

ACT 90

H.B. NO. 2760

A Bill for an Act Relating to the College Savings Program.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 256-1, Hawaii Revised Statutes, is amended as follows:

(1) By adding a new definition to be appropriately inserted and to read as follows:

““Eligible educational institution” means an institution defined in section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation.”

(2) By amending the definitions of “account owner” and “nonqualified withdrawal” to read as follows:

““Account owner” means the individual who enters into a tuition savings agreement pursuant to this chapter and as defined under the [final regulations adopted by the Internal Revenue Service.] proposed income tax regulations, sections 1.529-1 to 1.529-6 or the final regulations relating to section 529 of the Internal Revenue Code of 1986, as amended, whichever is applicable, including any amendments or supplements thereto.

“Nonqualified withdrawal” means a withdrawal from an account that is not:

(1) [A qualified withdrawal;] Used for qualified higher education expenses of the designated beneficiary;

- (2) [A withdrawal made as the result] Made on account of the death or disability of the designated beneficiary [of an account]; or
- (3) [A withdrawal made] Made on the account of a scholarship[.] (or allowance or payment described in section 135(d)(1)(B) or (C) of the Internal Revenue Code of 1986, as amended) received by the designated beneficiary, to the extent the withdrawal does not exceed the amount of the scholarship, allowance, or payment.”

(3) By deleting the definition “institution of higher education”.

[““Institution of higher education” means an institution defined in section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation.”]

SECTION 2. Section 256-3, Hawaii Revised Statutes, is amended to read as follows:

“[[§256-3]] Functions and powers of the director of finance. (a) The director of finance shall implement the program under the terms and conditions established by this chapter. The director of finance may make changes to the program as required for participants to obtain or maintain the federal [income] tax benefits or treatment provided by section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation.

(b) The director of finance may enter into tuition savings agreements with account owners pursuant to this chapter.

[(b)] (c) The director of finance may implement the program through the use of financial organizations as account depositories and managers. Under the program, individuals may establish accounts directly with an account depository.

[(c)] (d) The director of finance may solicit proposals from financial organizations to act as [depositories and managers of the] program[.] managers. Financial organizations submitting proposals shall describe the investment [instrument] instruments that will be held in accounts. The director of finance shall select as program [depositories and] managers the financial organizations[,] from among the bidding financial organizations that demonstrate the most advantageous combination, both to potential program participants and this State, based on the following factors:

- (1) The financial stability and integrity of the financial organization;
- (2) The safety of the investment [instrument] instruments being offered;
- (3) The ability of the investment [instrument] instruments to track the expected increasing costs of higher education;
- (4) The ability of the financial organization to satisfy recordkeeping and reporting requirements;
- (5) The financial organization’s plan for promoting the program and the resources it is willing to allocate to promote the program;
- (6) The fees, if any, proposed to be charged to persons for opening accounts;
- (7) The minimum initial deposit and minimum contributions that the financial organization will require;
- (8) The ability of financial organizations to accept electronic withdrawals, including payroll deduction plans; and
- (9) Other benefits to the State or its residents included in the proposal, including fees payable to the State to cover expenses to operate the program.

[(d)] (e) The director of finance may enter into a management contract of up to ten years with a financial organization. [The financial organization shall provide only one type of investment instrument.] The management contract shall include, at a minimum, terms requiring the financial organization to:

- (1) Take any action required to keep the program in compliance with requirements of section 256-4 and to manage the program to qualify it as a qualified state tuition plan under section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation;
- (2) Keep adequate records of each account, keep each account segregated from each other account, and provide the director of finance with the information necessary to prepare the statements required by section 256-4;
- (3) Compile information contained in statements required to be prepared under section 256-4 and provide the compilations to the director of finance;
- (4) If there is more than one program manager, provide the director of finance with the information necessary to determine compliance with section 256-4;
- (5) Provide the director of finance or designee access to the books and records of the program manager to the extent needed to determine compliance with the contract;
- (6) Hold all accounts for the benefit of the account owner;
- (7) Be audited at least annually by a firm of independent certified public accountants selected by the program manager, and provide the results of the audit to the director of finance; [and]
- (8) Provide the director of finance with copies of all regulatory filings and reports related to the program made by it during the term of the management contract or while it is holding any accounts, other than confidential filings or reports that will not become part of the program. The program manager shall make available for review by the director of finance, the results of any periodic examination of the manager by any state or federal banking, insurance, or securities commission, except to the extent that the report or reports may not be disclosed under applicable law or the rules of the commission[.]; and
- (9) Undertake to provide the information required by rule 15c2-12(b)(5) under the Securities Exchange Act of 1934 pursuant to a continuing disclosure certificate for the benefit of the account owners.

[(e)] (f) The director of finance may select more than one financial organization and investment instrument for the program [when the Internal Revenue Services has provided guidance that giving a contributor the choice of two or more investment instruments under a state program will not cause the program to fail to qualify for favorable tax treatment under section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation].

[(f)] (g) The director of finance may require an audit to be conducted of the operations and financial position of the program [depository and] manager at any time if the director of finance has any reason to be concerned about the financial position, the recordkeeping practices, or the status of accounts of the program [depository or] manager.

[(g)] (h) During the term of any contract with a program manager, the director of finance shall conduct an examination of the manager and its handling of accounts. The examination shall be conducted at least biennially if the manager is not otherwise subject to periodic examination by the commissioner of financial institutions, the Federal Deposit Insurance Corporation, or other similar entity.

[(h)] If selection of a financial organization as a program manager or depository is not renewed, after the end of the term:

- (1) Accounts previously established and held in investment instruments at the financial organization may be terminated;
- (2) Additional contributions may be made to the accounts;

- (3) No new accounts may be placed with the financial organization; and
- (4) Existing accounts held by the depository shall remain subject to all oversight and reporting requirements established by the director of finance.

If the director of finance terminates a financial organization as a program manager or depository, the director of finance shall take custody of accounts held by the financial organization and shall seek to promptly transfer the accounts to another financial organization that is selected as a program manager or depository and into investment instruments as similar to the original instruments as possible.]

(i) The director of finance may establish a nominal fee for an application for a college account.

(j) The director of finance may enter into contracts for the services of consultants for rendering professional and technical assistance and advice and any other contracts that are necessary and proper for the implementation of the program.

(k) The director of finance may adopt rules to implement the program pursuant to chapter 91.”

SECTION 3. Section 256-4, Hawaii Revised Statutes, is amended to read as follows:

“**[[§256-4]] Program requirements; college account.** (a) A college account may be opened by any person who desires to save money for the payment of the qualified higher education expenses on behalf of a designated beneficiary. The person shall be considered the account owner as defined in section 256-1. An application for an account shall be in the form prescribed by the program and shall contain the following:

- (1) The name, address, and social security number or employer identification number of the account owner;
- (2) The designation of a beneficiary;
- (3) The name, address, and social security number of the designated beneficiary;
- (4) A certification relating to no excess contributions; and
- (5) Other information as the program may require.

(b) Only the account owner may make contributions to the account after the account is opened.

(c) Contributions to accounts may be made only in cash.

(d) An account owner may withdraw all or part of the balance from an account on sixty days’ notice or a shorter period as may be authorized under rules governing the program. The rules shall include provisions to generally enable the determination of whether a withdrawal is a nonqualified withdrawal or a qualified withdrawal. The rules may require one or more of the following:

- (1) An account owner seeking to make a qualified withdrawal shall provide certifications of qualified higher education expenses and other information required to comply with section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation;
- (2) Withdrawals not meeting the requirements of this section shall be treated as nonqualified withdrawals by the program manager, and if the withdrawals are subsequently deemed qualified withdrawals within a reasonable time period as specified by the director of finance, the account owner shall seek any refund of penalties directly from the program.

(e) An account owner may change the designated beneficiary of an account to an individual who is a member of the family of the prior designated beneficiary. An account owner may transfer all or a portion of an account to another college

account, the designated beneficiary of which is a member of the same family, as defined in section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation, as the beneficiary of the initial account. Changes in designated beneficiaries and transfers under this section shall not be permitted if they constitute excess contributions.

(f) In the case of any nonqualified withdrawal from an account, an amount equal to ten per cent (or that rate imposed under final regulations adopted by the Internal Revenue Service) of the portion of the withdrawal constituting income as determined in accordance with the principles of section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation, shall be [withheld] collected as a penalty and paid to the college savings program trust fund[.], as provided under section 529 of the Internal Revenue Code of 1986, as amended, successor legislation, or any guidance issued by the Internal Revenue Service.

(g) The percentage of the penalty described in subsection (f) may be increased if the director of finance determines that the amount of the penalty must be increased to constitute a greater than de minimis penalty for purposes of qualifying the program as a qualified state tuition program under section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation.

(h) The percentage of the penalty described in subsection (f) may be decreased by rule if it is determined [that:

- (1) The] the penalty is greater than the amount required to constitute a greater than de minimis penalty for purposes of qualifying the program as a qualified state tuition program under section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation[; and
- (2) The penalty, when combined with other revenue generated under this chapter, is producing more revenue than is required to cover the costs of operating the program and recover any prior costs not previously recovered].

[(i) If an account owner makes a nonqualified withdrawal and no penalty amount is withheld pursuant to subsection (f), or the amount withheld was less than the amount required to be withheld under subsection (f) for nonqualified withdrawals, the account owner shall pay the unpaid portion of the penalty to the program. The unpaid portion shall be paid on the date that the account owner files the account owner's state or federal income tax return, whichever is filed earlier, for the taxable year of the withdrawal. If the account owner does not file a return, the unpaid portion shall be paid on the date that the earlier return is due. Authorized extensions to filing returns may be taken into account in determining the date for paying the unpaid portion.

(j) [(i)] The program shall provide separate accounting for each designated beneficiary.

[(k)] [(j)] No account owner or designated beneficiary of any account shall be permitted to direct the investment of any contributions to an account or the earnings on it.

[(l)] [(k)] Neither an account owner nor a designated beneficiary shall use an interest in an account as security for a loan. Any pledge of an interest in an account shall be of no force and effect.

[(m)] [(l)] Contributions on behalf of a designated beneficiary in excess of those necessary to provide for the qualified higher education expenses of the designated beneficiary shall not be allowed. The prohibition on excess contributions shall conform to section 529 of the Internal Revenue Code of 1986, as amended, or successor legislation.

[(n)] [(m)] If there is any distribution from an account to any individual or for the benefit of any individual during a calendar year, the distribution shall be reported

to the Internal Revenue Service and the account owner, the designated beneficiary, or the distributee, to the extent required by federal law or regulation.

Statements shall be provided to each account owner at least once each year within sixty days after the end of 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 to the account through the end of the period, the value of the account at the end of the period, distributions made during the period, and any other information that the director of finance requires to be reported to the account owner.

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

[(o)] (n) A local government or organization described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or successor legislation, may open and become the account owner of an account to fund scholarships for persons whose [[identity]] shall be determined upon disbursement. Any account opened pursuant to this subsection is not required to comply with the condition set forth in subsection (a) that a beneficiary be designated when an account is opened, and each individual who receives an interest in the account as a scholarship shall be treated as a designated beneficiary.

[(p)] (o) An annual fee may be imposed upon the account owner for the maintenance of the account.

[(q) A qualified withdrawal may be made only after at least three calendar years have elapsed from the time an account is opened.] (p) A minimum length of time as determined by the director of finance may be required of the account before distributions for qualified higher education can be made.

[(r)] (q) The program shall disclose in writing the following information to each account owner and prospective account owner of a college account:

- (1) The terms and conditions for purchasing a college account;
- (2) Any restrictions on the substitution of beneficiaries;
- (3) The person or entity entitled to terminate the tuition savings agreement;
- (4) The period of time during which a beneficiary may receive benefits under the tuition savings agreement;
- (5) The terms and conditions under which money may be wholly or partially withdrawn from the program, including any reasonable charges and fees that may be imposed for withdrawal; and
- (6) The probable tax consequences associated with contributions to and distributions from accounts.”

SECTION 4. Section 256-5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Nothing in this chapter shall create or be construed to create any obligation of the director of finance, the State, or any agency or instrumentality of the State to guarantee for the benefit of any account owner or designated beneficiary with respect to:

- (1) The rate of interest or other return on any account; [or]
- (2) The payment of interest or other return on any account[.]; or
- (3) The repayment of the principal of any account.

The director of finance shall provide by rule that every tuition savings agreement, contract, application, deposit slip, or other similar document that may be used in connection with a contribution to an account clearly indicate that the account is not insured by the State and neither the principal deposited nor the investment return is guaranteed by the State.”

SECTION 5. Section 256-6, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§256-6]]~~ **College savings program trust fund.** (a) There is established the college savings program trust fund. The director of finance shall have custody of the fund. All payments from the fund shall be made in accordance with this chapter.

(b) The fund shall consist of a trust account and an operating account. The trust account shall include amounts received by the college savings program pursuant to tuition savings agreements, administrative charges, fees, and all other amounts received by the program from other sources, and interest and investment income earned by the fund. The director of finance, from time to time, shall make transfers from the trust account to the operating account for the immediate payment of obligations under tuition savings agreements, operating expenses, and administrative costs of the college savings program. [Administrative costs shall be paid out of the operating account.]

(c) The director of finance, as trustee, shall invest the assets of the fund in securities that constitute legal investments under state laws relating to the investment of trust fund assets by trust companies, including those authorized by article 8 of chapter 412. Trust fund assets shall be kept separate and shall not be commingled with other assets, except as provided in this chapter. The director of finance may enter into contracts to provide for investment advice and management, custodial services, and other professional services for the administration and investment of the program. [Administrative fees, costs, and expenses, including investment fees and expenses, shall be paid from the assets of the fund.]

(d) The director of finance shall provide for the administration of the fund, including maintaining participant records and accounts, and providing annual audited reports. The director of finance may enter into contracts for administrative services, including reports.

(e) All administrative fees, costs, and expenses, including investment fees and expenses, shall be paid from the operating account of the fund and, notwithstanding any other law to the contrary, may be made without appropriation or allotment.”

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon its approval.

(Approved May 2, 2000.)