



IRS Issues Proposed ABLE Act Regulations

Friday June 19th, the Internal Revenue Service (IRS) released the highly anticipated Notice of Proposed Rule Making (NPRM) for the Achieving a Better Life Experience (ABLE) Act. The NPRM stipulates the proposed regulations by which state ABLE programs will largely be developed and administered. These proposed regulations are open for public comment until September 19th. In addition, a public hearing will be held on the morning of October 14th in Washington, DC to allow relevant stakeholders and the public at large to further express their comments regarding the details in the NPRM.

In an effort to inform the disability community and other relevant stakeholders about the details of the proposed regulations, NDI has developed the following preliminary highlights:

Background

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act) was signed into law on December 19th, 2014. This paramount new law permits states to create ABLE programs which would allow qualified individuals with disabilities the opportunity to save money in a tax advantaged account without jeopardizing their eligibility for most federally funded means tested programs (including Medicaid and to a certain extent Social Security benefits). The funds in this account are to be used for the benefit of the beneficiary who is the qualified individual with a disability and also the account owner. Disbursements from an ABLE account are to be used for qualified disability expenses, and contribution to the account are subject to certain annual and aggregate limits. To learn more click [here](#).

Establishing an ABLE Program¹

It is important to understand that the ABLE Act allows states to establish an ABLE program, but it does not obligate a state to do so. The proposed regulations state that “a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State”. While it appears that the proposed language does allow the establishment of a state ABLE program outside the vehicle of enacted state legislation, this is expected to be highly uncommon. States will likely have to enact state ABLE legislation or contract with a state that has agreed to extend their program to qualified residents of the state absent of a program before accounts can be set up.

¹ Guidance Under Section 529A: Qualified ABLE Programs NPRM,
<https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-230>

Signature Authority²

The proposed regulations reaffirm that the designated beneficiary, who is the qualified individual with a disability, is also the account owner. The regulations go on to stipulate that If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary can be allowed signature authority over the account.

Criteria for Establishing Eligibility

If the potential beneficiary is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act and the blindness or disability occurred before the individual's 26th birthday then the individual would be eligible to open an ABLE account. The proposed regulations assert that each state ABLE program is allowed to verify this however they see fit³.

If the potential beneficiary is attempting to receive eligibility through establishing a "disability certification" then the potential beneficiary must present to the state ABLE program documentation stipulating that the individual meets the criteria in the federal statute, along with the individual's diagnosis related to the individual's relevant impairment or impairments, signed by a licensed physician (DO or DM). At the point in which this documentation is given to the state ABLE program, that individual is eligible to open an ABLE account⁴.

For eligibility purposes, the phrase "marked and severe functional limitation" will be the same standard as the disability standard related to the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual⁵.

While the proposed regulations stipulate the importance of the accounts being readily available to those who qualify, the responsibility of determining eligibility (primarily for those seeking qualification through the "disability certification" process) may establish an unreasonable obligation to program administrators unfamiliar with this type of determination.

² Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-207>

³ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-31>

⁴ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-32>

⁵ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-34>

Recertification and Change in Eligibility Status

The proposed regulations state that a qualified ABLE program generally must require annual recertifications confirming that the designated beneficiary continues to satisfy the definition of an eligible individual. However, the proposed regulations also allow the states the flexibility to choose different methods of ensuring a designated beneficiary's status as an eligible individual and may impose different periodic recertification requirements depending on a qualified beneficiary's particular circumstance (in particular the severity and nature of their disability)⁶.

Again, this may establish an unreasonable obligation to program administrators unfamiliar with how to differentiate between severity and longevity of various conditions.

The proposed rules also allow for an individual to maintain their ABLE account even in a circumstance wherein their disability or condition may be temporarily alleviated to a point where they would not be considered a qualified beneficiary. There are limits to the use of the account while the individual is considered to not be a qualified beneficiary, including a moratorium on contributions and qualified disbursements⁷.

Change in Residency⁸

The proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State.

There may be a need for some education on the common practice as it relates to the Medicaid payback provision in circumstances in which a resident moves from the original state of the account's origin to another state (collecting Medicaid related supports and services from both over a period in which the ABLE account had been established).

Rollover from 529 to 529A⁹

The proposed regulations confirm that funds from a 529 college saving account will not be allowed to be rolled over to a 529A account (ABLE account) without applicable penalties and tax implications.

⁶ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-240>

⁷ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-242>

⁸ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-270>

⁹ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-47>

While this is disappointing, we do understand the reasoning behind the disallowance and would like to pursue this from a legislative standpoint in the future.

Qualified Disability Expenses¹⁰

The proposed regulations document the same disability related expense categories as stated in the statute, however it is stated that those are not exhaustive and should additionally include basic living expenses. The proposed regulation go on to stipulate that the disability related expenses should be construed broadly, may be attributed to the designated beneficiary's health, independence and quality of life, should not be limited to items for which there is a medical necessity, and may include expenses which could benefit individuals in addition to benefiting the designated beneficiary.

While the disability community is extremely pleased with the language in the proposed regulations pertaining to the broad definition of qualified disability expenses, it is worth noting that the proposed regulations additionally stipulate that the administrative entity is responsible for establishing "safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions...". Depending on what might be allowed to constitute a "safeguard", this responsibility does have the potential to create an unforeseen administrative burden on the program administer, which in turn could elevate the fees and costs of opening and maintaining an ABLE account.

Community Development Financial Institutions¹¹

Because each qualified ABLE program will have significant administrative obligations beyond what is required for the administration of qualified tuition programs under section 529 (on which section 529A was loosely modeled), and because the frequency of distributions from the ABLE accounts is likely to be far greater than those made from qualified tuition accounts, 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 serve disabled individuals and their families to provide one or more required 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.

A CDFI also may be able to obtain grants to defray the cost of administering the program. In general, if certified by the Treasury Department, a CDFI may receive a financial assistance award from the CDFI Fund that was established within the Treasury Department in 1994 to

¹⁰ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-261>

¹¹ Guidance Under Section 529A: Qualified ABLE Programs NPRM, <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#p-27>

promote community development in economically distressed communities through investments in CDFIs across the country.

Conclusion

It is important to understand that the proposed rules are a single step in a larger process which should hopefully result in an effective program that is readily available and responsive to the needs of qualified individuals with disabilities and their families.

NDI, in collaborations with other disability related and non-disability related groups, will be working together over the next several weeks to further analyze and better understand these proposed rules with the aim of offering meaningful comments to the Department of Treasury prior to the September 21st deadline.

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