5,000,000 per claim with a \$5,000,000 annual aggregate limit.
- D. AUTOMOBILE LIABILITY for liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of EDFUND, with limits of \$1,000,000 per accident for bodily and property damage.

The above insurance limits are the minimum amounts for the described policies and shall be adjusted as necessary to assure sufficient coverage. All such applicable policy(ies) of insurance shall contain a special endorsement naming as a covered entity "The State of California, Student Aid Commission."

ARTICLE V

Commission/CSAC Agreements

- 5.1 Scope of Services. The Commission agrees to provide EDFUND with support and services pursuant to this Agreement.
- 5.2 Review and Approvals. The Commission agrees to review any other requests and items within the scope of this Agreement and provide approvals in a timely manner.

ARTICLE VI

Payments to EDFUND and/or CSAC

- 6.1 Travel Expenses. All travel expenses incurred by EDFUND shall be reimbursed pursuant to the EDFUND Travel Policy approved by the Commission and the EDFUND Board. The policy is incorporated herein by this reference as if set forth in full.
- 6.2 Reimbursements to CSAC. EDFUND agrees to pay CSAC for services rendered pursuant to this Agreement.

ARTICLE VII

Effective Date, Assignment and Termination

- 7.1 Effective Date. This Agreement shall be in full force and effect as of the date first above written and shall continue in full force and effect until June 30, 2013 unless sooner terminated as herein provided. The parties may amend this Agreement for subsequent terms, as allowed by law, by written agreement of both parties prior to the expiration of this Agreement.
- 7.2 Assignment. This Agreement may not be assigned in whole or in part by either party without the prior written consent of the other party.

- 7.3 Termination without Cause. The Commission may terminate this Agreement at any time without cause upon sixty (60) days' written notice.
- 7.4 Termination for Cause. Either party may terminate this Agreement for cause upon thirty (30) days' written notice to the other party specifying the cause and the proposed termination date. For purposes of this Agreement "cause" shall mean:
- A. Material breach of this Agreement,
 - B. The inability by a party to perform in whole or material part any of its obligations hereunder for a period of more than thirty (30) consecutive days, or
 - C. With respect to termination by the Commission, the filing of a petition in bankruptcy by EDFUND or against EDFUND by someone other than a party to this Agreement.

However, should the party receiving notice of termination for cause cure, in the noticing party's sole judgment, the condition giving rise to such notice before the date specified for termination, then this Agreement shall continue in full force and effect.

In lieu of termination under this Section, the parties may initiate the dispute resolution process in Section 9.14.

- 7.5 Transfer of Assets. Upon termination of this Agreement and in the absence of a subsequent Operating Agreement between the parties, all of EDFUND's assets, tangible and intangible, shall immediately and without further action by either party become the property of CSAC. EDFUND agrees to take promptly, all steps reasonably requested by the Commission to effectuate such transfer.

ARTICLE VIII Oversight

- 8.1 Commission Oversight. the Commission has statutory and fiduciary responsibilities for oversight of EDFUND and cannot delegate such responsibilities to other individuals or entities. While the Commission may prescribe through policies certain functions and responsibilities to EDFUND, the EDFUND Board, and/or other individuals or entities to assist the Commission, all final decisions that involve the Commission's statutory and fiduciary responsibilities shall be made by the Commission.
- 8.2 Audits Supporting the Commission's Oversight Responsibilities. The following audits shall be performed in accordance with California Education Code Sections 69522(c)(2) and 69527(a); and/or any other applicable State or federal statutory provisions:
- A. Annual EDFUND Financial Statement Audit – An independent certified public accountant shall provide to the Commission and the EDFUND Board the annual audited financial statements of EDFUND.

- B. Annual EDFUND 401(k) Plan Financial Statement Audit – An independent certified public accountant shall provide to the EDFUND Board the annual audited financial statements of the EDFUND 401(k) Plan.
 - C. United States Department of Education Audits – The United States Department of Education shall provide to the Commission the audit findings issued by the United States Department of Education.
 - D. Other Audits and Evaluations – This shall include any other review, audit or evaluation approved by the Commission in consultation with the EDFUND Board. This shall include conducting regular performance evaluations of the operations of EDFUND in furtherance of the Commission’s fiscal and fiduciary responsibility for approved programs as required in California Education Code Section 69522 (c)(2). This shall also include any other audits required by State or federal law, including the State auditor. Such reviews, audits or evaluations shall be conducted by an independent certified public accountant, independent consultant or such other independent individuals or entities designated by the Commission.
- 8.3 Audit Issues or Findings. EDFUND agrees to respond to audit issues or findings in a timely manner.
- 8.4 Reports Supporting the Commission’s Oversight Responsibility. EDFUND agrees to provide any requested or required report(s) to the Commission or such individual(s) designated by the Commission, provided that the Commission may, in their discretion, discontinue any report due to obsolescence.

ARTICLE IX General Provisions

- 9.1 Corporate Obligation. This Agreement is a corporate obligation of EDFUND and an obligation of a public agency with respect to the Commission. Any liability arising hereunder shall be a corporate liability or, with respect to the Commission, governed by the California Education Code Section 69510 *et seq.* No commissioner, director, officer or employee of either party shall be subject to any liability to any other party for any action taken, or for refraining from taking action in good faith or for errors in judgment.
- 9.2 Waiver. No failure or delay on the part of either party in exercising any right, power or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy hereunder.
- 9.3 Amendments. No amendment or variation of the terms of this Agreement shall be valid unless made in writing, signed by the parties and approved as required. No oral understanding or agreement not incorporated in the Agreement is binding on any of the parties.

CSAC and EDFUND agree to mutually work together to address any further concerns that may exist with regard to this Agreement that are expressed by the California Department of Finance and the Joint Legislative Budget Committee and to submit

amendments relating thereto to the Commission and the EDFUND Board for their approval pursuant to the provisions of Section 69522 (d)(2) of the California Education Code.

- 9.4 Governing Law. This Agreement shall be construed in accordance with and be governed by the laws of the State of California. The parties agree that the venue for any action pursuant to this Section shall be Sacramento County, California.
- 9.5 Continuing Covenants. All covenants, agreements, representations and warranties contained herein shall extend to, inure to the benefit of and bind all assignees and successors of the respective parties hereto, and the representations, warranties and covenants herein contained shall survive the termination of this Agreement, but shall not be deemed to have been made with respect to any period of time subsequent to the termination of this Agreement.
- 9.6 Notice. No written notice required to be given hereunder shall be effective until received by the party, with proof of delivery, to whom addressed, or until five (5) calendar days after mailing to the addressee, whichever is earlier.
- 9.7 Force Majeure. If either party is rendered unable, wholly or in part, by a force outside the control of the parties (including, but not limited to, acts of God or the public enemy, acts of government in either its sovereign or contractual capacity, strikes, lockouts, riots, acts of war, terrorism, epidemics, fire, communication line or power failure, changes in applicable law, embargoes, weather, quarantine, earthquakes, or other disasters) to carry out its obligations under this Agreement, that party shall give to the other party prompt written notice to that effect; thereupon, the affected obligations of the party giving the notice, shall be suspended so long as such party is unable to so perform and such party shall have no liability to the other for the failure to perform any suspended obligation during the period of suspension; however, this provision is not intended to modify or abrogate in any way the right of a party to terminate this Agreement if a condition for termination specified elsewhere herein exists.
- 9.8 Cooperation between Parties. The Commission and EDFUND agree that they will cooperate promptly and fully with one another in order to carry out the terms and provisions of this Agreement. The Commission and EDFUND also agree to mutually promote and support each other in the market place.
- 9.9 Duly Authorized. Each party with respect to itself represents and warrants that the making and performance of this Agreement and the activities contemplated hereby (i) have been duly authorized by all necessary corporate, statutory, regulatory or Commission action, and (ii) do not and will not violate any provision of law, or any regulation, order, decree, writ or injunction, or any provision of its governing statute or instrument.

This Agreement is the legal, valid and binding obligation of such party, enforceable in accordance with the terms hereof subject to the exercise of judicial discretion in accordance with general principles of equity, to the valid exercise of the police powers of the sovereign states of the United States of America, and of the constitutional powers of the United States of America and to bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally.

- 9.10 Safeguards and Information Security. Throughout this Agreement, CSAC and EDFUND shall implement and maintain appropriate safeguards, as that term is used in the Federal Trade Commission's Safeguards Rule ("Safeguards Rule") at 16 C.F.R. §314 *et. seq.*, for all Customer Information as defined at §314.2 *et. seq.* of the Safeguards Rule, as well as all Confidential Information provided to CSAC and/or EDFUND by any individual, only as necessary to perform the services as set forth in this Agreement. CSAC and/or EDFUND agrees to not disclose such information provided to them with any third party other than as permitted in this Agreement and SLA. In addition, the parties agree to comply with any other state and federal laws.
- 9.11 Custodian of Records, Examination. EDFUND shall serve as the custodian of all CSAC records and systems within its possession and control as defined by Federal Trade Commission's Safeguards Rule, at 16 C.F.R. §314.1(b). The Commission shall be granted complete right and access to such records and systems upon request.
- 9.12 Confidentiality. Subject to the requirements of applicable law, including the Bagley-Keene Open Meeting Act, California Government Code Section 11120 *et seq.*, the Public Records Act, California Government Code Section 6250 *et seq.*, and California Education Code Section 69525(g), both parties agree to maintain the confidentiality of documents and other information provided under this Agreement to the fullest extent possible, including all those marked "Proprietary and Confidential." As an auxiliary of the Commission, EDFUND may not deem any document, information or record, including employee records, as "confidential" as to the Commission.
- 9.13 Contract Manager. CSAC and EDFUND shall each designate in writing a Contract Manager within ten (10) days of signing this Agreement. All notices to be provided under this Agreement shall be directed to the Contract Manager. In addition, each party agrees to communicate any material issues or disputes arising out of this Agreement to the other party's Contract Manager.
- 9.14 Dispute Resolution. The parties will attempt in good faith to resolve through informal negotiation any issue, dispute, claim, controversy and/or breach (hereinafter referred to as breach) arising out of or relating to this Agreement. In the event the breach cannot be resolved by the Commission and EDFUND Board, the Commission's decision shall be final.
- 9.15 Legal Recourse. Because all monies expended by EDFUND are state monies, EDFUND is not authorized to pursue legal action against the State of California, the Commission, the Department of Finance or any other subdivisions of the State, its officials or employees, on any issue, dispute, claim, controversy and/or breach arising out of, or in any manner relating to, this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

California Student Aid Commission

EDFUND

By: _____

**Barry Keene
Commission Chair
California Student Aid Commission**

By: _____

**Enrique Murillo
Board of Directors, Chair
EDFUND**

Date: _____

Date: _____