

# MAY ADAM

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## HAND DELIVERY

Legislative Research Council  
ATTN: Jason Hancock, Director  
500 E. Capitol Avenue  
Pierre, SD 57501

Office of the Attorney General  
ATTN: Richard M. Williams  
1302 E. Hwy. 14, #1  
Pierre, SD 57501

RE: South Dakota Authorities Captive Insurer  
Joint Powers Agreement  
MAGT File: 0202.56

Gentlemen:

Pursuant to SDCL 1-24-6.1, enclosed for filing please find a true and correct copy of the fully executed Joint Powers Agreement between and among South Dakota Bureau of Administration, South Dakota Science and Technology Authority, South Dakota Building Authority, South Dakota Health and Educational Facilities Authority, Educational Enhancement Funding Corporation, South Dakota Housing Development Authority and South Dakota Ellsworth Development Authority. The date of the last signature on the Agreement is June 1, 2015.

If you have any questions, please do not hesitate to contact me.

Best regards.

Sincerely,

MAY, ADAM, GERDES & THOMPSON LLP

TIMOTHY M. ENGEL

TME:drm

Enclosure

cc/enc: Paul Kinsman  
Craig Ambach  
Mike Headley ✓  
Don Templeton  
Mark Lauseng

Scott Langduth  
Lt. Governor Matt Michels  
Jason Dilges  
Terry Prendergast

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**JOINT POWERS AGREEMENT  
AMONG  
SOUTH DAKOTA BUREAU OF ADMINISTRATION, SOUTH DAKOTA  
SCIENCE AND TECHNOLOGY AUTHORITY, SOUTH DAKOTA BUILDING  
AUTHORITY, SOUTH DAKOTA HEALTH AND EDUCATIONAL FACILITIES  
AUTHORITY, EDUCATIONAL ENHANCEMENT FUNDING CORPORATION,  
SOUTH DAKOTA HOUSING DEVELOPMENT AUTHORITY AND SOUTH DAKOTA  
ELLSWORTH DEVELOPMENT AUTHORITY**

This JOINT POWERS AGREEMENT (AGREEMENT) is entered into by and among the State of South Dakota, Bureau of Administration, 500 East Capitol Avenue, Pierre, South Dakota, 57502 (“BOA”); South Dakota Science and Technology Authority, 630 E. Summit Street, Lead, South Dakota, 57754 (“SDSTA”); South Dakota Building Authority, 330 S. Poplar Avenue, Suite 102, Pierre, South Dakota, 57501 (“SDBA”); South Dakota Health and Educational Facilities Authority, 330 S. Poplar Avenue, Suite 102, Pierre, South Dakota, 57501 (“HEFA”); Educational Enhancement Funding Corporation, 330 S. Poplar Avenue, Suite 102, Pierre, South Dakota, 57501 (“EEFC”); South Dakota Housing Development Authority, 3060 E. Elizabeth Avenue, Pierre, South Dakota, 57501 (“SDHDA”); and South Dakota Ellsworth Development Authority, 14 E. St. Joseph Street, Rapid City, South Dakota, 57701 (“SDEDA”). SDSTA, SDBA, HEFA, EEFC, SDHDA and SDEDA are sometimes referred to herein collectively as “the Authorities.”

WHEREAS, pursuant to SDCL ch. 58-46, governmental entities may cooperate to form a captive insurance company (the “Company”); and

WHEREAS, BOA and the Authorities desire to form a captive insurance company to insure certain risks as described herein; and

WHEREAS, BOA desires to provide formation and administrative services for the Company as described herein;

NOW THEREFORE, in consideration of the covenants and agreements contained herein, and the joint and mutual benefits and responsibilities flowing to each party as outlined in this AGREEMENT, the parties agree as follows:

1. The parties enter into this AGREEMENT pursuant to SDCL Ch. 1-24, SDCL Ch. 58-46 and the following authority:
  - a. BOA pursuant to SDCL Ch. 1-24;
  - b. SDSTA pursuant to SDCL 1-16H-32;

- c. SDBA pursuant to SDCL 5-12-8.1(15)
  - d. HEFA pursuant to SDCL 1-16A-15
  - e. EEFC pursuant to SDCL 5-12-51(8)
  - f. SDHDA pursuant to SDCL 11-11-34
  - g. SDEDA pursuant to SDCL 1-16J-24.
2. The purpose of this AGREEMENT is (a) to provide for the creation of the Company to insure certain risks of the parties hereto; and (b) to provide for certain administrative services for the Company by and through BOA both before and after formation of the Company.
  3. This AGREEMENT shall commence upon the date it is last signed and executed by duly authorized representatives of the parties and shall remain in full force and effect until terminated as permitted by this AGREEMENT.
  4. This AGREEMENT may be terminated as to all parties at any time by written agreement of the parties. This AGREEMENT may be terminated as to any one party upon 180 days written notice by the terminating party to the other parties.

Notwithstanding any other provision, this AGREEMENT depends upon continued availability of appropriated funds and expenditure authority for the purposes contemplated herein. This AGREEMENT will be terminated if the Legislature fails to appropriate funds or grant expenditure authority or if there is a lack of sufficient appropriated funds or lack of expenditure authority available to the parties to perform their obligations under this AGREEMENT, whether due to lack of appropriations by the Legislature or otherwise. Once the determination of funding insufficiency is made by the affected party, the affected party will provide written notice to the other parties of such funding insufficiency and the effective date of the termination of the AGREEMENT based upon such insufficiency.

Termination by any party under this provision does not constitute a default or give rise to any claim against the notifying party except that the terminating party agrees to pay or otherwise make provision for its obligations hereunder up to the effective date of termination.

It is anticipated that the Company's assets will consist of its surplus, , receivables, software systems and cash. In the event of termination of this AGREEMENT, the capital

of the Company will be held as required by SDCL Ch. 58-46 and other applicable law. Any amounts remaining after the payment of, or provision for, all claims or other amounts due shall be returned to the party making the contribution.

5. The parties agree that BOA may assist the parties to take all steps reasonably necessary to form the Company in conformity with SDCL Ch. 58-46 and other applicable law including, but not limited to, retaining legal counsel of BOA's choosing (after consultation with the other parties hereto), drafting governing documents and related documents, executing and filing the governing documents on behalf of the parties hereto (after consultation with the other parties hereto), filing the appropriate applications with the South Dakota Division of Insurance and other regulatory authorities to form a captive insurance company, and making such regulatory filings as may be necessary under applicable law. BOA shall also be responsible for the day-to-day management of the Company and its capital, including managing claims, providing or contracting for actuarial services, providing or contracting for administrative services for the board of directors or board of managers of the Company and the investment and reinvestment of its capital and other funds.
6. The Company will establish two Cells, as follows:
  - a. Cell One, to provide certain coverages for SDSTA; and
  - b. Cell Two, to provide certain coverages for SDBA, HEFA, EEFC, SDHDA and SDEDA.
7. The initial capital for each Cell, and the anticipated source of funding for each Cell, are as follows:
  - a. Cell One, the sum of \$2,500,000.00, to be funded by repurposing a portion of an existing \$10,000,000.00 indemnification fund held by SDSTA; and
  - b. Cell Two, the sum of \$2,000,000.00, to be funded by an appropriation to BOA to make a grant to the Company.

In the event funding for any of the Cells is not forthcoming as anticipated hereby by August 1, 2015, BOA shall notify the remaining parties hereto and this Agreement shall be deemed terminated as of the date of said notification; provided, however, that the parties may agree not to terminate this Agreement or may otherwise amend the terms of this Agreement; and provided further that each party shall remain responsible for its share

of the costs and expenses associated with the formation of the Company. It shall be a condition of continued membership in the Company that each member purchase coverage from the Company to the extent provided by the Company.

8. The Company shall be governed by a board of directors or board of managers of five members, consisting of two directors or managers appointed by SDSTA, one appointed by BOA and two appointed by the remaining parties hereto. The board of directors or board of managers shall provide for acquiring, holding and disposing of any property of the Company.
9. The costs of forming the Company, including all related regulatory costs, and ongoing administrative costs shall be paid 50% by Cell One and 50% by Cell Two. It is anticipated that the costs of formation and ongoing administration will be paid out of the funds described above in paragraph 7. In the event those funds are not sufficient to provide for such costs, the parties agree to contribute such additional amounts as are necessary.
10. The board of directors or board of managers of the Company shall at least annually prepare a budget for the Company, which budget shall include any calls for additional capital or other contributions from the parties hereto.
11. If at any time there is not sufficient capital in any Cell as determined by a regulatory body with authority or the Company's board of directors or board of managers, BOA shall promptly call a special meeting of the board of directors or board of managers for the purpose of determining a course of action to address the deficiency. If determined necessary by the parties, the Company shall be formed as a non-profit corporation or limited liability company (if permitted under applicable law) with the authority to issue bonds which qualify as tax-exempt bonds under Section 103 of the Internal Revenue Code, Revenue Ruling 63-20 and Revenue Procedure 82.26.
12. This AGREEMENT may not be assigned without the express prior written consent of all parties. This AGREEMENT may not be amended except in writing, which writing shall be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.
13. The rights and remedies herein conferred shall be cumulative and not alternative and shall be in addition and not in substitution of or in derogation of rights and remedies conferred

by any other agreements between the parties hereto or by any applicable law. The failure of a party to enforce strict performance of any covenant, promise, term, or condition herein contained, shall not operate as a waiver of that party's right thereafter to require that the terms hereof be strictly performed.

14. The parties declare that no specific entity is being created to implement this AGREEMENT, and that the parties shall administer through their authorized designees the cooperative undertaking herein described. The initial authorized designees for SDBA, HEFA, EEFC, SDHDA and SDEDA (one for each entity) shall be named in each entity's motion or resolution authorizing execution of this AGREEMENT. SDSTA shall name two designees in the motion or resolution authorizing execution of this AGREEMENT. BOA shall name its authorized designee at the time of execution of this AGREEMENT.

Upon formation of the Company, the authorized designees of BOA and SDSTA shall be the directors or managers of the Company representing BOA and SDSTA pursuant to paragraph 8 of this AGREEMENT. Upon formation of the Company, the designees of SDBA, HEFA, EEFC, SDHDA and SDEDA shall forthwith name a total of two directors or managers to represent SDBA, HEFA, EEFC, SDHDA and SDEDA as provided in paragraph 8 of this Agreement.

15. This AGREEMENT and the covenants herein contained shall inure to the benefit of and be obligatory upon the legal representatives, agents, employees, successors in interests and assigns to the respective parties hereto.
16. All notices or communications herein shall be in writing and shall be sufficiently given and shall be deemed given as delivered, if delivered by personal delivery to the officers executing this AGREEMENT or their authorized designees, or if delivered by mail, shall be sent by first class, postage prepaid at the addresses set forth above. The parties, by giving notice hereunder, may designate any further or different addresses to which subsequent notices, certificates, and other communications shall be sent.
17. In the event that any court of competent jurisdiction shall hold unenforceable or invalid any provision of this AGREEMENT, that holding shall not invalidate or render unenforceable any other provision hereof.

18. Any dispute arising out of related to this Agreement must be brought in the Circuit Court in and for Hughes County, South Dakota.
19. All other prior discussions, communications and representations concerning the subject matter of this AGREEMENT are superseded by the terms of this AGREEMENT, and except as specifically provided herein, this AGREEMENT constitutes the entire agreement with respect to the subject matter hereof.
20. This AGREEMENT is intended to only to govern the rights and interest of the parties named herein. It is not intended to, does not and may not be relied upon to create any rights, substantial or procedural, enforceable at law by any third party in any matters, civil or criminal.
21. The parties acknowledge that a true and correct copy of this AGREEMENT will be filed with the Office of Attorney General and the Legislative Research Council within 14 days of its final execution pursuant to SDCL 1-24-6.1.
22. By the signature of their representative below, each party certifies that approval of this Agreement by ordinance, resolution or other appropriate means has been obtained by that governmental body's governing body or officer pursuant to SDCL 1-24-3 and 1-24-6 and that the representative is authorized to sign on the party's behalf.

IN WITNESS HERETO, the parties have set their hand effective the day and year above first written.

Dated this 1 day of June, 2015.

SOUTH DAKOTA BUREAU OF ADMINISTRATION

BY: Paul Krumm

ITS: Commissioner BOA

[SIGNATURES CONTINUE ON FOLLOWING PAGES]

Dated this 11 day of May, 2015.

SOUTH DAKOTA SCIENCE AND  
TECHNOLOGY AUTHORITY

BY: 

ITS: Executive Director

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

SOUTH DAKOTA BUILDING AUTHORITY

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

SOUTH DAKOTA HEALTH AND EDUCATIONAL  
FACILITIES AUTHORITY

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

EDUCATIONAL ENHANCEMENT FUNDING  
CORPORATION

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

SOUTH DAKOTA SCIENCE AND  
TECHNOLOGY AUTHORITY

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

Dated this 6th day of May, 2015.

SOUTH DAKOTA BUILDING AUTHORITY

BY: Paul Teplett

ITS: Executive Secretary

Dated this 25th day of May, 2015.

SOUTH DAKOTA HEALTH AND EDUCATIONAL  
FACILITIES AUTHORITY

BY: Paul Teplett

ITS: Executive Director

Dated this 6th day of May, 2015.

EDUCATIONAL ENHANCEMENT FUNDING  
CORPORATION

BY: Paul Teplett

ITS: Executive Secretary

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

Dated this 14<sup>th</sup> day of May, 2015.

SOUTH DAKOTA HOUSING  
DEVELOPMENT AUTHORITY

BY: Mam Janssens  
ITS: Executive Director

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

SOUTH DAKOTA ELLSWORTH  
DEVELOPMENT AUTHORITY

BY: \_\_\_\_\_  
ITS: \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

SOUTH DAKOTA HOUSING  
DEVELOPMENT AUTHORITY

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

Dated this 7<sup>th</sup> day of May, 2015.

SOUTH DAKOTA ELLSWORTH  
DEVELOPMENT AUTHORITY

BY: Scott Lapham

ITS: Executive Director