

**MEMO# 29144**

July 6, 2015

# IRS Issues Proposed ABLE Act Regulations and Notice of Public Hearing

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TO: 529 PLAN MEMBERS No. 7-15  
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 22-15  
BROKER/DEALER ADVISORY COMMITTEE No. 30-15  
OPERATIONS MEMBERS No. 23-15  
PENSION MEMBERS No. 23-15  
TRANSFER AGENT ADVISORY COMMITTEE No. 32-15 RE: IRS ISSUES PROPOSED ABLE ACT REGULATIONS AND NOTICE OF PUBLIC HEARING

On June 22, 2015, the Internal Revenue Service (“IRS”) issued proposed regulations [\[1\]](#) and notice of a public hearing [\[2\]](#) regarding the implementation of accounts established under The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act”). As you may recall, the ABLE Act creates a new Section 529A of the Internal Revenue Code (“IRC”) to permit states to establish and maintain a new type of tax-advantaged savings program—a qualified ABLE program—under which contributions may be made to an ABLE account that is established for the purpose of meeting the qualified disability expenses of the designated disabled beneficiary who is a resident of that state. If a state does not wish to establish and maintain its own qualified ABLE program, it may enter into a contract with another state to provide its residents with access to a qualified ABLE program. [\[3\]](#) The IRS proposal is briefly summarized below.

Comments on the proposal are due to the IRS on or before September 21, 2015. The Institute is planning to submit a comment letter. If there are any issues you believe the Institute should consider including in its letter, please provide them to Tami Salmon by email ([tamara@ici.org](mailto:tamara@ici.org)) or phone (202-326-5825) no later than Friday, July 31, 2015.

## Qualification as an ABLE Program

The proposed regulations provide guidance on the requirements a program must satisfy in order to be a “qualified” ABLE program that can rely on Section 529A. Specifically, the proposed regulations provide that the program must:

- Be established and maintained by a State or State’s agency or instrumentality;
- Permit the establishment of an ABLE account only for a designated beneficiary who is a resident of that State, or a State contracting with that State for purposes of the

ABLE program;

- Permit the establishment of an ABLE account only for a designated beneficiary who is an eligible individual;
- Limit a designated beneficiary to only one ABLE account, wherever located;
- Permit contributions to an ABLE account established to meet the qualified disability expenses of the account's designated beneficiary;
- Limit the nature and amount of contributions that can be made to an ABLE account;
- Require a separate accounting for the ABLE account of each designated beneficiary with an ABLE account in the program;
- Limit the designated beneficiary to no more than two opportunities in any calendar year to provide investment direction, whether directly or indirectly, for the ABLE account; and
- Prohibit the pledging of an interest in an ABLE account as security for a loan.

## **Use of Community Development Financial Institutions (CDFIs)**

According to the preamble, because each qualified ABLE program will have significant administrative obligations beyond what is required for the administration of a section 529 qualified tuition program, and because the frequency of distributions from the ABLE accounts is likely to be far greater than those made from qualified tuition accounts (under Section 529 of the IRC), the proposed regulations expressly allow a qualified ABLE program or any of its contractors to contract with one or more Community Development Financial Institutions ("CDFIs"), that commonly service disabled individuals and their families, to provide one or more required program services. For example, a CDFI could provide screening and verification of disabilities, certification of the qualified purpose of distributions, debit card services to facilitate distributions, and social data collection and reporting.

## **Account Establishment**

### **Designated Beneficiary**

The proposed regulations provide that, consistent with the ABLE Act's definition, the "designated beneficiary" of an ABLE account is the eligible individual who establishes the account. However, the proposed regulations clarify that, if the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for the eligible individual. The proposed regulations also provide that a person other than the designated beneficiary with signature authority over the account of the designated beneficiary may neither have, nor acquire, any beneficial ownership in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.

### **Eligible Individual**

The proposed regulations also provide that, at the time an account is established, the designated beneficiary must provide evidence that he or she is an "eligible individual" as defined in the ABLE Act. The proposed regulations provide two alternative methods for an individual to qualify as an "eligible individual."

The first is the provision of evidence that the individual is entitled to benefits based on blindness or disability under Title II or XVI of the Social Security Act, and that such blindness or disability occurred before age 26. Notably, the proposed regulations provide that each

qualified ABLE program may determine the evidence required to establish the individual's eligibility.

The second is the filing of a disability certification with the Secretary of the Treasury (the "Secretary") that certifies that the individual has a qualifying disability or is blind and that such blindness or disability occurred before age 26. The disability certification must be accompanied by a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician. Such a disability certification will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification. [\[4\]](#)

### **Recertification and Loss of Qualification as an Eligible Individual**

The proposed regulations provide that a qualified ABLE program may choose different methods of ensuring a designated beneficiary's continued status as an eligible individual and may impose different periodic recertification requirements for different types of impairments. Further, the proposed regulations provide that, in developing its rules on recertification, a qualified ABLE program may take into consideration whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future.

Additionally, the proposed regulations provide that, if the designated beneficiary of an ABLE account ceases to be an eligible individual, the account will continue to be an ABLE account for each taxable year in which the designated beneficiary is not an eligible individual, and the account will not be deemed to have been distributed. However, beginning on the first day of the designated beneficiary's first taxable year for which he or she is not an eligible individual, no additional contributions to the designated beneficiary's ABLE account may be made.

### **Contributions to an ABLE Account**

The proposed regulations provide that, as a general rule, all contributions to an ABLE account must be made in cash, and that a qualified ABLE program may accept cash contributions in the form of cash or a check, money order, credit card payment, or other similar method of payment. Further, consistent with IRC Section 529A, the proposed regulations limit the total contributions to a designated beneficiary's ABLE account to the amount of the annual per-donee gift tax exclusion under IRC Section 2503(b) in effect for that calendar year (currently \$14,000). The proposed regulations provide that an ABLE program must provide adequate safeguards to ensure that the total contributions to an ABLE account do not exceed that State's limit for aggregate contributions under its qualified tuition (Section 529) program. The proposed regulations also include specific requirements regarding the return of any excess contributions.

### **Distributions and Tax Consequences**

The proposed regulations provide that if distributions from an ABLE account do not exceed the designated beneficiary's qualified disability expenses, no amount is includable in the designated beneficiary's gross income. However, the earnings portion of distributions from the ABLE account in excess of the qualified disability expenses is included in the gross income of the designated beneficiary. In addition to the tax on the portion of a distribution included in gross income, an additional tax of 10 percent of the amount includable in gross income is imposed. Finally, the proposed regulations provide that, any contribution by a designated beneficiary to a qualified ABLE program benefitting the designated beneficiary is not treated as a completed gift. Contributions to an ABLE account by a person other than the designated beneficiary are treated as completed gifts to the designated beneficiary of

the account, and such gifts are neither gifts of a future interest nor a qualified transfer and, as such, no distribution from an ABLE account to the designated beneficiary of that account is treated as a taxable gift.

The proposed regulations also address the tax consequences associated with a rollover of an ABLE account to another ABLE account for the same designated beneficiary under a different State's qualified ABLE program. In addition, the proposed regulations provide specific guidance regarding the ability to change an ABLE account's designated beneficiary.

## **Qualified Disability Expenses**

Consistent with IRC section 529A, the proposed regulations provide that qualified disability expenses are expenses that relate to the designated beneficiary's blindness or disability and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses. Other qualified disability expenses may be identified from time to time in future IRS guidance. Further, according to the preamble, in order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity.

The proposed regulations require a qualified ABLE program to establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions and to permit the identification of the amounts distributed for housing expenses as permitted by the Supplemental Security Income program of the Social Security Administration.

## **Reporting Requirements**

The proposed regulations include several recordkeeping and reporting requirements. In particular, a qualified ABLE program must:

- Maintain records that enable the program to account to the Secretary for all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLE account;
- Report to the Secretary the establishment of each ABLE account, including the name and residence of the designated beneficiary, and other relevant information that is included on the new Form 5498-QA, "ABLE Account Contribution Information." [\[5\]](#)
- File Form 1099-QA, "Distributions from ABLE Account," to report information regarding distributions; [\[6\]](#) and
- Provide a separate accounting for each designated beneficiary. [\[7\]](#)

The proposed regulations would also require states to submit electronically statements on relevant distributions and account balances from all ABLE accounts to the Commissioner of Social Security on a monthly basis and in the manner specified by the Commissioner.

## Effective Date and Transition Relief

The proposed regulations, when finalized, will apply to taxable years beginning after December 31, 2014. The proposed regulation's reporting requirements are applicable to information returns required to be filed, and payee statements required to be furnished, after December 15, 2015. According to the IRS, until the issuance of final regulations, taxpayers and qualified ABLE programs may rely on the proposed regulations. The preamble to the regulations confirms that states that enact legislation creating an ABLE program in accordance with IRC Section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, will not fail to receive the benefits of section 529A merely because the legislation or the account documents do not fully comport with the final regulations when issued. [8]

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Associate General Counsel

### endnotes

[1] The proposed regulations are available at: [www.gpo.gov/fdsys/pkg/FR-2015-06-22/pdf/2015-15280.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-06-22/pdf/2015-15280.pdf). In March 2015, the IRS issued Notice 2015-18 to provide transition relief and advance notification of provisions it anticipated including in its proposed regulations under the ABLE Act. For a summary of Notice 2015-18, see Institute [Memorandum](#) to Pension Members No. 10-15, Operations Members No. 10-15, Bank, Trust and Advisory Committee No. 8-15, Broker/Dealer Advisory Committee No. 12-15, and Transfer Agent Advisory Committee No. 13-13 [28839], dated March 17, 2015.

[2] The public hearing is scheduled for October 10, 2015. Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic by September 21, 2015. The Institute is not planning to present testimony at the hearing.

[3] For a description of the ABLE Act, see Institute [Memorandum](#) to Tax Members No. 36-14, Pension Members No. 53-14, Accounting/Treasurers Members No. 20-14, 529 Plan Members No. 21-14 Bank, Trust and Retirement Advisory Committee No. 501-14, Transfer Agent Advisory Committee No. 78-14, and International Members No. 48-14 [28594], dated December 18, 2014.

[4] The proposed regulations are silent on the level of diligence an ABLE program must engage in when evaluating whether the disability certification complies with the substantive requirements of the ABLE Act.

[5] Form 5498-QA requires the inclusion of information regarding the disability certification or other basis for eligibility of the designated beneficiary. A draft of the Form is available at: <http://www.irs.gov/pub/irs-dft/f5498qa--dft.pdf>.

[6] The IRS has issued a draft of Form 1099-QA. See <http://www.irs.gov/pub/irs-dft/f1099qa--dft.pdf>.

[7] Whether a program ordinarily provides each designated beneficiary with an annual account statement showing the income and transactions related to the account, it must

provide this information to the designated beneficiary upon request.

[8] The preamble also states that the Department of the Treasury and the IRS intend to provide state programs and accounts transition relief to enable them to conform to the final regulations and sufficient time within which to do so.

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