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## A Primer on ABLE Accounts

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# ESSAYS

## A PRIMER ON ABLE ACCOUNTS

*Christopher T. McGee* \*

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### INTRODUCTION

It has been called the most significant piece of legislation benefiting individuals with disabilities since the 1990 passage of the Americans with Disabilities Act.<sup>1</sup> The Stephen Beck Jr., Achieving a Better Life Experience (“ABLE”) Act created a tax-advantaged savings account for individuals with eligible disabilities that permits, for the first time, these individuals and their families to save for their daily and future expenses in meaningful amounts without affecting their eligibility for Supplemental Security Income, Medicaid, and other public benefits.<sup>2</sup> The ABLE Act is local in its origins and its passage in December 2014 was profoundly bittersweet.

### I. BEGINNINGS

In 2001, Stephen E. Beck, Jr., a father of two children, one of whom, Natalie, has Down Syndrome, was speaking with friends in the living room of his Burke, Virginia, home.<sup>3</sup> The discussion

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1. Michael Morris, *Becoming ABLE Account Ready*, HUFFINGTON POST: THE BLOG (June 22, 2016, 5:56 PM), [http://www.huffingtonpost.com/michael-morris/becoming-able-account-rea\\_b\\_10619328.html](http://www.huffingtonpost.com/michael-morris/becoming-able-account-rea_b_10619328.html).

2. Stephen Beck, Jr., *Achieving a Better Life Experience Act of 2014*, Pub. L. No. 113-295, 128 Stat. 4056 (codified as amended at I.R.C. § 529A (Supp. III 2013–2016)).

3. See Jennifer Davis, *Va. Man Remembered for Helping People with Disabilities Save*

turned to Mr. Beck's frustration that Natalie was prohibited from saving more than \$2000 in order to continue receiving her Social Security benefits.<sup>4</sup> Many others in the disability community shared this opinion, and from that living room conversation, a largely grass-roots effort, spearheaded by several disability associations,<sup>5</sup> began a long campaign to create accounts that would permit individuals with certain disabilities to save while not impacting means-tested benefits.

### A. Legislative and Regulatory History

An ABLE bill was first introduced during the 111th Congress, but neither the Senate nor the House bill made it to committee.<sup>6</sup> It came up again in 2011<sup>7</sup> and 2013<sup>8</sup> but again failed until a bi-partisan version of the bill passed both the House (404-17) on December 3, 2014, and the Senate on December 16, 2014, as part of the Tax Extenders package.<sup>9</sup> Three days later, on December 19, 2014, President Obama signed the Tax Extenders package making the ABLE Act law.<sup>10</sup> Tragically, however, Stephen Beck died unexpectedly just eleven days before the signing, and in his honor the bill was renamed the "Stephen Beck, Jr. ABLE Act of 2014."<sup>11</sup>

The ABLE Act directed the United States Department of Treasury to draft critically needed regulations for the new program, the first draft of which was released on June 19, 2015.<sup>12</sup> Much to its

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*Financially with ABLE Act*, FOX 5 (Jan. 5, 2015, 10:21 PM), <http://www.fox5dc.com/news/1365410-story>.

4. *Id.*

5. These associations include the National Down Syndrome Society, the National Disability Institute, Autism Speaks, and The ARC.

6. See Achieving a Better Life Experience Act of 2009, S. 493, 111th Cong. (2009); Achieving a Better Life Experience Act of 2009, H.R. 1205, 111th Cong. (2009).

7. See ABLE Act of 2011, S. 1872, 112th Cong. (2011); ABLE Act of 2011, H.R. 3423, 112th Cong. (2011).

8. ABLE Act of 2013, S. 313, 113th Cong. (2013).

9. Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, H.R. 647, 113th Cong., 128 Stat. 4010, 4056 (codified at I.R.C. § 529(A) (Supp. II 2013-2015)). These bills were sponsored by Senators Robert Casey, Jr. (D-Pa.) and Richard Burr (R-N.C.) and Representatives Ander Crenshaw (R-Fla.), Chris Van Hollen (D-Md.), Cathy McMorris Rodgers (R-Wash.), and Pete Sessions (R-Tex.).

10. *Able Act Passed by Congress, Signed into Law*, ANCOR (Dec. 19, 2014), <http://www.ancor.org/newsroom/news/able-act-passed-congress-signed-law>.

11. See Davis, *supra* note 3.

12. INTERNAL REVENUE SERVICE, NOTICE 2015-81, INTERIM GUIDANCE REGARDING CERTAIN PROVISIONS OF PROPOSED REGULATIONS RELATING TO QUALIFIED ABLE PROGRAMS 1-2 (2015) [hereinafter I.R.S. NOTICE 2015-81].

credit, upon the release of these Proposed Regulations (the “Proposed Regulations”), Treasury held several meetings with interested parties, and in response to significant concerns, eliminated requirements that would have substantially increased the cost of administering ABLE programs including the categorization of distributions, the collection of contributors’ social security numbers, and the requirement that ABLE applicants produce their medical records to an ABLE program in order to prove eligibility.<sup>13</sup> To date, the Proposed Regulations are still in effect, as no final regulations for ABLE have been proposed. What had been a crowded year for the ABLE community was wrapped up with a flourish by the passage of the Protecting Americans from Tax Hikes (“PATH”) Act on December 18, 2015, which, among other things, amended the original ABLE Act by removing a provision that required an ABLE applicant to open an account only in the state where he or she resided.<sup>14</sup>

In December 2016, the Social Security Administration (“SSA”) issued a Program Operations Manual System (“POMS”) for ABLE.<sup>15</sup> POMS are the primary source of information used by SSA employees to process claims for Social Security benefits.<sup>16</sup> On September 7, 2017, the Centers for Medicare & Medicaid Services (“CMS”) followed suit and released a guidance letter on the implications of the ABLE Act for state Medicaid programs.<sup>17</sup> To date, the Proposed Regulations, the ABLE POMS, the CMS guidance letter, and a recent announcement by the United States Department of Agriculture (“USDA”) that ABLE balances are exempt from certain benefit calculations<sup>18</sup> are the only official bureaucratic pronouncements from the federal government on how ABLE accounts

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13. *See id.* at 1.

14. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3087 (2015) (codified as amended at I.R.C. § 529A(a), (b), (d) (Supp. III 2013–2016)).

15. *See* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), SI 01130.740 ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) ACCOUNTS (2016) [hereinafter POMS], <https://secure.ssa.gov/poms.nsf/lnx/0501130740>.

16. *Public Policy Home*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/> (last visited Sept. 27, 2017).

17. Brian Neale, *Dear Colleague Letter: Implications of the ABLE Act for State Medicaid Programs*, CTMS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUM. SERVS. 1 (Sept. 7, 2017), <http://www.medicare.gov/federal-policy-guidance/downloads/smd17002.pdf>.

18. *See* USDA Food and Nutrition Service, 82 Fed. Reg. 2010, 2018 (Jan. 6, 2017) (to be codified at 7 C.F.R. pt. 273).

should operate and how they interact with government benefit programs. To date, no other federal agency that provides benefits to ABLE-eligible individuals has officially commented on ABLE.

### B. *State Passage and Program Launches*

While created by federal statute, operationally ABLE is a creature of state government. The ABLE Act mandates that states are the only entities that may establish and maintain ABLE programs.<sup>19</sup> If they prefer not to offer a program, states are free to do so, or they may contract with another state to offer a program for them.<sup>20</sup>

Virginia was the first state after the ABLE Act's passage to enact state ABLE legislation<sup>21</sup> and, with the exception of Wyoming, all states have now passed some form of ABLE legislation.<sup>22</sup> Most states have chosen to enact bills that empower them to create an ABLE program; however, some states, like Maine, Idaho, and Wisconsin, have chosen to pass bills that permit a study of ABLE options (Maine), merely authorize technical assistance with accounts (Idaho), or prohibit the creation of a state ABLE program but provide a state tax deduction for contributions to other states' programs (Wisconsin).<sup>23</sup> As of August 23, 2017, twenty-eight states have opened ABLE programs.<sup>24</sup>

The goal of this article is not a comprehensive treatment of the subject matter. ABLE programs have been operating for just over a year and, at this time, there is still too little information and experience to provide that level of coverage. Our goal is to convey a

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19. I.R.C. § 529A(b)(1) (Supp. III 2013–2016).

20. I.R.C. § 529A(e)(7) (Supp. II 2013–2015).

21. See *Virginia Becomes First State to Enact ABLE Program in 2015*, AUTISM VOTES (Mar. 20, 2015), <https://www.autismspeaks.org/advocacy/advocacy-news/virginia-becomes-first-state-enact-able-program-2015>.

22. *ABLE Legislation By State*, THE ARC (Mar. 23, 2017), <http://www.thearc.org/what-we-do/public-policy/policy-issues/able-legislation-by-state>.

23. *Id.*

24. Virginia's program, ABLEnow, opened on December 19, 2016. *Advocates Celebrate Launch of ABLEnow Savings Program*, ABLENOW (Dec. 19, 2016), <https://www.able-now.com/about-ablenow/press/advocates-celebrate-launch-of-ablenow-savings-program>. Other states with open programs as of August 23, 2017, are: Alabama, Alaska, Colorado, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Vermont. *ABLE Program Implementation*, THE ARC (Aug. 23, 2017), <http://www.thearc.org/what-we-do/public-policy/issues/able-program-implementation>.

basic working knowledge of this new program, to make the reader aware of some of the issues that have arisen in the first year of operations, and to offer some proposed solutions.

## II. THE PRIMER

### A. *The Account Owner*

The definition of a designated beneficiary (“Designated Beneficiary”) of an ABLE account in section 529A is the eligible individual who established an ABLE account and, importantly, is always the owner of such account.<sup>25</sup> The Designated Beneficiary may also be an eligible individual who has succeeded the former Designated Beneficiary in that capacity.<sup>26</sup> ABLE accounts are available to only United States citizens and legal residents.<sup>27</sup>

A qualified ABLE program must permit changes in the Designated Beneficiary of an ABLE account, but may only permit these changes during the life of the Designated Beneficiary.<sup>28</sup> At the time of the Designated Beneficiary change, the new or successor Designated Beneficiary must also be an eligible individual and a member of the family (“Member of the Family”) of the former Designated Beneficiary in order for the beneficiary change to not be treated as a distribution.<sup>29</sup> Member of the Family “means a sibling, whether by blood or by adoption . . . [and] includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.”<sup>30</sup>

#### 1. Eligibility

An individual is an eligible individual for a taxable year if, during that year, either “the individual is entitled to benefits based on blindness or disability under Title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26,” or a disability certification meeting specified requirements is filed with the Secretary of the

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25. I.R.C. § 529A(e)(3) (Supp. III 2013–2016).

26. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. 35,602, 35,611 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1).

27. Cf. I.R.C. § 529A(a) (Supp. III 2013–2016) (stating that the ABLE program allows tax exemptions).

28. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,614.

29. *Id.* at 35,616.

30. *Id.* at 35,612.

Treasury during such taxable year.<sup>31</sup> The determination applies for the entire taxable year.<sup>32</sup> Each “qualified ABLE program must specify the documentation that an individual must provide, both at the time an ABLE account is established . . . and thereafter, in order to ensure that the [D]esignated [B]eneficiary of the ABLE account” is an eligible individual at the time of establishment and continues to be an eligible individual.<sup>33</sup>

If the Designated Beneficiary self-certifies that he or she is an eligible individual, then the Designated Beneficiary must submit a disability certification under the rules of the qualified ABLE program. The disability certification is a certification to the satisfaction of the Secretary of the Treasury by the Designated Beneficiary, or the parent or guardian of that individual, that certifies

(I) the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the meaning of section 1614(a)(2) of the Social Security Act), and

(II) such blindness or disability occurred before the date on which the individual attained age 26.<sup>34</sup>

Section 529A states that the disability certification must also “include[] a copy of the individual’s diagnosis relating to the individual’s relevant impairment[s],” signed by a qualified physician meeting certain criteria of the Social Security Act.<sup>35</sup> The Proposed Regulations require that the disability certification must be signed under penalties of perjury by the individual or the other individual establishing the account for the eligible individual.<sup>36</sup>

For purposes of the disability certification, the phrase “marked and severe functional limitations” refers to “the standard of disability in the Social Security Act for children claiming Supplemental Security Income for the Aged, Blind, and Disabled (“SSI”) benefits based on disability.”<sup>37</sup> The phrase also includes “any impairment or standard of disability identified in future guidance published in

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31. I.R.C. § 529A(e)(1) (Supp. III 2013–2016).

32. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,613.

33. *Id.*

34. I.R.C. § 529A(e)(2)(A)(i) (Supp. III 2013–2016).

35. *Id.* § 529A(e)(2)(A)(ii) (Supp. III 2013–2016).

36. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,613.

37. *Id.* at 35,614.

the Internal Revenue Bulletin.”<sup>38</sup> In addition, conditions listed in the “List of Compassionate Allowances Conditions” kept by the SSA are “deemed to meet the requirements of section 529A(e)(1)(B) regarding the filing of a disability certification, if the condition was present before the date on which the individual attained age 26.”<sup>39</sup>

During the comment period on the Proposed Regulations, states expressed concerns about their perceived responsibility and potential liability for requesting, receiving, and safely storing the medical information required in the signed diagnosis portion of the disability certification.<sup>40</sup> These potential ABLE administrators also indicated that they did not possess the infrastructure or expertise to safeguard or evaluate the medical information required on the disability certification.<sup>41</sup> For these reasons, the projected costs that states would incur in attempting to comply with the requirements of the proposed ABLE regulations would be unmanageable, resulting in the inability of many states or administrators to implement or run an ABLE program.<sup>42</sup>

The consensus of the commenters was a recommendation that qualified ABLE programs be permitted to allow eligible individuals to open an ABLE account based on the certification “by the person opening the ABLE account, signed under penalties of perjury, that the [Designated Beneficiary] has a condition that meets all of the required elements to qualify as an eligible individual” and that they have obtained a diagnosis from a physician regarding the eligible individual’s specific impairment.<sup>43</sup> The Treasury Department and the Internal Revenue Service (“IRS”) took the commenters’ recommendation into consideration and concluded that a certification under penalties of perjury that the Designated Beneficiary (or their agent under a power of attorney or a parent or legal guardian) has the required physician’s signed diagnosis is adequate to meet the requirements of certifying that the Designated Beneficiary is an eligible individual and satisfies the filing of a disability certification.<sup>44</sup> The individual opening the ABLE account must retain the signed diagnosis and provide it to the ABLE program or the IRS

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38. *Id.*

39. *Id.*

40. I.R.S. NOTICE 2015-81, *supra* note 12, at 8–9.

41. *See id.* at 8.

42. *Id.* at 8–9.

43. *Id.* at 9.

44. *Id.*



upon request.<sup>45</sup> It is likely that the final regulations will provide that the certification may include certain information provided by the certifying physician as to the categorization of the disability, and this information could determine the appropriate frequency of any state's required recertification.<sup>46</sup>

A qualified ABLE program must ensure that an eligible individual continues to be eligible. The ABLE program may develop and choose different methods of ensuring the eligible individual status of the Designated Beneficiary of an ABLE account.<sup>47</sup> The qualified ABLE program may also "impose different periodic recertification requirements for different types of impairments."<sup>48</sup> When a qualified ABLE program develops its rules on recertification, it may take into consideration whether a condition is incurable and, if it is currently incurable, the likelihood a cure may be found.<sup>49</sup> The stated number of years for which the initial certification is deemed valid may be different depending on the Designated Beneficiary's type of impairment.<sup>50</sup>

If the Designated Beneficiary of an ABLE account at any point ceases to be an eligible individual, then the ABLE account will continue to be considered an ABLE account for each taxable year that the Designated Beneficiary is not an eligible individual and the ABLE account will not be considered distributed.<sup>51</sup> During the time that the Designated Beneficiary is not considered an eligible individual (starting "on the first day of the [D]esignated [B]eneficiary's first taxable year for which [he or she] does not satisfy the definition of an eligible individual"), additional contributions to the ABLE account must not be accepted by the ABLE program and expenses incurred by the Designated Beneficiary during that time are not considered qualified disability expenses ("Qualified Disability Expenses").<sup>52</sup> If the Designated Beneficiary later meets the definition of an eligible individual, then contributions to the ABLE

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45. *Id.* at 8.

46. *Id.* at 9–10.

47. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. 35,602, 35,613 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

account may be accepted and expenses incurred will meet the definition of Qualified Disability Expenses again.<sup>53</sup>

## 2. The Authorized Representative

Certain situations may arise where eligible individuals are not able to establish an ABLE account on their own behalf due to inability or incapacity. If the eligible individual is unable to establish an ABLE account on his or her own behalf, then the ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by his or her parent or legal guardian.<sup>54</sup> For purposes of this article, this person is referred to as the authorized representative ("Authorized Representative") and he or she has signature authority over the Designated Beneficiary's ABLE account.

Often due to mobility issues or situations where an individual with a disability is declared legally incapacitated, a person will be appointed either by the person with a disability or the court to handle financial affairs on behalf of that individual. As stated previously, the eligible individual for whose benefit an ABLE account is established is both the Designated Beneficiary and the owner of the account, and an Authorized Representative "may neither have nor acquire any beneficial interest in the [ABLE] account during the lifetime of the [D]esignated [B]eneficiary."<sup>55</sup> The Authorized Representative "must administer the account for the benefit of the [D]esignated [B]eneficiary of the account."<sup>56</sup> Authorized Representatives play an important role in the management of many eligible individuals' ABLE accounts and will allow many Designated Beneficiaries to take advantage of the ABLE Act.

### B. *The One Account Rule*

#### 1. General Rule

Once an ABLE account is opened for the Designated Beneficiary, no further ABLE accounts can be opened by or for that person.<sup>57</sup>

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. I.R.C. § 529A(b)(1)(B), (c)(4) (Supp. III 2013–2016).

To ensure that this requirement is met, an applicant must verify, under penalty of perjury, that the Designated Beneficiary has no other existing ABLE account.<sup>58</sup> While it is still too early to discern the limitation's impact, concerns have been voiced that the one account rule could negatively impact the number of contributions from third parties who would like to help the Designated Beneficiary financially, but would prefer to deposit the money in an account that they themselves have opened.

## 2. Treatment of Additional Accounts

Should a second ABLE account be opened for the Designated Beneficiary, that account (and any other subsequent accounts) will not be treated as an ABLE account.<sup>59</sup> Should a second ABLE account be opened and funds deposited therein, the Proposed Regulations permit what is essentially a do-over: the second account will be treated as never having been established if the balances in the second ABLE account are returned in accordance with the rules that apply to excess contributions.<sup>60</sup> Critically, a second account is to be avoided because funds deposited therein are not exempt from means-testing and do not enjoy the tax advantages of the deposits held in the original ABLE account.

## 3. Exception to the One Account Rule

The only exception to the one account rule occurs when a Designated Beneficiary or Authorized Representative transfers an existing ABLE account from one state's program to another program offered by a different state.<sup>61</sup> During this transfer, known as either a rollover or a program-to-program transfer,<sup>62</sup> a Designated Beneficiary may briefly own two ABLE accounts: the first being the original ABLE account and the second being the new ABLE account opened with the other state. Recognizing the logistical realities of a rollover, where a customer takes possession of the distributed

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58. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,613.

59. *Id.*

60. See *infra* Part II.E.3 (discussing rollovers and program-to-program transfers).

61. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,613.

62. See *infra* Part II.E.3 (discussing rollovers and program-to-program transfers).

funds and then sends them to the new ABLE program for contribution, the Proposed Regulations give the Designated Beneficiary sixty days to complete the rollover process.<sup>63</sup>

### C. *Qualified Disability Expenses*

A Qualified Disability Expense is defined in Internal Revenue Code section 529A as

any expenses related to the [Designated Beneficiary's] blindness or disability which are made for the benefit of [a Designated Beneficiary], including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations.<sup>64</sup>

The Proposed Regulations state that a Qualified Disability Expense includes “expenses that are for the benefit of the [D]esignated [B]eneficiary in maintaining or improving his or her health, independence, or quality of life.”<sup>65</sup> The Proposed Regulations clarify that Qualified Disability Expenses include, but are not limited to, the expenses enumerated in the section 529A definition of Qualified Disability Expenses.<sup>66</sup>

The term Qualified Disability Expense is purposefully construed broadly by the IRS to permit the inclusion of basic living expenses, and it is expressly stated in the Proposed Regulations that the term includes basic living expenses and is not limited to expenses for items for which there is a medical necessity or which provide no benefit to others in addition to the Designated Beneficiary.<sup>67</sup> Each Designated Beneficiary is unique, therefore the kinds of needs and expenses may vary depending on their disability and circumstances. If an expense is incurred at a time when a Designated Beneficiary is not considered an eligible individual, then the expense is not a Qualified Disability Expense.<sup>68</sup>

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63. The sixty-day time period begins when the distribution from the original ABLE account is made. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,613.

64. I.R.C. § 529A(e)(5) (Supp. III 2013–2016).

65. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,612.

66. *Id.* at 35,614–15.

67. *Id.* at 35,615.

68. *Id.* at 35,612.

The original version of the Proposed Regulations stated that qualified ABLE programs are required to establish safeguards to distinguish between distributions for Qualified Disability Expenses and other non-qualified distributions, as well as to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the SSI program of the Social Security Act.<sup>69</sup> Upon consideration of comments regarding the Proposed Regulations, the IRS issued Notice 2015-81 to address concerns regarding certain requirements set forth in the Proposed Regulations. One of the main concerns expressed by commenters was the requirement that qualified ABLE programs must establish safeguards to categorize distributions from ABLE accounts.

Since identification of housing expenses is not relevant for federal income tax purposes, the Treasury Department and IRS agreed that reference to the requirement for an ABLE program to classify distributions as housing expenses will not be included in the final regulations.<sup>70</sup> Similarly, commenters expressed concerns that requiring qualified ABLE programs to determine how distributions will be used prior to making the distribution is unduly burdensome for the program and the Designated Beneficiary.<sup>71</sup> The Treasury Department and IRS also confirmed that the final regulations will not require a qualified ABLE program to distinguish between distributions from an ABLE account used for Qualified Disability Expenses and any other non-qualified distributions.<sup>72</sup> It will be the responsibility of the Designated Beneficiary to categorize the distributions as Qualified Disability Expenses or non-qualified expenses to properly determine their federal income tax obligations.<sup>73</sup>

Each qualified ABLE program is required to submit electronically to the Commissioner of Social Security, on a monthly basis and in a manner specified by the Commissioner of Social Security, "statements on relevant distributions and account balances from all ABLE accounts."<sup>74</sup> Each state will enter into a data exchange agreement with the SSA and the agreement will specify the con-

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69. *Id.* at 35,615.

70. I.R.S. NOTICE 2015-81, *supra* note 12, at 4.

71. *Id.*

72. *Id.*

73. *Id.* at 4-5.

74. I.R.C. § 529A(d)(4) (Supp. III 2013-2016).

tent, format, and security and privacy requirements for the reports. These reports are required to contain certain information including, but not limited to, the name, social security number, and date of birth of the Designated Beneficiary, and ABLE account balances and distribution data from each ABLE account. If an ABLE Designated Beneficiary receives SSI or Medicaid, then the SSA may investigate any distribution from an ABLE account to determine if the withdrawal is for a Qualified Disability Expense. An ABLE Designated Beneficiary may need to keep records of any housing expenses paid from their ABLE account if required by virtue of receiving SSI.<sup>75</sup>

#### D. Means-Testing Exemptions

Normally, an individual with a disability who receives benefits from certain federal means-tested programs like SSI may only have a maximum of \$2000 in assets in order to remain eligible for the benefits.<sup>76</sup> One of the most important features of ABLE accounts is the ability to shelter balances held therein from federal, and in some cases state, benefit programs that would usually include those balances in determining whether to provide government benefits to an individual and in what amounts. This exemption is not absolute. The amount that can be saved in an ABLE account and be exempt differs depending upon the benefit.

##### 1. Federal Benefits Programs

The ABLE statute specifically provides means-testing exemptions for two types of federal benefits: SSI and Medicaid.

SSI is a benefits program administered by the SSA that “pays benefits to disabled adults and children who have limited income and resources.”<sup>77</sup> In order to receive SSI, an individual is typically required to have no more than \$2000 in resources or, if married, no more than \$3000 (including the spouse’s assets even if that spouse is not disabled).<sup>78</sup> ABLE account balances are not counted

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75. See POMS, *supra* note 15.

76. CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE SUPPLEMENTAL SECURITY INCOME (SSI) PROGRAM 2 (2014), <https://www.cbpp.org/sites/default/files/atoms/files/1-10-11socsec.pdf>.

77. *Supplemental Security Income (SSI) Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/disabilityssi/ssi.html> (last visited Sept. 27, 2017).

78. SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME (SSI) 6 (2016), <https://www.>

as a resource for SSI eligibility determinations until those balances exceed \$100,000.<sup>79</sup> Critically, once ABLE balances go over this \$100,000 limit, SSI benefits are merely suspended, not terminated, until such time as balances drop below \$100,000.<sup>80</sup>

With a notable exception, the SSA will exclude from a Designated Beneficiary's countable resources for purposes of means-testing a distribution for a Qualified Disability Expense, other than housing, if it is retained beyond the month received. This exclusion applies while (1) the Designated Beneficiary maintains, makes contributions to, or receives distributions from the ABLE account; (2) the distribution is unspent; (3) the distribution is identifiable; and (4) the individual still intends to use the distribution for a non-housing related Qualified Disability Expense.<sup>81</sup> However, the SSA will count as a resource a distribution for a housing-related Qualified Disability Expense if the distribution is retained into the month following the month of receipt.<sup>82</sup>

In addition to the SSI means-testing exemption, ABLE balances are also exempt from Medicaid eligibility calculations, but to a greater degree. Established by Congress in 1965, Medicaid provides health insurance for, among others, individuals with disabilities who have limited income and resources.<sup>83</sup> The program is administered and funded by CMS in partnership with each state.<sup>84</sup> Unlike SSI, all ABLE balances, up to the maximum allowable balance,<sup>85</sup> are exempt from Medicaid means-testing calculations. In other words, ABLE balances have no impact on Medicaid eligibility.

While the ABLE statute mentions SSI, Medicaid, and distributions for housing expenses<sup>86</sup> by name and explicitly discusses them, there is also a broader exemption granted in the Act which states that ABLE balances and distributions used for Qualified Disability

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ssa.gov/pubs/EN-05-11000.pdf.

79. See POMS, *supra* note 15.

80. *Id.*

81. *Id.*

82. *Id.*

83. CMS Press Toolkit, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/newsroom/PressToolkit.html> (last visited Sept. 27, 2017).

84. *Id.*

85. Virginia, for instance, permits up to \$500,000 to be saved in its ABLEnow account. *FAQs: Contributing to an Account*, ABLENOW, <https://www.able-now.com/resources/faqs#contributing-to-an-account> (last visited Sept. 27, 2017).

86. See *supra* Part II.C (discussing housing expense distributions).

Expenses will be disregarded for programs which federal law normally requires consideration of the applicant's financial circumstances.<sup>87</sup>

As ABLE is a relatively new program, only a few agencies have issued any type of official guidance on the subject. As mentioned above, the Treasury issued its interim guidance in the form of Proposed Regulations<sup>88</sup> and the SSA released its POMS.<sup>89</sup> The Food and Nutrition Service of the USDA published a final rule<sup>90</sup> which considers balances held in a qualified ABLE program as excludable resources for the Supplemental Nutrition Assistance Program ("SNAP").<sup>91</sup> Finally, CMS recently released a guidance letter on the implications of the ABLE Act for state Medicaid programs.

The United States Department of Housing and Urban Development ("HUD") has not released guidance on how to treat ABLE balances when determining housing benefits. Unlike CMS's Medicaid program, HUD's benefit programs are not specifically mentioned in the ABLE Act. While at least five states have requested

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87. Stephen Beck, Jr., *Achieving a Better Life Experience Act of 2014*, Pub. L. No. 113-295, § 103, 128 Stat. 4056, 4063 (codified as amended at I.R.C. § 529A(a) (Supp. III 2013-2016)). The Act describes this general exemption as follows:

ACCOUNT FUNDS DISREGARDED FOR PURPOSES OF CERTAIN OTHER MEANS-TESTED FEDERAL PROGRAMS—Notwithstanding any other provision of Federal law that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount (including earnings thereon) in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLE account of the individual, and any distribution for [Q]ualified [D]isability [E]xpenses (as defined in subsection (e)(5) of such section) shall be disregarded for such purpose with respect to any period during which such individual maintains, makes contributions to, or receives distributions from such ABLE account . . . .

*Id.* The Act then goes on to discuss the specific exemptions for housing expenses, SSI, and Medicaid which, are treated separately from this general exemption. *Id.*

88. *Guidance Under Section 529A: Qualified ABLE Programs*, 80 Fed. Reg. 35,602 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1).

89. POMS, *supra* note 15.

90. *See Supplemental Nutrition Assistance Program (SNAP): Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation and Energy Act of 2008*, 82 Fed. Reg. 2010, 2018 (Jan. 6, 2017) (to be codified at 7 C.F.R. pt. 273) (stating that the USDA will include ABLE programs as excludable resources under 7 C.F.R. § 273.8(e)(2)(ii)).

91. *Federal Achieving a Better Life Experience (ABLE) Act*, NAT'L DOWN SYNDROME SOC'Y [hereinafter NAT'L DOWN SYNDROME SOC'Y], <http://www.ndss.org/Advocacy/Legislative-Agenda/Economic-Self-Sufficiency/Achieving-a-Better-Life-Experience-ABLE-Act/Federal-Achieving-a-Better-of-Life-Experience-ABLE-Act/> (last updated May 10, 2017).



HUD exclude ABLE balances when determining housing benefits,<sup>92</sup> there are recent anecdotal reports that HUD, despite the language found in the ABLE Act, is taking into account ABLE balances in their means-testing calculations. Whether this inclusion is a result of HUD regional offices simply adhering to policies that were in existence prior to the December 2014 passage of ABLE or evidence that HUD has determined it is exempt from the ABLE Act is not clear at this time.

## 2. State Benefits Programs

In order to ensure that ABLE balances would be exempt from all government means-testing, the National Down Syndrome Society reports that when most of the states passed their ABLE legislation, they included a provision that exempts ABLE assets from state and local means-tested benefits programs.<sup>93</sup> Virginia's exemption is found at Code section 23.1-707(G) and exempts ABLE balances and distributions made for Qualified Disability Expenses from any means-test that is required by state law.<sup>94</sup>

### E. *Tax Advantages*

Generally, distributions from an ABLE account for Qualified Disability Expenses for the Designated Beneficiary of the ABLE

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92. On December 8, 2016, the treasurers of California, Nevada, Illinois, Rhode Island, and Alaska sent a joint letter to then-HUD Secretary Julián Castro asking him not to include ABLE balances in eligibility calculations since it "deviates from the original spirit of the ABLE Act . . ." Letter from John Chiang et al., State Treasurers, to Julián Castro, Sec'y of U.S. Dep't of Hous. & Urban Dev. (Dec. 8, 2016), [http://treasurer.ca.gov/news/releases/2016/20161216\\_ushud.pdf](http://treasurer.ca.gov/news/releases/2016/20161216_ushud.pdf).

93. See NAT'L DOWN SYNDROME SOC'Y, *supra* note 91.

94. VA. CODE ANN. § 23.1-707(G) (Repl. Vol. 2016) states,

Notwithstanding any other provision of state law that requires consideration of one or more financial circumstances of an individual for the purpose of determining (i) the individual's eligibility to receive any assistance or benefit pursuant to such provision of state law or (ii) the amount of any such assistance or benefit that such individual is eligible to receive pursuant to such provision of state law, any (a) moneys in an ABLE savings trust account for which such individual is the beneficiary, including any interest on such moneys, (b) contributions to an ABLE savings trust account for which such individual is the beneficiary, and (c) distribution for qualified disability expenses for such individual from an ABLE savings trust account for which such individual is the beneficiary shall be disregarded for such purpose with respect to any period during which such individual remains the beneficiary of, makes contributions to, or receives distributions for qualified disability expenses from such ABLE savings trust account.

account are not included in the Designated Beneficiary's gross income for federal income tax purposes. If distributions from a qualified ABLE program do not exceed the Qualified Disability Expenses of the Designated Beneficiary, then no amount shall be included in gross income.<sup>95</sup> Earnings on funds invested in an ABLE account are also not subject to federal income tax if the funds are used for Qualified Disability Expenses.<sup>96</sup>

States may also offer certain state income tax incentives for ABLE accounts. For example, earnings on funds invested in the Virginia-sponsored qualified ABLE program, ABLEnow, are not subject to Virginia state income tax if the funds are used for Qualified Disability Expenses.<sup>97</sup> Virginia also offers an annual state income tax deduction for Virginia taxpayers of up to \$2000 per contributor for contributions to a Virginia sponsored ABLE account.<sup>98</sup>

Several other states have tax incentives as well, but most, like Virginia, have deductions only for state taxpayers who invest in their specific state's qualified ABLE program. The following states currently offer qualified ABLE programs and a state tax benefit for taxpayers investing in their state's ABLE program: Iowa, Michigan, Nebraska, Ohio, Oregon, and Virginia.<sup>99</sup> Wisconsin offers a tax deduction for its taxpayers who invest in any qualified ABLE program, as Wisconsin currently does not have legislation that will offer an ABLE program through the state.<sup>100</sup>

Additional exclusions from gross income include rollovers and program-to-program transfers, as well as certain changes of the Designated Beneficiary. A rollover is defined as a contribution to an ABLE account of a Designated Beneficiary of all or a portion of an amount withdrawn from the Designated Beneficiary's ABLE account, as long as the contribution is made within sixty days of the date of withdrawal and no rollover has been made to an ABLE account of that same Designated Beneficiary within the prior twelve

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95. I.R.C. § 529A(c)(1)(B) (Supp. III 2013–2016).

96. *Id.* § 529A(c)(1)(B)(i) (Supp. III 2013–2016).

97. See Act of May 20, 2016, ch. 780, 2016 Va. Acts 2037, 2509 (codified as amended at VA. CODE ANN. § 58.1-321 note (Repl. Vol. 2017)).

98. *Id.*

99. Megan Leonhardt, *ABLE Savings Accounts: An Updated, State-by-State List of Programs*, TIME MONEY (Jan. 4, 2017), <http://time.com/money/4618317/529-able-savings-account-states/>.

100. See WIS. STAT. § 71.98(7) (2017).

months.<sup>101</sup> This type of rollover is not included in the gross income of the Designated Beneficiary.<sup>102</sup>

A program-to-program transfer (“Program-to-Program Transfer”) is defined as “the direct transfer of the entire balance of an ABLE account into an ABLE account of the same [D]esignated [B]eneficiary in which the transferor ABLE account is closed upon completion of the transfer,” or it is the transfer of part or all of the balance of a Designated Beneficiary’s ABLE account to another eligible individual who is a Member of the Family of the former Designated Beneficiary.<sup>103</sup> A Program-to-Program Transfer is not considered a distribution and is not included in the Designated Beneficiary’s gross income.<sup>104</sup> Finally, a change of an ABLE account’s Designated Beneficiary is not treated as a distribution and is not includible in a Designated Beneficiary’s gross income if the successor Designated Beneficiary is an eligible individual for that calendar year and “is a [M]ember of the [F]amily of the former [D]esignated [B]eneficiary.”<sup>105</sup>

In addition to income tax advantages, ABLE accounts also enjoy additional kinds of favorable tax treatment. Any contribution to a qualified ABLE program on behalf of the Designated Beneficiary shall be treated as a completed gift to that Designated Beneficiary for purposes of gift tax and generation-skipping transfers (“GSTs”).<sup>106</sup> “To the extent that a contributor’s gifts to the [D]esignated [B]eneficiary, including [all contributions paid] into the [D]esignated [B]eneficiary’s ABLE account, do not exceed the annual limit in [Internal Revenue Code] Section 2503(b), the contribution is not subject to gift tax.”<sup>107</sup> A distribution from an ABLE account to that account’s Designated Beneficiary is also not treated as a taxable gift.<sup>108</sup> Some transfers to a new Designated Beneficiary, including those from certain rollovers from ABLE accounts and changes in a Designated Beneficiary to an eligible individual

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101. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. 35,602, 35,612 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1).

102. *Id.* at 35,616.

103. *Id.* at 35,612.

104. *Id.* at 35,616.

105. *Id.*

106. I.R.C. § 529A(c)(2)(A) (Supp. III 2013–2016).

107. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,616.

108. I.R.C. § 529A(c)(2)(B) (Supp. III 2013–2016).

who is also a Member of the Family of the former beneficiary, do not result in the imposition of a gift tax or GST taxes.<sup>109</sup>

Certain payments made from the ABLE account after the Designated Beneficiary's death are not taxed or penalized. Distributions made after the death of the Designated Beneficiary for payment of his or her outstanding obligations due for Qualified Disability Expenses are not included in the gross income of the Designated Beneficiary or his or her estate.<sup>110</sup> The payment of outstanding Qualified Disability Expenses and the payment of certain claims made by the Designated Beneficiary's state of residence under its Medicaid plan may be deductible for estate tax purposes.<sup>111</sup> In addition, the ten percent penalty imposed on a non-qualified distribution from a qualified ABLE program shall not apply if the distribution is made on or after the death of the Designated Beneficiary to the estate of the Designated Beneficiary, to an heir or legatee of the Designated Beneficiary, or to certain creditors of the Designated Beneficiary.<sup>112</sup>

## F. Contributions

### 1. The Basics

Anyone can contribute to an ABLE account: the Designated Beneficiary, relatives, and even unrelated third parties. And restrictions on these contributions are based on both annual and aggregate dollar limits. The maximum amount that can be contributed each calendar year to an ABLE account is equal to the amount of the federal gift tax exclusion for that same year, currently \$14,000.<sup>113</sup> Contributions must also always be made in cash and can be in the form of check, money order, credit card, electronic transfer, or similar method.<sup>114</sup> The total overall amount a Designated Beneficiary can save in his one ABLE account is equal to the maximum savings limit of the 529 college savings plan of the state

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109. *Id.* § 529A(c)(2)(C) (Supp. III 2013–2016).

110. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,616.

111. *Id.*

112. *See id.*

113. I.R.C. § 529A(b)(2)(B) (Supp. III 2013–2016); Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,614.

114. I.R.C. § 529A(b)(2)(A) (Supp. III 2013–2016); Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,614.

that runs the ABLE program.<sup>115</sup> ABLE maximum savings limits among programs open, as of October 2017, run from \$235,000 (Georgia) to \$511,758 (Pennsylvania).<sup>116</sup> Virginia's maximum saving limit, currently \$500,000, is on the higher end of that scale.<sup>117</sup> While these are generous amounts, because of the dollar limits placed on annual contributions, realistically no ABLE account is likely to reach the maximum savings limit for quite some time.

## 2. Excess Contributions and Excess Aggregate Contributions

An attempt to make a contribution to an ABLE account that has already received deposits equal to the annual contribution limit (known as an "Excess Contribution") is required to be returned by an ABLE program to the contributor.<sup>118</sup> The rejection of the attempted contribution should take place before it is deposited into the ABLE account. However, if for some reason the Excess Contribution is deposited into the ABLE account and accrues interest, not only must the Excess Contribution be taken out of the account and returned to the contributor, but any net income attributable to the Excess Contribution must be returned as well.<sup>119</sup> Similarly, should an account ever reach the maximum savings limit permitted, the ABLE program that holds that account is obliged to turn away all further contributions to that account (known as "Excess Aggregate Contributions") and return them to the contributor.<sup>120</sup> Should the Excess Aggregate Contribution be placed in the ABLE account and accrue interest, the net income attributable to that contribution must also be returned to the contributor.<sup>121</sup> Should either an Excess Contribution or Excess Aggregate Contribution be returned to a contributor who is not also the Designated Beneficiary, the ABLE program must notify the Designated Beneficiary of the returned contribution.<sup>122</sup>

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115. I.R.C. § 529(b)(6) (2012); Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,614. Internal Revenue Code section 529(b)(6) provides the statutory basis for the maximum 529 college savings account limits. I.R.C. § 529(b)(6).

116. *529 Plans, Compare by Features*, SAVINGFORCOLLEGE.COM, [http://www.savingforcollege.com/compare\\_529\\_plans/?plan\\_question\\_ids\[\]=308&page=compare\\_plan\\_questions](http://www.savingforcollege.com/compare_529_plans/?plan_question_ids[]=308&page=compare_plan_questions) (last visited Sept. 27, 2017).

117. *See id.*

118. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,614.

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.*

The return of Excess Contributions and Excess Aggregate Contributions are handled on a last-in, first-out basis.<sup>123</sup> Consequently, if an ABLE account has calendar year-to-date contributions totaling \$13,000 and then receives three separate \$500 contributions at 1:00 PM, 2:00 PM, and 3:00 PM on a particular day, the \$500 contribution received at 3:00 PM would be returned to the contributor.

Finally, “[r]eturned contributions must be received by the [person who made them] on or before the due date (including extensions) for the Federal income tax return of the [D]esignated [B]eneficiary for the taxable year in which the [E]xcess [C]ontribution or [E]xcess [A]ggregate [C]ontribution was made.”<sup>124</sup> Excess Contributions returned to the contributor during this time period are not treated as contributions to the ABLE account.<sup>125</sup> Importantly, both the Designated Beneficiary and the ABLE program would do well to note that if the Excess Contribution is not received by the contributor within the time period described immediately above, a six percent excise tax is levied upon the Designated Beneficiary.<sup>126</sup>

### G. Distributions

A distribution is the withdrawal of funds or payment from an ABLE account.<sup>127</sup> Only the Designated Beneficiary or the Authorized Representative may request a distribution.<sup>128</sup> Distributions from ABLE accounts are only to or for the benefit of the Designated Beneficiary.<sup>129</sup>

Each distribution from an ABLE account usually “consists of earnings . . . and investment in the account.”<sup>130</sup> If the total of all distributions from a qualified ABLE account to or for the benefit of the Designated Beneficiary during his or her taxable year do not exceed the Designated Beneficiary’s Qualified Disability Expenses for that year, then no amount distributed is includible in the Designated Beneficiary’s gross income for that year.<sup>131</sup> Basically, if all

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123. *Id.*

124. *Id.*

125. *Id.* at 35,616.

126. *Id.*

127. *Id.* at 35,611.

128. POMS, *supra* note 15.

129. *Id.*

130. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,615.

131. *Id.*

distributions from the ABLE account are used for the Designated Beneficiary's Qualified Disability Expenses, then there are no tax consequences.

If the total amount distributed from an ABLE account to or for the benefit of the [D]esignated [B]eneficiary . . . during his or her taxable year exceeds the [Q]ualified [D]isability [E]xpenses of the [D]esignated [B]eneficiary for that year, the distributions from the ABLE account except to the extent excluded from gross income under [any provision of the I.R.C.] must be included in the gross income of the [D]esignated [B]eneficiary.<sup>132</sup>

So any distribution that is not used for the Designated Beneficiary's Qualified Disability Expenses is included in the Designated Beneficiary's gross income. In these cases,

the earnings portion of the distribution includible in gross income is equal to the earnings portion of the distribution reduced by an amount that bears the same ratio to the earnings portion as the amount of [Q]ualified [D]isability [E]xpenses during the year [related] to the total distributions during the year.<sup>133</sup>

On top of the inclusion of the earnings portion of the non-qualified distribution from the ABLE in the gross income of the Designated Beneficiary, there is an additional penalty of ten percent of the includible amount imposed by the IRS.<sup>134</sup>

Each qualified ABLE program is required to report the total amount of distributions from each ABLE account to the IRS.<sup>135</sup> The administrator of each qualified ABLE program must file an annual information return with the IRS and send an annual statement to the Designated Beneficiary who received a distribution from an ABLE account.<sup>136</sup> ABLE Designated Beneficiaries must keep records of the distributions from their ABLE accounts to show records of their Qualified Disability Expenses in case their ABLE accounts are audited by the IRS.

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132. *Id.*

133. *Id.*

134. *Id.* at 35,616.

135. I.R.C. § 529A(d)(1) (Supp. III 2013–2016).

136. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,617–18.

## H. Rollovers

Should a Designated Beneficiary or an Authorized Representative, after establishing an account with an ABLE plan, choose to transfer that account to another state's plan, there are two ways in which to do so: indirect rollovers and direct rollovers. Designated Beneficiaries are permitted one rollover per rolling twelve-month period.<sup>137</sup>

### 1. Indirect Rollovers

An indirect rollover, sometimes simply referred to as a "rollover," is a withdrawal of all funds from an account in one ABLE program, followed within sixty days of that withdrawal by a contribution of those funds into an account managed by a different ABLE program, or to a person who is an eligible individual and a Member of the Family of the Designated Beneficiary.<sup>138</sup>

### 2. Direct Rollovers

A direct rollover, referred to as a Program-to-Program Transfer<sup>139</sup> in the Proposed Treasury Regulations means the direct transfer of the entire balance from one ABLE account into another ABLE account of the same Designated Beneficiary in which the transferor ABLE account is closed upon completion of the transfer, or part or all of the balance to an ABLE account of another eligible individual who is a Member of the Family<sup>140</sup> of the former Designated Beneficiary, without any intervening withdrawal or deemed withdrawal to the Designated Beneficiary.<sup>141</sup>

### 3. Application of Tax Rules to Rollovers

A rollover is not includible in the gross income of the Designated Beneficiary. However, a rollover that does not meet the conditions

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137. *Id.* at 35,612.

138. *Id.*

139. *See id.* at 35,615.

140. Again, under the Proposed Regulations, a person is considered a Member of the Family if the person is "a sibling, whether by blood or adoption . . . [including] a brother, sister, stepbrother, stepsister, half-brother, and half-sister." *Id.* at 35,612.

141. *Id.*



stated above will constitute a non-qualified withdrawal, making it subject to federal tax and an additional ten percent tax.<sup>142</sup> Both the federal income tax and the additional ten percent federal tax are on earnings. In addition, a transfer to a person who is not a Member of the Family will subject the Designated Beneficiary to federal gift tax and GST tax.<sup>143</sup>

#### 4. Loss of Means-Testing Exemption

Importantly, in addition to adverse tax consequences, a transfer of funds that does not comply with all the requirements for rollovers is deemed to be a non-qualified withdrawal which may, in turn, negatively impact benefit eligibility and amounts because transferred funds no longer enjoy the exemption from means-testing.<sup>144</sup>

#### 5. Two Other Important Notes on Rollovers

When executing a rollover, the ABLE account from which amounts were transferred must be closed as of the sixtieth day after that transfer in order for the account that received the transferred funds via the rollover to be treated as an ABLE account.<sup>145</sup> Failing to close the old ABLE account within the sixty-day time period results in the account receiving the funds not being treated as an ABLE account and thus not being eligible for the benefits of ABLE accounts, including the means-testing exemption and tax advantages.<sup>146</sup> Non-compliance with the sixty-day rule could also result in the imposition of federal taxes and penalties.

In addition, while the Proposed Regulations state that what was principal and interest before the rollover remains principal and interest after the rollover,<sup>147</sup> the ABLE plan receiving rollover funds from another state's ABLE plan will treat the entire amount of that

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142. *Id.* at 35,616.

143. *Id.*

144. *Id.* at 35,607 (explaining that the Treasury Department and the IRS recognize that moving funds by a rollover may jeopardize the Designated Beneficiary's eligibility for certain benefits under various means-tested programs).

145. *Id.* at 35,613.

146. *See id.* (noting that additional accounts will not be treated as ABLE accounts and, therefore, will not reap the benefits enjoyed by such an account).

147. *See id.* at 35,615.

rollover as earnings, unless the receiving ABLE plan receives appropriate documentation showing the actual earnings portion of the rollover funds.<sup>148</sup> An example of a worst case scenario for non-compliance of this requirement goes something like this: a Designated Beneficiary executes a rollover and transfers his \$10,000 ABLE account balance from state X's program to state Y's program, but never provides state Y with a breakdown of how much of the \$10,000 is principle and how much is interest. Soon after opening the new account, the Designated Beneficiary makes a non-qualified withdrawal of the entire \$10,000. One of the consequences of the withdrawal is that, for tax purposes, the entire \$10,000 is treated as interest on which the Designated Beneficiary will pay taxes and the ten percent penalty. When executing a rollover, it is advisable that the Designated Beneficiary or Authorized Representative ask the ABLE program to which he is rolling funds about its deadline for receiving the principal/interest breakdown, because states frequently have different reporting deadlines.

## I. *Death of the Designated Beneficiary*

### 1. Outstanding Debts and Transfer to Estate

If the Designated Beneficiary dies, the balances left in his or her ABLE account may be used to pay for all of the Designated Beneficiary's Qualified Disability Expenses.<sup>149</sup> The balance in an ABLE account after the payment of all outstanding payments due for these expenses is then paid into the Designated Beneficiary's estate.<sup>150</sup> However, the balance transfer (or at least a portion of it) to the estate does not occur if applicable state law prohibits it or if there are valid claims made by a state under its Medicaid Recapture guidelines.<sup>151</sup>

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148. *See id.* (allowing ABLE accounts to be maintained after a Designated Beneficiary's residency changes, but subjecting the ABLE program to all applicable reporting requirements); *see, e.g.*, ENABLE, ENABLE SAVINGS PLAN PROGRAM DISCLOSURE STATEMENT AND PARTICIPATION AGREEMENT 17 (2017), <http://cdn.unite529.com/jcdn/files/NEB/pdfs/programdescription.pdf> (disclosing Nebraska's policy of treating the entire rollover contribution from another ABLE program as earnings unless the Program Manager receives appropriate documentation showing the actual earnings portion of the rollover contribution).

149. *Id.* at 35,615.

150. *Id.* at 35,616.

151. *Id.* at 35,609, 35,615–16.

## 2. Medicaid Recapture

Upon the death of the Designated Beneficiary, section 529A permits a state to file a claim for the amount of the total medical assistance paid for the Designated Beneficiary under the state's Medicaid plan after the establishment of the Designated Beneficiary's ABLE account (or any ABLE account from which amounts were rolled over or transferred to that account).<sup>152</sup> The amount of the claim is to be paid only after the payment of all outstanding payments due for the Qualified Disability Expenses of the Designated Beneficiary and is to be reduced by the amount of all premiums paid by or on behalf of the Designated Beneficiary to a Medicaid Buy-In program under that state's Medicaid plan.<sup>153</sup> Currently it is not clear what procedures will govern the assertion of such a claim by a state's Medicaid plan, but once established, these procedures may vary from state to state.

### III. SUGGESTED CHANGES AND IMPROVEMENTS

While ABLE programs have only been in existence for a little over a year, there have already been many suggestions on how to improve them.<sup>154</sup> These suggestions come from disability associations, current ABLE programs, commentators, and others. Predictably, most of the suggested changes have their proponents as well as their detractors. Three of the more discussed proposals are highlighted below.

#### A. *Age Limits*

To meet the criteria of an eligible individual for purposes of opening an ABLE account, the onset of the individual's disability must have occurred prior to age twenty-six. The ABLE Act provides that an individual is an eligible individual for a taxable year if, during that year, either the individual 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

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152. *Id.* at 35,609.

153. *Id.* at 35,609, 35,615.

154. *Guidance Under Section 529A: Qualified ABLE Programs (REG-102837-15)*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=IRS-2015-0030> (acknowledging that 226 comments were received regarding the IRS's proposed regulations under section 529A).

date on which the individual attained age twenty-six, or a disability certification meeting specified requirements is filed with the Secretary.<sup>155</sup> This is a significant limitation for those individuals living with disabilities who are otherwise eligible for an ABLE account, if not for the onset of their disability occurring after age twenty-six.

Early versions of the ABLE federal legislation did not contain any age limitations or restrictions for ownership of an ABLE account.<sup>156</sup> Prior to the passage of the final ABLE Act, the age limitation was added as a concession in order to lower the cost of the legislation.<sup>157</sup> Many disability groups and individuals with disabilities who are currently prevented from opening an ABLE account due to their age at onset of disability are interested in raising the age limit to allow for broader use of ABLE accounts.

To address this issue, the ABLE Age Adjustment Act, introduced in Congress on April 4, 2017, would raise the age limit for ABLE accounts to forty-six.<sup>158</sup> This is an important improvement to ABLE for many individuals in the disability community because so many debilitating diseases and conditions often occur later in life, for example, disabled veterans may have experienced their disability while serving after turning age twenty-six. Increasing the age limits for eligible individuals to participate in ABLE programs provides the opportunity for more individuals living with disabilities to take advantage of ABLE accounts and save money to help cover the costs of their disability related expenses, while protecting their federal means-tested benefits. This being said, financial realities may make passage of the bill difficult because the increase in the age of onset predictably increases the cost of the ABLE program. Current estimates predict that raising the age limit to forty-six would double the cost of ABLE from \$2,000,000,000 to \$4,000,000,000 over a ten-year period.<sup>159</sup> However, some industry

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155. I.R.C. § 529A(e)(1) (Supp. III 2013–2016).

156. *Compare* ABLE Act of 2013, S. 313, 113th Cong. § 3 (2013) (stating that an individual's disability status under the Act was determined "regardless of age"), *with* Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,611–12 (providing that eligible individuals' disability or blindness must have occurred before his or her twenty-sixth birthday).

157. *See* H.R. REP. NO. 113-614, pt. 1, at 23–24 (2014).

158. ABLE Age Adjustment Act, S. 817, 115th Cong. (2017); ABLE Age Adjustment Act, H.R. 1874, 115th Cong. (2017).

159. H.R. REP. NO. 113-614, pt. 1, at 19 (discussing Congressional Budget Office's and Joint Committee on Taxation's estimate that the enactment of the ABLE Act of 2014 would result in an increased deficit in the amount of \$2,100,000,000 over the next ten years); *see*

participants and disability associations have begun to doubt the accuracy of those cost estimates given the relatively small number of ABLE accounts opened nationwide to date.<sup>160</sup>

### B. *Guardians and Conservators*

Soon after ABLE programs began to open, an issue arose regarding the type of guardians permitted to open an ABLE account on behalf of their ward. Under the Proposed Regulations, if a Designated Beneficiary is unable or unwilling to exercise signatory authority over their ABLE account, a power of attorney or, if none, a parent or guardian, may exercise this authority.<sup>161</sup> While seemingly unambiguous, a debate nevertheless has arisen over what kind of guardian is permitted to open an account in the case of Designated Beneficiary that is eighteen years or older.

Virginia, like many states, has two types of persons who can be appointed to care for an incapacitated adult: (1) a guardian who is responsible for the “person”, that is, his support, welfare, habilitation, education, and therapeutic treatments; and (2) a conservator, who is responsible for managing the estate and financial affairs of their adult ward.<sup>162</sup>

The issue now being encountered is that some banks with whom ABLE programs deposit contributions will not permit a guardian of the person to open an account as an Authorized Representative who is not also a conservator (or, as they are known in some states, a guardian of the estate) that has been given the power to manage the finances of the ward.<sup>163</sup> While the ABLE Proposed Regulations do permit guardians to open ABLE accounts for their wards, these

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Michelle Diament, *Proposed Changes to ABLE Act Draw Opposition*, DISABILITY SCOOP (Oct. 6, 2016), <https://www.disabilityscoop.com/2016/10/06/proposed-changes-able-opposition/22843/> (quoting the president of the National Down Syndrome Society, Sara Hart Weir, who estimates that an age increase to forty-six would increase costs \$2,000,000,000 over ten years).

160. This information is based off the authors' experience as administrators of Virginia's ABLEnow program.

161. Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,611, 36,613.

162. VA. CODE ANN. § 64.2-2000 (Repl. Vol. 2017). Some states refer to these two roles as “guardian of the person” and “guardian of the property.” See, e.g., DEL. CODE ANN. tit. 12, §§ 3901(a)(2), 3921(b) (2017). Other states refer to these roles as “Conservator of the person” and “Conservator of the estate.” See, e.g., CONN. GEN. STAT. § 45a-644(a), (b) (2017).

163. See CONSUMER FIN. PROT. BUREAU, MANAGING SOMEONE ELSE'S MONEY: HELP FOR COURT-APPOINTED GUARDIANS OF PROPERTY AND CONSERVATORSHIP 6–7 (2015).

financial institutions appear to be guided instead by applicable state law.

A possible solution for this issue may be to amend the Proposed Regulations and widen the pool of eligible Authorized Representatives to include representative payees appointed by the SSA, which has the advantage of simplicity and economy. Representative payees are appointed by the SSA to receive Social Security or SSI benefits on behalf of an individual “who can’t manage or direct the management” of these benefits.<sup>164</sup> Representative payees, unlike guardians and conservators, are not appointed by a court, but rather by completing form SSA-11, providing certain documents to prove their identity, and then, usually, appearing in person at a Social Security Office to complete the application.<sup>165</sup> Preliminary discussions within the ABLE program industry indicate that there is some interest in studying this solution further; however, some concerns have been expressed over whether there would be appropriate level of oversight of a representative payee’s use of a Designated Beneficiary’s ABLE account.<sup>166</sup>

Another solution that has been suggested is amending the Proposed Regulations to specifically include as Authorized Representatives guardians of the person. However, supremacy issues involved with a federal regulation attempting to trump state law may prevent this change from effecting the nationwide solution that is desired. Amending instead Internal Revenue Code section 529A may address the supremacy issues inherent in the regulatory solution above, but may take some time to actually come to fruition.

Finally, some may refer to Proposed Regulations and point out that a parent may serve as an Authorized Representative thereby alleviating the need of at least some to go through the time and expense of having a conservator appointed for an adult Designated Beneficiary. However, again, some financial institutions have expressed an unwillingness to allow a parent to serve as the Authorized Representative of their adult child, without some underlying legal basis for doing so (guardianship, power of attorney, etc.).

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164. *Frequently Asked Questions (FAQs) For Representative Payees*, SOC. SEC. ADMIN., <https://www.ssa.gov/payee/faqrep.htm> (last visited Sept. 27, 2017).

165. *Id.*

166. The following information in Part II.B is based off the authors’ experience as administrators of Virginia’s ABLEnow program.

### C. Rollovers Between 529 Accounts and ABLE Accounts

Another change proposed by many would make ABLE accounts more flexible by allowing families to rollover savings in a 529 college savings plan to an ABLE account.<sup>167</sup> While certain ABLE-qualifying disabilities like Down Syndrome may be apparent at or even before birth, other disabilities may not be so readily apparent. A recent study appearing in *Neuropsychiatric Disease and Treatment* found that, currently, the mean age of diagnoses of Autism Spectrum Disorder (“ASD”) was 6.2 with a range of 2.2 to 17.2 years.<sup>168</sup> Most diagnoses of Asperger Syndrome, a type of ASD, come between the ages of five and nine.<sup>169</sup>

Prior to an ASD diagnosis, a parent may have opened a section 529 college savings account for the child. While young adults with ASD are going to college in ever increasing numbers,<sup>170</sup> after an ASD diagnosis, parents may wish or need to use the money they have saved for future college to instead cover the current costs of their child’s medical treatment and therapies. However, under current law,<sup>171</sup> monies withdrawn from a 529 college savings account that are used for non-qualified higher education expenses are assessed taxes and a penalty.<sup>172</sup> These taxes and penalty serve an important purpose—they deter people from saving money in a tax-advantaged 529 college savings account and then using that money for something other than higher education. However, with the advent of ABLE programs, these taxes and penalties unintentionally

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167. See NAT’L DOWN SYNDROME SOC’Y, THE ABLE ACT: FREQUENTLY ASKED QUESTIONS 3, <https://www.ndss.org/Global/Policy/ABLE/The?ABLEAct-FrequentlyAskedQuestionsweb.pdf> (last updated May 10, 2017).

168. Michal Hrdlicka et al., *Age at Diagnosis of Autism Spectrum Disorders: Is There an Association with Socioeconomic Status and Family Self-Education About Autism?*, 12 *NEUROPSYCHIATRIC DISEASE & TREATMENT* 1639, 1641 (2016).

169. *Asperger Syndrome*, KIDSHEALTH, <http://kidshealth.org/en/parents/asperger.html> (last visited Sept. 27, 2017).

170. Anna Almendrala, *More Children with Autism Are Going to College Than Ever Before (and 5 Other Key Findings)*, HUFFINGTON POST (Mar. 11, 2014, 9:32 AM), [http://www.huffingtonpost.com/2014/03/11/research-autism-spectrum\\_n\\_4939200.html](http://www.huffingtonpost.com/2014/03/11/research-autism-spectrum_n_4939200.html).

171. See I.R.C. § 529 (2012).

172. *Id.* § 529(a), (b)(1). 529 college savings account withdrawals used for non-qualified expenses suffer the same types of penalties that ABLE account non-qualified withdrawals do: gains are taxed and a ten percent penalty on the gains is also assessed. *Id.*; *id.* § 529A(c)(3)(A) (Supp. III 2013–2016); Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. at 35,602, 35,616 (proposed June 22, 2015) (to be codified at 26 C.F.R. pt. 1). In addition, under Virginia law, any Virginia state tax deductions taken on monies contributed to a Virginia 529 college savings account must be recaptured. VA. CODE ANN. § 58.1-322.03(7)(a) (Repl. Vol. 2017).

punish parents who did the right thing in saving early for their child's higher education but unexpectedly now face the challenges and substantial expense of raising a child with ASD.

According to an estimate by the USDA, a middle-income married couple with a child born in 2015 who has no disabilities can expect to spend between \$12,350 and \$13,900 annually on that child until age seventeen for a total of \$233,610, not including the cost of college.<sup>173</sup> The annual average cost of raising a child with ASD is more than four times greater, around \$60,000, with total lifetime costs estimated at \$1,400,000 and increasing to \$2,400,000 if there is also an intellectual disability.<sup>174</sup>

Two bills were introduced that would allow families to rollover savings in a 529 college savings account to an ABLE account. The ABLE Financial Planning Act was introduced on April 4, 2017, and would allow these families to set up an ABLE account for the eligible child with a disability using the funds in their established 529 account without incurring taxes or penalties.<sup>175</sup> This bill would subject any rollovers to ABLE accounts from 529s to the \$14,000 annual contribution limit.<sup>176</sup> The second bill, H.R. 529, the "529 and ABLE Improvement Act of 2017," would permit tax-free transfers not only from 529s to ABLE accounts, but also from ABLE accounts to 529s.<sup>177</sup>

## CONCLUSION

The ABLE Act is a major step forward for individuals with disabilities. It has brought to the attention of legislators and other policymakers the significant challenges and costs associated with living with a disability. The opportunity to open an ABLE account finally gives individuals with disabilities the ability to save and invest money, often for the first time. Tax-advantaged ABLE accounts offer individuals with disabilities a vehicle to save money

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173. Press Release, U.S. Dep't of Agric., Families Projected to Spend an Average of \$233,610 Raising a Child Born in 2015 (Jan. 9, 2017), <https://www.usda.gov/media/press-releases/2017/01/09/families-projected-spend-average-233610-raising-child-born-2015>.

174. Chris Taylor, *Raising an Autistic Child: Coping with the Costs*, TIME MONEY (June 24, 2014), <http://time.com/money/2918134/cost-raising-autistic-child/>.

175. ABLE Financial Planning Act, S. 816, 115th Cong. (2017); ABLE Financial Planning Act, H.R. 1897, 115th Cong. (2017).

176. ABLE Financial Planning Act, S. 816, 115th Cong. (2017); ABLE Financial Planning Act, H.R. 1897, 115th Cong. (2017).

177. 529 and ABLE Account Improvement Act of 2017, H.R. 529, 115th Cong. (2017).



for their Qualified Disability Expenses, providing them the opportunity for greater independence and an improved quality of life. Additionally, and most profoundly felt by some in the disability community, is the means-testing exemption provided by ABLE. For the first time, many individuals with disabilities have the ability to save money to meet their own personalized needs while remaining qualified for benefits programs that are critical to maintaining their health and well-being.