

# **Incapacity Planning with ABLE Accounts v. Other Supports**

**JOHN B. HENRY, III**  
**jbhenry@johnhenrylaw.com**

**JOHN B. HENRY, III**  
**ATTORNEY & COUNSELOR AT LAW**  
2646 S. Loop West, Ste 130C  
Houston, Texas 77054  
Telephone: 832.464.5767  
Facsimile: 866.864.7749

**www.johnhenrylaw.com**

**Ceremonial Courtroom of the Harris County Civil District  
Courthouse  
March 29, 2016**



Attorney John B. Henry, III, practices throughout Texas, including Harris County, Jefferson County, Galveston County, Fort Bend County and the surrounding counties. Mr. Henry is a native of Texas, and he brings his perspective and experience to represent his client with the knowledge and care their matters deserve. His practice focuses on guardianship, probate and estate administration, estate planning, special needs planning and elder law. Mr. Henry's experience with these areas of law began with his work in the non-profit arena where he continues to devote his volunteer time to increasing access to justice for low-income Texans. Providing a skilled level of care and attention to his clients' cases are of primary importance to his practice. Whether representing clients who must navigate the emotional and complex arena of guardianship or clients who need a skilled professional to represent them with a probate matter in Houston, Sugar Land, Beaumont, Port Arthur, or surrounding cities, Mr. Henry provides legal services to clients who are seeking professional legal assistance and guidance.

**Education:**

Washington University School of Law in St. Louis, J.D.  
University of Notre Dame, B.A.

**Admissions:**

State Bar of Texas

**Certifications:**

Certified Guardianship Attorney ad Litem

**Associations & Memberships:**

State Bar of Texas  
Real Estate, Probate and Trust Law Section of the State Bar of Texas  
State Pro Bono College  
Notre Dame Club of Houston

## Introduction

With much bipartisan support, the Achieving a Better Life Experience (ABLE) Act of 2013 (S 313/HR 647)<sup>1</sup> was introduced in the 113th Congress on February 13, 2013 and signed into law by President Barack Obama in tax package legislation on December 19, 2014. The ABLE Act amended Section 529 of the Internal Revenue Service Code of 1986 to create a savings vehicle for individuals with disabilities to cover the costs of qualified expenses while maintaining eligibility for vital needs-based public benefit programs such as Medicaid and Supplemental Security Income (SSI).

The Texas legislature enacted the Texas Achieving a Better Life Experience (ABLE) Program in June of 2015.<sup>2</sup> The Texas ABLE program was created “...to encourage and assist individuals and families in saving funds for the purpose of supporting individuals with disabilities to maintain health, independence and quality of life; and to provide secure funding for qualified disability expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under Title XIX of the Social Security Act, the supplemental security income program under Title XVI of the Social Security Act, the beneficiary’s employment, and other sources.”<sup>3</sup>

This article is meant to be a brief overview of this important legislation and its relative impact versus existing supports to manage or invest funds for individuals with disabilities. Frequently, wards under guardianships are SSI and Medicaid recipients, and understanding these two programs along with this new savings alternative will be key to advising clients and crafting special needs estate plans. By no means will this article attempt to provide a comprehensive understanding of either SSI or Medicaid, but it should provide a basic knowledge of the purposes of the programs and how eligibility for those programs are affected by income and resources received by program participants,<sup>4</sup> providing a framework to understand why ABLE accounts were created.

### 1. Basics of SSI & Medicaid

#### a. SSI

##### i. What is it?

Supplemental Security Income (hereinafter “SSI”) is a state administered federal supplement program designed to assist help aged, blind, and disabled people, who have little or no income. With that supplemental income, the program expects that the recipient or their

---

<sup>1</sup> <https://www.congress.gov/bill/113th-congress/house-bill/647/text>

<sup>2</sup> See Appendix A

<sup>3</sup> Section 54.901 of Texas Education Code. Sign up for program updates at <http://www.texasable.org>

<sup>4</sup> Please note that the discussion of SSI in this article focuses on SSI for adults. SSI for children has separate rules that apply such as deeming of income.

representative payee<sup>5</sup> use this cash to meet basic needs for food, clothing, and shelter. Because there was no Cost of Living Adjustment (also “COLA”) that applied to Social Security Benefits, the Federal monthly maximum amounts for 2016 are \$733 for an eligible individual and \$1,100 for an individual with an eligible spouse. The amount of the benefit can be reduced by subtracting countable income. Income, according to the Social Security Administration (hereinafter “SSA”), is anything you receive during a calendar month and can use to meet your needs for food or shelter. Countable income, then, is the amount left over after eliminating from consideration all items that are not income; and applying all appropriate exclusions to the items that are income. It may be in cash or in kind. In-kind income is not cash; it is food or shelter, or something you can use to get food or shelter.

## ii. Eligibility Requirements

Again, please note that this article is focusing on eligibility requirements for adults. There are separate rules relating to eligibility for SSI for children. For adults, individuals who are aged (anyone who is 65 years or older), blind, or disabled, **and** who have limited income and resources may be eligible to receive SSI. The following are the administrations definition of the three aforementioned categories:

- **Aged**—anyone is 65 years and older.
- **Blind**—
  - Someone who has a central visual acuity of 20/200 or less in your better eye with use of a correcting lens; or
  - Someone who has a visual field limitation in your better eye, such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.
    - Though someone may not meet the definition of visual impairment, they may still be eligible under the third category of disabled.
- **Disabled**—for individuals who have a medically determinable physical or mental impairment (including an emotional or learning problem) which:
  - results in the inability to do any substantial gainful activity<sup>6</sup>; and
  - can be expected to result in death; or
  - has lasted or can be expected to last for a continuous period of not less than 12 months.

---

<sup>5</sup> An individual, often family member or non-profit organization, designated by either the social security benefit recipient or agency, to management the benefits on behalf of the recipient. To learn more about Social Security’s Representative Payment Program, visit: <https://www.ssa.gov/payee/>.

<sup>6</sup> Substantial gainful activity is SSA’s measure of work that is both “substantial and gainful.” For disabilities other than blindness, earnings averaging over \$1,130 for 2016 generally demonstrate SGA.

How SSA actually goes about making its disability determination is a much more detailed discussion, which is not the subject of this paper. It is often called the Five-Step Process for adults because the administration considers five factors: 1) has the individual achieved substantial gainful activity (“SGA”) in the past 12 months, 2) does the individual have a severe impairment, 3) does the individual have an impairment that meets or equals a listing in the listing of impairments<sup>7</sup>, 4) is the individual able to do his or her past work, and 5) can the individual do other kind of work. The Program Operational Manual System (“POMS”)<sup>8</sup> is the primary resource SSA employees to process disability claims. This is an essential resource to bookmark for disability determination inquiries.

### iii. Disqualifying Events

What could make an individual ineligible to receive benefits? The most obvious disqualifying event would be a failure to be disabled pursuant to SSA’s definition. In addition, income and resource ineligibility are other grounds:

#### 1. Income Ineligibility

Income is defined in several different ways by the SSA, including:

**Earned Income** is wages, net earnings from self–employment, certain royalties, honoraria, and sheltered workshop payments.

**Unearned Income** is all income that is not earned, such as Social Security benefits, pensions, State disability payments, unemployment benefits, interest income, and cash from friends and relatives.

**In–Kind Income** is food or shelter that you get for free or less than its fair market value.

**Deemed Income** is the part of the income of your spouse with whom you live, your parent(s) with whom you live, or your sponsor (if you are an alien), which we use to compute your SSI benefit amount.

An individual has the duty to report changes in earned or unearned income as soon as possible but no later than 10 days after the end of the month in which the change occurred. SSA does, however, disregard or consider certain income as not countable:

Examples of payments or services not counted as income for the SSI program include but are not limited to:

- the first \$20 of most income received in a month;
- the first \$65 of earnings and one–half of earnings over \$65 received in a month;

---

<sup>7</sup>Listing of Impairments: <https://www.ssa.gov/disability/professionals/bluebook/listing-impairments.htm>

<sup>8</sup>POMS: <https://secure.ssa.gov/apps10/>

- the value of Supplemental Nutrition Assistance Program (food stamps) received;
- income tax refunds;
- home energy assistance;
- assistance based on need funded by a State or local government, or an Indian tribe;
- small amounts of income received irregularly or infrequently;
- interest or dividends earned on countable resources or resources excluded under other Federal laws;
- grants, scholarships, fellowships or gifts used for tuition and educational expenses;
- food or shelter based on need provided by nonprofit agencies;
- loans to you (cash or in-kind) that you have to repay;
- money someone else spends to pay your expenses for items other than food or shelter (for example, someone pays your telephone or medical bills);
- income set aside under a Plan to Achieve Self-Support (PASS). See the SSI Spotlight on Plan to Achieve Self-Support;
- earnings up to \$1,780 per month to a maximum of \$7,180 per year (effective January 2015) for a student under age 22. See the SSI Spotlight on Student Earned Income Exclusion;
- the cost of impairment-related work expenses for items or services that a disabled person needs in order to work. See the SSI Spotlight on Impairment-Related Work Expenses;
- the cost of work expenses that a blind person incurs in order to work. See the SSI Spotlight on Special SSI Rule for Blind People Who Work;
- disaster assistance;
- the first \$2,000 of compensation received per calendar year for participating in certain clinical trials;
- refundable Federal and advanced tax credits received on or after January 1, 2010; and
- certain exclusions on Indian trust fund payments paid to American Indians who are members of a federally recognized tribe

For that countable income, (being the amount left over after eliminating from consideration all items that are not income; and applying all appropriate exclusions to the items that are income), it will reduce SSI benefits dollar for dollar until an individual may no longer be eligible to receive SSI benefits.

## 2. Resource Ineligibility

Recall, SSI is a program for aged, blind, and disabled individuals who are low-income. The SSI Program, then, contains limits for countable resources. The current resource limit is \$2,000 for an individual and \$3,000 for a couple. Generally, resources are items like:

- cash;
- bank accounts, stocks, U.S. savings bonds;
- land;
- life insurance;
- personal property;
- vehicles;
- anything else you own which could be changed to cash and used for food or shelter; and
- deemed resources.<sup>9</sup>

Just as there is uncounted income, there are uncounted resources. Some uncounted resources include:

- the home you live in and the land it is on;
- household goods and personal effects (e.g., your wedding and engagement rings);
- burial spaces for you or your immediate family;
- burial funds for you and your spouse, each valued at \$1,500 or less (see the SSI Spotlight on Burial Funds);
- life insurance policies with a combined face value of \$1,500 or less;
- one vehicle, regardless of value, if it is used for transportation for you or a member of your household;
- retroactive SSI or Social Security benefits for up to nine months after you receive them (including payments received in installments);
- grants, scholarships, fellowships, or gifts set aside to pay educational expenses for 9 months after receipt

### iv. Planning Strategies During Disqualification

There are planning strategies to continue eligibility for SSI benefits if one is over resource limits. Some of those strategies are discussed in more detail later, i.e., special needs trusts. One strategy to reduce resource limits is to agree to sell countable resources. Those resources that may be sold include: real property, such as land or a house that you don't live in; or personal property, such as non-excluded vehicles (for example, a second car). Assuming that an individual continues to be disabled and will be for a substantial portion of his or her life, the liquidation of assets places

---

<sup>9</sup> Sometimes SSA deems a portion of the resources of a spouse, parent, parent's spouse, sponsor of an alien or sponsor's spouse as belonging to the person who applies for SSI. This process is called deeming of resources.

an individual with very few options for self-support. Further, because SSI and Medicaid are linked in Texas, receiving just \$1.00 in SSI benefits could make an individual eligible for Medicaid.

## **b. Medicaid**

### **i. What is it?**

Medicaid is a state-administered federal program funded by both federal and state dollars that provides health coverage to eligible disabled and low-income participants. Nationally, as of 2014, 72.5 million people are enrolled in Medicaid programs. In Texas, Medicaid provides coverage to 4 million low-income Texans, and covers half of all children in the state of Texas and two-thirds of people in nursing homes. The impact of Medicaid programs is pervasive and extremely valuable. There are many programs under Medicaid but, for the purpose of this article, will take a brief look at traditional Medicaid eligibility for the disabled and elderly.

### **ii. Eligibility Requirements**

Each Medicaid program including waiver programs, of which there are many, have their own program eligibility rules<sup>10</sup> and special income limits.<sup>11</sup> Again, the focus of this section is to highlight that Medicaid, like SSI, has its own disability, income and resource eligibility requirements. To focus in on this issue, this article will concentrate on what's called straight or traditional Medicaid for the Elderly and People with Disabilities and **not** waiver programs<sup>12</sup> or programs for non-disabled but low-income individuals, as the current iteration of ABLE legislation focuses on individuals who are disabled before age 26. It is important to note, however, that Medicaid programs like CLASS and HCS can provide items like Adaptive Aids & Medical Supplies to Companion Care. These dynamic programs are critical in the spectrum of supports and services for disabled individuals. Also, note that these programs operate on what's called an "interest list," which is a queue that an individual must sign-up for with a local authority and continue to provide updated contact information to ensure program participation when his or her name has reached the top of the list.<sup>13</sup>

For disability determinations, traditional Medicaid for the Elderly and People with Disabilities uses the agreement Texas entered into with SSA under Section 1634 of the Social Security Act for SSA to make Medicaid eligibility determinations. Persons found eligible for SSI cash payment are automatically determined eligible for Medicaid.<sup>14</sup> In this way, SSI and Medicaid are linked in Texas. In fact, for certain low-income SSI recipients who are dually eligible for Medicaid and Medicare, Texas may help pay Medicare premium costs through programs like Qualified Medicare Beneficiary (QMB), Specified Low Income Beneficiary (SLMB), Qualified

---

<sup>10</sup> See Section A-3000 of Texas MEPD Handbook

<sup>11</sup> See Appendix B

<sup>12</sup> To understand more about waiver programs and what they offer, visit: <http://www.hhsc.state.tx.us/medicaid/managed-care/home-and-community-based-programs-english.pdf>, and to learn more about Star + Plus Waiver Programs and Managed Care, visit: <http://www.hhsc.state.tx.us/medicaid/managed-care/starplus/overview-of-starplus.pdf> and <http://www.hhsc.state.tx.us/medicaid/managed-care/mmc.shtml>

<sup>13</sup> To search for a local authority, visit: <http://www.dads.state.tx.us/contact/search.cfm>

<sup>14</sup> Section A-2100 of the Texas MEPD Handbook

Individual (QI), or Qualifying Disabled Working Individual (QDWI).<sup>15</sup> Loss of SSI benefits, then can dramatically affect the continuum of care for a disabled individual.

The Texas Health and Human Services Commission (HHSC) follows §1612 of the Social Security Act (42 U.S.C. §1382a) and 20 CFR §§416.1101 - 416.1104 regarding the definition and general treatment of income for the purpose of determining financial eligibility and calculating a co-payment.<sup>16</sup> While HSSC has adopted Social Security Act's definition and general treatment of income, the program policies and rules are not identical. Those differences are not the subject of this article, as Medicaid's income and resources rules would require a more thorough review and do not fit the focus herein. To understand the general income requirements of Medicaid programs, see the Appendix XXXI of the MEPD Handbook that provides a detailed overview.<sup>17</sup> Like SSI, Medicaid divides income into two categories—earned and unearned income<sup>18</sup>:

*Income, whether earned or unearned, is received in either of two forms:*

**Cash** — *Currency, checks, money orders or electronic funds transfers (EFT), such as:*

- *Social Security checks;*
- *unemployment compensation checks; or*
- *payroll checks or currency.*

**In-kind** — *Noncash items such as:*

- *real property (including shelter);*
- *food; and*
- *noncash wages (for example, room and board as compensation for employment).*

*Income, whether cash or in-kind, is received in either of two ways:*

**Fixed** — *Income received on a regular, predictable schedule (usually monthly) and for the same amount each month, such as:*

- *Social Security checks;*
- *VA checks; or*
- *state retirement checks.*

**Variable** — *Income that is either received on a varying schedule or for different amounts, such as:*

- *payroll checks or currency;*
- *monthly bank interest; or*

---

<sup>15</sup> <https://www.ssa.gov/ssi/text-other-ussi.htm>

<sup>16</sup> Section E-1100 of MEPD Handbook

<sup>17</sup> <http://www.dads.state.tx.us/handbooks/mepd/appendix/XXXI/index.htm>

<sup>18</sup> Section E-1300 of MEPD Handbook

- *gas production checks.*

As to the relationship between income and resources, in general, anything received in a month, from any source, is income to a person, if it meets the person's needs for food and shelter. Anything the person owned prior to the month under consideration is subject to the resource counting rules, except for periodic payments that are not purposefully interrupted.<sup>19</sup> What are resources, then, for Medicaid purposes? Again, Medicaid is linked to the Social Security Act by adopting the general treatment of resources under that statute:

*§358.321. General Treatment of Resources.*

*(a) The Texas Health and Human Services Commission (HHSC) follows §1613 of the Social Security Act (42 U.S.C. §1382b) and 20 CFR §416.1201 regarding the general treatment of resources.*

*(b) HHSC follows 20 CFR §416.1207 regarding the determination of resources. Resource determinations are made as of 12:01 a.m. on the first day of the month.*

*(c) If a person's countable resources exceed the resource limit as of 12:01 a.m. on the first day of the month, the person is not eligible for the entire month. Eligibility may be reestablished no sooner than the first day of the next month.<sup>20</sup>*

The following is a chart of common resource exclusions<sup>21</sup>:

<b>Exclusion</b>	<b>Section No.</b>	<b>No Limit on Value and /or Length of Time</b>	<b>Limit on Value and /or Length of Time</b>
<b>Home</b> Serving as the principal place of residence, including the land on which the home stands and other buildings on that land	F-3000		X F-3600
Funds from the sale of a home if reinvested timely in a replacement home	F-3400		X
Jointly-owned real property which cannot be sold without undue hardship (due to loss of housing) to the other owner(s)	F-1221	X	
Real property that was previously the home for so long as the owner's reasonable efforts to sell it are unsuccessful	F-4211 F-3130 F-3500	X	

<sup>19</sup> Section E-1310 of the MEPD Handbook

<sup>20</sup> Section F-1100 of the MEPD Handbook

<sup>21</sup> Section F-5200 of the MEPD Handbook

Exclusion	Section No.	No Limit on Value and /or Length of Time	Limit on Value and /or Length of Time
Restricted, allotted Indian land if the Indian/owner cannot dispose of the land without permission of other individuals, his/her tribe or an agency of the federal government	F-2240 F-1220	X	
Automobile serving for transportation for medical	F-4221		
Life insurance, depending on its face value	F-4223		X
Burial space or plot	F-4214	X	
Burial funds for an applicant/recipient and/or his/her spouse	F-4227		X
Certain prepaid burial contracts	F-4160		X
Household goods and personal effects	F-4222		X
Property essential to self-support	F-4300		X
Resources of a blind or disabled person which are necessary to fulfill an approved plan for achieving self-support	F-4400		X
Retained retroactive SSI or RSDI benefits	F-2150		X
Radiation Exposure Compensation Trust Fund payments	F-2200	X	
German reparation payments made to World War II Holocaust survivors	F-2200	X	
Austrian social insurance payments	F-2200	X	
Japanese-American and Aleutian restitution payments	F-2200	X	
Federal disaster assistance received on account of a presidentially declared major disaster, including interest accumulated thereon	F-2200	X	
Cash (including accrued interest) and in-kind replacement received from any source at any time to	F-1270		X

<b>Exclusion</b>	<b>Section No.</b>	<b>No Limit on Value and /or Length of Time</b>	<b>Limit on Value and /or Length of Time</b>
replace or repair lost, damaged or stolen excluded resources			
Certain items excluded from both income and resources by other federal statutes	F-2260	Varies	
Agent Orange settlement payments to qualifying veterans and survivors	F-2260	X	
Victims' compensation payments	F-2210		X
State or local relocation assistance payments	F-2170		X
Tax refunds related to Earned Income Tax Credits	F-2130		X

Beyond the general treatment of resources, Medicaid determines that individual or a couple meets the eligibility criteria if the value of all countable resources does not exceed the resources limits set forth in 20 CFR §416.1205.<sup>22</sup> Generally speaking, then, resources are cash, other liquid assets, or any real or personal property or other nonliquid assets that a person, a person's spouse or parent could convert to cash to be used for his or her support and maintenance. Support and maintenance assistance not counted as income is not considered a resource.<sup>23</sup>

### **iii. Disqualifying Events**

Perhaps, the most obvious of disqualifying events for traditional Medicaid is failure to meet the agency's definition of disability. Like Social Security, Medicaid recipients will be redetermined by the agency based on disability and income and resource levels subject to the agency's timelines for redetermination.<sup>24</sup> In addition, receipt of additional countable income or countable resources could disqualify a benefit recipient unless planning techniques are implemented.

### **iv. Planning Strategies During Disqualification**

Some planning strategies during periods of disqualification or potential disqualification or techniques to create initial eligibility include:

---

<sup>22</sup> *Id.*

<sup>23</sup> F-1210 of the MEPD Handbook

<sup>24</sup> Section B-8200 of MEPD Handbook

- Special Needs Trusts (SNTs) (discussed in more detail later) –generally, are trust designed to maximize public benefits eligibility to ensure a continuum of care throughout the lifetime of the beneficiary by supplementing but not supplanting the benefits afforded by needs-based public benefits programs.
- Qualified Income Trust<sup>25</sup> (QIT formerly known as Miller’s Trusts)—A QIT is an irrevocable trust established for the benefit of a person and/or his spouse, the corpus of which is composed only of his or her income (including accumulated income). The trust must include a provision that the state is designated as the residuary beneficiary to receive, at the person's death, funds remaining in the trust equal to the total amount of Medicaid paid on his behalf.
- Spend down—monthly spend down of income on medical expenses to meet eligibility level.
- Resource conversion—If a person converts one type of resource to another, HHSC considers the new resource according to the policy governing that type of resource.<sup>26</sup>

By no means is this list exhaustive of planning techniques available but it does provide a look at some of the most commonly used techniques.

### **c. ABLE**

#### **i. Enabling Legislation**

The Achieving a Better Life Experience (ABLE) Act of 2013 (S 313/HR 647) was introduced in the 113th Congress on February 13, 2013 and signed into law by President Barack Obama in tax package legislation on December 19, 2014. The ABLE Act amended Section 529 of the Internal Revenue Service Code of 1986 to create a savings vehicle for individuals with disabilities to cover the costs of qualified expenses while maintaining eligibility for vital needs-based public benefit programs such as Medicaid and Supplemental Security Income (SSI). Texas adopted the ABLE program in June of 2015.<sup>27</sup> SSA has adopted POMS provisions concerning ABLE accounts.<sup>28</sup>

#### **ii. So, what is it?**

The Texas ABLE program was created “...to encourage and assist individuals and families in saving funds for the purpose of supporting individuals with disabilities to maintain health,

---

<sup>25</sup> Section F-6800 of MEPD Handbook. Note, however, although the use of a QIT can overcome the special income limit for MEPD eligibility for institutional or Home and Community-Based Services waiver services, it is not available to individuals in Community Attendant Services (CAS) who are income ineligible.

<sup>26</sup> Section F-1260 of MEPD Handbook

<sup>27</sup> See Appendix A

<sup>28</sup> See SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts:

<http://policy.ssa.gov/poms.nsf/lnx/0501130740>

independence and quality of life; and to provide secure funding for qualified disability expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under Title XIX of the Social Security Act, the supplemental security income program under Title XVI of the Social Security Act, the beneficiary's employment, and other sources.”<sup>29</sup>

An ABLÉ Account is given the meaning assigned by 529A, Internal Revenue Code.<sup>30</sup> An ABLÉ account, then, is a tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet certain qualified disability expenses. Further, the proposed regulations provide related amendments to regulations under sections 511 and 513 regarding unrelated business taxable income, sections 2501, 2503, 2511, 2642, and 2652, regarding gift and generation-skipping transfer taxes, and section 6011 regarding reporting requirements.<sup>31</sup>

Beyond the favorable tax treatment, ABLÉ accounts have favorable treatment for public benefits programs where financial circumstances must be considered by an agency. In Texas, in making an eligibility determination, an agency, notwithstanding other provisions of state law, “may not consider the amount in the applicant's ABLÉ account, including earnings on that amount, and any distribution for qualified disability expenses in determining the applicant's eligibility to receive and the amount of the assistance or benefit with respect to the period during which the individual maintains the ABLÉ account.”<sup>32</sup>

### **iii. Eligibility Requirements**

#### **1. An Eligible Program**

Generally, to be a qualified ABLÉ program, a program must be established and maintained by a State or agency or instrumentality of a State:

- (A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLÉ account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,*
- (B) which limits a designated beneficiary to 1 ABLÉ account for purposes of this section, and*
- (C) which meets the other requirements of this section.*<sup>33</sup>

In addition to other program requirements, a state program must do the following:

- Be established and maintained by a State or a State's agency or instrumentality;

---

<sup>29</sup> Section 54.901 of the Texas Education Code. Sign up for program updates at <http://www.texasable.org>

<sup>30</sup> Section 54.902(1) of the Texas Education Code

<sup>31</sup> See Appendix B

<sup>32</sup> Section 54.9065(1) of the Texas Education Code

<sup>33</sup> 26 U.S.C. § 529A(b)(1)

- Permit the establishment of an ABLÉ account only for a designated beneficiary who is a resident of that State, or a State contracting with that State for purposes of the ABLÉ program;
- Permit the establishment of an ABLÉ account only for a designated beneficiary who is an eligible individual;
- Limit a designated beneficiary to only one ABLÉ account, wherever located;
- Permit contributions to an ABLÉ 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 ABLÉ account;
- Require a separate accounting for the ABLÉ account of each designated beneficiary with an ABLÉ 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 ABLÉ account; and
- Prohibit the pledging of an interest in an ABLÉ account as security for a loan.<sup>34</sup>

## 2. An Eligible Individual

An eligible individual<sup>35</sup> is an individual in taxable year that either:

*(A) 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*

*(B) a disability certification with respect to such individual is filed with the Secretary for such taxable year.*

A disability certification<sup>36</sup> is:

*The term "disability certification" means, with respect to an individual, a certification to the satisfaction of the Secretary by the individual or the parent or guardian of the individual that-*

*(i) certifies that-*

*(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*

---

<sup>34</sup> See Guidance Under Section 529A: Qualified ABLÉ Programs 80 Fed. Reg. 119 (June 22, 2015).

<sup>35</sup> 26 U.S.C. §§ 529A(e)(1)

<sup>36</sup> 26 U.S.C. § 529A(e)(2)(A)

*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, and*

*(ii) includes a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act.*

For the program's purposes, the person who is considered the owner of the account is a "designated beneficiary"<sup>37</sup> not to be confused with the otherwise widely used term for the recipient of financial account's assets upon death of the accountholder.

### **3. Limits**

#### **a. Limit One Account Per Qualified Eligible Individual**

Any one qualified disabled individual is limited to one ABLE account.<sup>38</sup> Nevertheless, this limit of one ABLE account per qualified disabled individual does not affect rollover from able accounts:

*Subparagraph (A) shall not apply to any amount paid or distributed from an ABLE account to the extent that the amount received is paid, not later than the 60th day after the date of such payment or distribution, into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a member of the family of the designated beneficiary.*<sup>39</sup>

#### **b. Limit of Annual Contributions**

Contributions to any one ABLE account must be in cash or a rollover in any given year that cannot exceed the annual exclusion amount for gift tax under section 2503(b) for the calendar year in which the taxable year begins.<sup>40</sup> In 2016, the annual gift tax exclusion amount is \$14,000. While there are annual and aggregate contribution limits, ABLE accounts do not limit who may make contributions to the account. The term person is defined in section 7701(a)(1) of the Internal Revenue Code to include an individual, trust, estate, partnership, association, company, or corporation.

---

<sup>37</sup> See Guidance Under Section 529A: Qualified ABLE Programs 80 Fed. Reg. 119 (June 22, 2015).

<sup>38</sup> 26 U.S.C. § 529A(b)(1)(B)

<sup>39</sup> 26 U.S.C. § 529A(c)(1)(C)(i)

<sup>40</sup> 26 U.S.C. § 529A(b)(2)(B)

### **c. Limit of Aggregate Contributions**

Aggregate contributions to an ABLE account cannot exceed the limit established by the State under section 529(b)(6). As a 529 plan in Texas, aggregate total of contributions can be no more than \$370,000.

### **d. Limit of investment direction**

The designated beneficiary is limited to no more than two opportunities in any calendar year to provide investment direction, whether directly or indirectly, for the ABLE account.

### **e. Limit on Expenditures**

Expenditures from an ABLE account are limited to qualified disability expenses. Qualified disability expenditures are defined by Texas statute and the Internal Revenue Code, explored below. Where an individual or his or her agent uses ABLE account funds for non-qualified disability expenses, the individual will be taxed 10 percent for the includible amount.<sup>41</sup>

### **f. Limit of Account Institutions**

An ABLE program must be established by and maintained by a State or agency or instrumentality of a State. Therefore, an individual may only establish financial institutions with which a beneficiary or his or her agent may establish an account will be limited by States' contractual relationships.

### **g. Limits on ABLE Account Exclusion**

An ABLE account is excluded from program financial considerations up and until \$100,000, and thereafter, the value of the account that exceeds \$100,000 will be considered a resource.<sup>42</sup> For SSI program purposes, benefits of an individual will be suspended due to excess resources attributable to an ABLE account not disregarded under subsection (a) of Section 103.<sup>43</sup> For Medicaid program purposes, however, resources in ABLE account that exceed \$100,000 will be treated as if an individual is still continuing to receive SSI benefits.<sup>44</sup> Therefore, there will be no impact on Medicaid benefits due to resources up to the aggregate contribution limit of \$370,000.

## **iv. Permitted Expenditures**

Permitted expenditures from an ABLE account are those expenditures considered "qualified disability expenses." As defined in the Texas Education Code, qualified disability expenses are "any expenses related to the eligible individual's blindness or disability that are made

---

<sup>41</sup> 26 U.S.C. § 529A(c)(3)(A)

<sup>42</sup> 26 U.S.C. § 103(a)(2)

<sup>43</sup> 26 U.S.C. § 103(b)(1)

<sup>44</sup> 26 U.S.C. § 103(b)(2)

for the benefit of an eligible individual who is the designated beneficiary, and includes expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, oversight and monitoring, a funeral and burial, and other expenses approved under federal regulations adopted under Section 529A, Internal Revenue Code.”<sup>45</sup>

#### **v. Rollover of Accounts**

Rollover of accounts is permitted under the following circumstances:

*(i) ROLLOVERS FROM ABLE ACCOUNTS.—Subparagraph (A) shall not apply to any amount paid or distributed from an ABLE account to the extent that the amount received is paid, not later than the 60th day after the date of such payment or distribution, into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a family member of the designated beneficiary.*

*(ii) CHANGE IN DESIGNATED BENEFICIARIES.—Any change in the designated beneficiary of an interest in a qualified ABLE program during a taxable year shall not be treated as a distribution for purposes of subparagraph (A) if the new beneficiary is an eligible individual for such taxable year and a member of the family of the former beneficiary.*

*(iii) LIMITATION ON CERTAIN ROLLOVERS.—Clause (i) shall not apply to any transfer if such transfer occurs within 12 months from the date of a previous transfer to any qualified ABLE program for the benefit of the designated beneficiary.*<sup>46</sup>

A family member is defined as defined by 26 U.S.C. § 152(f)(1)(B) which includes, including those by adoption as in 26 U.S.C. § 152(f)(1)(B), a “brother, sister, stepbrother, or stepsister.”<sup>47</sup> Rollovers may only be done before a designated beneficiary’s death. Therefore, time-conscious rollovers to another eligible family member near a designated beneficiary’s potential passing could preserve resources for the benefit of another family member in need.

#### **vi. Gift Tax Rules**

For purposes of gift taxes under chapters 12 and 13, ABLE accounts receive the following treatment:

*GIFT TAX RULES.—For purposes of chapters 12 and 13—*

---

<sup>45</sup> Section 54.902(10) of the Texas Education Code

<sup>46</sup> 26 U.S.C. § 529A(c)(1)(C)

<sup>47</sup> 26 U.S.C. § 529A(e)(4)

*“(A) CONTRIBUTIONS.—Any contribution to a qualified ABLE program on behalf of any designated beneficiary—*

*“(i) shall be treated as a completed gift to such designated beneficiary which is not a future interest in property, and*

*“(ii) shall not be treated as a qualified transfer under section 2503(e).*

### **vii. Medicaid Payback Provision**

Except for outstanding payments due for qualified disability expenses, ABLE accounts are subject to paying back to the State for costs in expended in the care of the disabled individual, including:

- All amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account, and
- Net of any premiums paid from the account or paid by or on behalf of the beneficiary to a Medicaid Buy-In program under any State Medicaid plan established under title XIX of the Social Security Act<sup>48</sup>

A State is considered a creditor of an ABLE account and not a beneficiary, and upon the filing of a claim, a State shall receive the value of its expenditures as set forth above.<sup>49</sup>

### **viii. Practical Applications**

Some of the most common types of issues recipients of SSI and Medicaid encounter are inheritance, sales of properties, child support payments as disabled adult child support, or gifts from family. Often, special needs trusts are used to funnel these resources or income to maintain eligibility. An ABLE account can considered to manage these resources or income based on the considerations below.

### **ix. Loss of Eligible Individual Status**

Though someone may no longer be an eligible individual, as in being disabled per the statute, an individual’s account does not lose its protected tax status. Nonetheless, further contributions or expenditures would be suspended by the first day of next taxable year.

---

<sup>48</sup> 26 U.S.C. § 529A(f)

<sup>49</sup> *Id.*

#### **d. How to start an account?**

An individual or his or her agent must open an account in the state in which he or she resides or with a contracting state.<sup>50</sup> As referenced above, an individual cannot go to any bank or investment institution to open account—either the State or its licensed or contracted vendors may be used to create a qualifying ABLE account.

#### **e. ABLE v. Other Supports**

##### **i. Money Management Program**

Money management programs like the Harris County Representative Payee Program<sup>51</sup> become the payee for benefits that have a representative payee program like Social Security, Veterans' Benefits, or Railroad System benefits. A benefit of this type of program is that comes with a needs assessment and case management.

##### **ii. Statutory Durable Power of Attorney**

A Statutory Durable Power of Attorney<sup>52</sup> is a directive in which an individual designates another to manage his or her finances. This document permits the principal's agent to do a range of estate management activities like investment, sell, trade, and etc. For ABLE account purposes, having a disabled individual whose financial estate may benefit from an ABLE account will be critical as the proposed regulations make a clear reference to legal authority to act for the intended designated beneficiary, as "references to the to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary."<sup>53</sup>

##### **iii. D4A Self-Settled Trust (Remember not a 3d Party)**

A D4A Self-Settled Special Needs Trust is a trust that establishes title to the trust beneficiary's assets and resources to create eligibility for means tested or needs-based benefits like SSI and Medicaid and provides for payback to Medicaid. This also may be done as a court created trust pursuant to Section 1301 of Texas Estates Code. To be a self-settled special needs trust, a trust must:

*A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all*

---

<sup>50</sup> 26 U.S.C. § 529A(b)(1)(C). A "contracting state", per 26 U.S.C. § 529A(e)(7), is "...a State without a qualified ABLE program which has entered into a contract with a State with a qualified ABLE program to provide residents of the contracting State access to a qualified ABLE program."

<sup>51</sup> <http://www.hc-ps.org/reppayee.aspx>

<sup>52</sup> Tex. Est. Code § 752 et. seq.

<sup>53</sup> See Guidance Under Section 529A: Qualified ABLE Programs 80 Fed. Reg. 119 (June 22, 2015).

amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.<sup>54</sup>

#### **iv. D4C Pooled Trust (Remember not a 3d Party)**

A D4C Pooled Trust, again, uses the assets and resources of the trust beneficiary to create eligibility for means tested or needs-based benefits and provides for payback to Medicaid. This trust is managed in a pool along with other trusts, and meets the following standards:

*(i) The trust is established and managed by a non-profit association.*

*(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.*

*(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.*

*(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.*

#### **v. Third Party Special Needs Trust**

A third party special needs trust uses the assets and resources of an individual who is not the beneficiary of the trust. A properly drafted third party special needs trust does not require the repayment or payback to Medicaid. Further, this kind of special needs trust may be an inter vivos trust or testamentary trust, allowing the testator or grantor the ability to craft trust terms, including distribution language, succession of management, and designation of remainder beneficiaries.

#### **vi. Financial Planning & Management**

As mentioned earlier, an ABLE account is one tool in the planning toolkit for disabled individuals. There are several factors to consider when choosing among the alternatives mentioned in this article (among other planning techniques), including rate of return on investments, ease of access, taxation, fees for professional or third party management, trust and confidence in managers of funds, succession of management for the investments, state payback and recovery provisions that apply, benefit eligibility, and the needs and preferences of the disabled individual.<sup>55</sup>

---

<sup>54</sup> 42 USC 1396p(d)(4)(a)

<sup>55</sup> Please see the slide presentation associated with this article to see some of the comparisons made between some of the eligibility and management tools.

AN ACT

relating to the establishment of the Texas Achieving a Better Life Experience (ABLE) Program; authorizing the imposition of fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 54.602(b), Education Code, is amended to read as follows:

(b) The board shall administer the following programs:

(1) the prepaid higher education tuition program established under this subchapter; ~~and~~

(2) the higher education savings plan established under Subchapter G;

(3) the prepaid tuition unit undergraduate education program established under Subchapter H;

(4) the Texas Save and Match Program established under Subchapter I; and

(5) the Texas Achieving a Better Life Experience Program established under Subchapter J.

SECTION 2. Chapter 54, Education Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. TEXAS ACHIEVING A BETTER LIFE EXPERIENCE (ABLE)

PROGRAM

Sec. 54.901. PURPOSES OF PROGRAM. The purposes of this subchapter are as follows:

(1) to encourage and assist individuals and families

1 in saving funds for the purpose of supporting individuals with  
2 disabilities to maintain health, independence, and quality of life;  
3 and

4 (2) to provide secure funding for qualified disability  
5 expenses on behalf of designated beneficiaries with disabilities  
6 that will supplement, but not supplant, benefits provided through  
7 private insurance, the Medicaid program under Title XIX of the  
8 Social Security Act, the supplemental security income program under  
9 Title XVI of the Social Security Act, the beneficiary's employment,  
10 and other sources.

11 Sec. 54.902. DEFINITIONS. In this subchapter:

12 (1) "ABLE account" has the meaning assigned by Section  
13 529A, Internal Revenue Code.

14 (2) "ABLE program" or "program" means the Texas  
15 Achieving a Better Life Experience Program created under this  
16 subchapter.

17 (3) "Board" means the Prepaid Higher Education Tuition  
18 Board established under Section 54.602.

19 (4) "Designated beneficiary" means a resident of this  
20 state with a disability who is an eligible individual and named as  
21 the designated beneficiary of an ABLE account.

22 (5) "Eligible individual" means a person who has  
23 certified to the board that the person is eligible to participate in  
24 the ABLE program.

25 (6) "Financial institution" means a bank, a trust  
26 company, a depository trust company, an insurance company, a  
27 broker-dealer, a registered investment company or investment

1 manager, the Texas Safekeeping Trust Company, or another similar  
2 financial institution authorized to transact business in this  
3 state.

4 (7) "Internal Revenue Code" means the Internal Revenue  
5 Code of 1986.

6 (8) "Participant" means a designated beneficiary or  
7 the parent or custodian or other fiduciary of the beneficiary who  
8 has entered into a participation agreement under this subchapter.

9 (9) "Participation agreement" means an agreement  
10 between a participant and the board under this subchapter that  
11 conforms to the requirements prescribed by this subchapter.

12 (10) "Qualified disability expenses" means any  
13 expenses related to the eligible individual's blindness or  
14 disability that are made for the benefit of an eligible individual  
15 who is the designated beneficiary, and includes expenses for  
16 education, housing, transportation, employment training and  
17 support, assistive technology and personal support services,  
18 health, prevention and wellness, financial management and  
19 administrative services, legal fees, oversight and monitoring, a  
20 funeral and burial, and other expenses approved under federal  
21 regulations adopted under Section 529A, Internal Revenue Code.

22 (11) "Texas ABLE savings plan account" means the Texas  
23 ABLE savings plan account created under Section 54.903.

24 Sec. 54.903. CREATION OF PROGRAM AND ACCOUNT;  
25 ADMINISTRATION. (a) The Texas Achieving a Better Life Experience  
26 (ABLE) Program is created under this subchapter. The Texas ABLE  
27 savings plan account is established as a trust fund outside of the

1 state treasury.

2 (b) The board shall administer the ABLE program.

3 (c) The board, the office of the comptroller, and any  
4 manager or other contractor that contracts with the board to  
5 provide services under this subchapter are not covered entities for  
6 purposes of Chapter 181, Health and Safety Code.

7 Sec. 54.904. POWERS AND DUTIES OF BOARD. (a) To establish  
8 and administer the ABLE program, the board shall:

9 (1) develop and implement the program;

10 (2) adopt rules and establish policies and procedures  
11 to implement this subchapter to:

12 (A) permit the program to qualify as a qualified  
13 ABLE program under Section 529A, Internal Revenue Code;

14 (B) make changes to the program as necessary for  
15 the participants in the program to obtain or maintain federal  
16 income tax benefits or treatment provided by Section 529A, Internal  
17 Revenue Code, and exemptions under federal securities laws; and

18 (C) make changes to the program as necessary to  
19 ensure the program's compliance with all other applicable laws and  
20 regulations;

21 (3) either directly or through a contractual  
22 arrangement for investment or plan manager services with a  
23 financial institution or plan manager or another qualified entity,  
24 develop and provide information for participants and their families  
25 necessary to establish and maintain an ABLE account;

26 (4) enter into agreements with any financial  
27 institution or any state or federal agency or contractor or other

1 entity as required to administer the program under this subchapter;

2 (5) enter into participation agreements with  
3 participants;

4 (6) solicit and accept any gifts, grants, legislative  
5 appropriations, and other funds from the state, any unit of  
6 federal, state, or local government, or any other person, firm,  
7 partnership, or corporation;

8 (7) invest participant funds in appropriate  
9 investment instruments; and

10 (8) make provision for the payment of costs of  
11 administering the program.

12 (b) The board has all powers necessary or proper to carry  
13 out its duties under this subchapter and to effectuate the purposes  
14 of this subchapter, including the power to:

15 (1) sue and be sued;

16 (2) enter into contracts and other necessary  
17 instruments;

18 (3) enter into agreements or other transactions with  
19 the United States, state agencies, and other entities as necessary;

20 (4) appear on its own behalf before governmental  
21 agencies;

22 (5) contract for necessary goods and services,  
23 including specifying in the contract duties to be performed by the  
24 provider of a good or service that are a part of or are in addition  
25 to the person's primary duties under the contract;

26 (6) contract with another state that administers a  
27 qualified ABLE program as authorized by Section 529A, Internal

1 Revenue Code, to provide residents of this state with access to a  
2 qualified ABLÉ program;

3 (7) engage the services of private consultants,  
4 trustees, records administrators, managers, legal counsel,  
5 auditors, and other appropriate parties or organizations for  
6 administrative or technical assistance;

7 (8) participate in any government program;

8 (9) impose fees and charges;

9 (10) develop marketing plans or promotional materials  
10 or contract with a consultant to market the program;

11 (11) make reports;

12 (12) purchase liability insurance covering the board  
13 and employees and agents of the board;

14 (13) make changes to the program as necessary for the  
15 participants in the program to obtain or maintain federal income  
16 tax benefits or treatment provided by Section 529A, Internal  
17 Revenue Code, and exemptions under federal securities laws; and

18 (14) establish other policies, procedures, and  
19 eligibility criteria to implement this subchapter.

20 Sec. 54.9045. COLLECTION OF FEES. The board shall collect  
21 administrative fees and service charges in connection with any  
22 agreement, contract, or transaction relating to the program in  
23 amounts not exceeding the amount necessary to recover the cost of  
24 establishing and maintaining the program.

25 Sec. 54.905. INVESTMENT OF FUNDS. (a) All money paid by a  
26 participant in connection with a participation agreement shall be:

27 (1) deposited into an individual ABLÉ account held on

1 behalf of that participant in the Texas ABLE savings plan account;  
2 and

3 (2) promptly invested by the board.

4 (b) The board at least annually shall establish and review  
5 the asset allocation and selection of the underlying investments of  
6 the ABLE program.

7 (c) The board may delegate to duly appointed financial  
8 institutions authority to act on behalf of the board in the  
9 investment and reinvestment of all or part of the funds and may also  
10 delegate to those financial institutions the authority to act on  
11 behalf of the board in the holding, purchasing, selling, assigning,  
12 transferring, or disposing of any or all of the securities and  
13 investments in which the funds in the Texas ABLE savings plan  
14 account have been invested, as well as the proceeds from the  
15 investment of those funds.

16 (d) In delegating investment authority to financial  
17 institutions, the board may authorize the pooling of funds from the  
18 ABLE accounts with other funds administered by the board to  
19 maximize returns for participants. If funds from the ABLE accounts  
20 are pooled with other funds administered by the board, the board  
21 shall track, monitor, report, and record separately all investment  
22 activity related to the ABLE accounts, including any earnings and  
23 fees associated with each individual ABLE account.

24 (e) The board may select one or more financial institutions  
25 to serve as custodian of all or part of the program's assets.

26 (f) In the board's discretion, the board may contract with  
27 one or more financial institutions to serve as plan manager and to

1 invest the money in ABLE accounts.

2 (g) A contract between the board and a financial institution  
3 to act as plan manager under this subchapter may be for a term of up  
4 to five years and may be renewable.

5 (h) In exercising or delegating investment powers and  
6 authority, members of the board shall exercise ordinary business  
7 care and prudence under the facts and circumstances prevailing at  
8 the time of the action or decision. A member of the board is not  
9 liable for any action taken or omitted with respect to the exercise  
10 of, or delegation of, those powers and authority if the member  
11 discharged the duties of the member's position in good faith and  
12 with the degree of diligence, care, and skill that a prudent person  
13 acting in a like capacity and familiar with those matters would use  
14 in the conduct of an enterprise of a like character and with like  
15 aims.

16 (i) In administering this subchapter, the board is subject  
17 to the board's ethics policy adopted under Section [54.6085](#).

18 Sec. 54.906. TREATMENT OF ASSETS. (a) The assets of the  
19 ABLE program shall at all times be preserved, invested, and spent  
20 only for the purposes provided by this subchapter and in accordance  
21 with the participation agreements entered into under this  
22 subchapter.

23 (b) Except as provided by Section 529A, Internal Revenue  
24 Code, the state does not have a property right in the assets of the  
25 ABLE program.

26 Sec. 54.9065. EXCLUSION OF ABLE ACCOUNT ASSETS FROM CERTAIN  
27 BENEFIT ELIGIBILITY DETERMINATIONS. Notwithstanding any other

1 provision of state law that requires consideration of the financial  
2 circumstances of an applicant for assistance or a benefit provided  
3 under that law, the agency making the determination of eligibility  
4 for the assistance or benefit may not consider the amount in the  
5 applicant's ABLE account, including earnings on that amount, and  
6 any distribution for qualified disability expenses in determining  
7 the applicant's eligibility to receive and the amount of the  
8 assistance or benefit with respect to the period during which the  
9 individual maintains the ABLE account.

10 Sec. 54.907. EXEMPTION FROM SECURITIES LAWS. An ABLE  
11 account is not a security within the meaning of the term as defined  
12 by Section 4, The Securities Act (Article 581-4, Vernon's Texas  
13 Civil Statutes), and is exempt from the provisions of The  
14 Securities Act (Article 581-1 et seq., Vernon's Texas Civil  
15 Statutes).

16 Sec. 54.908. PARTICIPATION AGREEMENTS. (a) Under the ABLE  
17 program, the board may enter into participation agreements with  
18 participants on behalf of designated beneficiaries.

19 (b) A participation agreement may include the following  
20 terms:

21 (1) the requirements and applicable restrictions for:  
22 (A) opening an ABLE account;  
23 (B) making contributions to an ABLE account; and  
24 (C) directly or indirectly, directing the  
25 investment of the contributions or balance of the ABLE account;

26 (2) the eligibility requirements for a participant to  
27 enter into a participation agreement and the rights of that

1 participant;

2 (3) the administrative fee and other fees and charges  
3 applicable to an ABLE account;

4 (4) the terms and conditions under which an ABLE  
5 account or participation agreement may be modified, transferred, or  
6 terminated;

7 (5) the method of disposition of abandoned ABLE  
8 accounts; and

9 (6) any other terms and conditions the board considers  
10 necessary or appropriate, including those necessary to conform the  
11 ABLE account to the requirements of Section 529A, Internal Revenue  
12 Code, or other applicable federal law.

13 (c) The participation agreement may be amended throughout  
14 the term of the agreement, including to allow a participant to  
15 increase or decrease the level of participation and to change the  
16 designated beneficiary or other matters authorized by this section  
17 and Section 529A, Internal Revenue Code.

18 (d) If the board finds a participant has made a material  
19 misrepresentation in the application for a participation agreement  
20 or in any communication regarding the ABLE program, the board may  
21 liquidate the participant's ABLE account. If the board liquidates  
22 an ABLE account under this subsection, the participant is entitled  
23 to a refund, subject to any charges or fees provided by the  
24 participation agreement and the Internal Revenue Code.

25 Sec. 54.9085. ENCUMBRANCE OR TRANSFER OF ACCOUNT  
26 PROHIBITED. (a) An ABLE account may not be assigned for the  
27 benefit of creditors, used as security or collateral for any loan,

1 or otherwise subject to alienation, sale, transfer, assignment,  
2 pledge, encumbrance, or charge.

3 (b) Notwithstanding Subsection (a), the state is a  
4 permissible creditor upon the death of a designated beneficiary for  
5 the purposes set forth in Section 529A, Internal Revenue Code.

6 Sec. 54.909. USE OF FUND ASSETS. The assets of the program  
7 may only be used to:

8 (1) make distributions to designated beneficiaries;

9 (2) pay the costs of program administration and  
10 operations;

11 (3) make refunds for cancellations, excess  
12 contributions, liquidation under Section 54.908(d), and death, in  
13 accordance with a computation method determined by the board;

14 (4) roll over funds to another ABLE account to the  
15 extent authorized by Section 529A, Internal Revenue Code; and

16 (5) make distributions to the state as authorized by  
17 Section 529A, Internal Revenue Code.

18 Sec. 54.910. DESIGNATED BENEFICIARY. (a) The participant  
19 is the designated beneficiary and the owner of the ABLE account  
20 except as described by Subsection (b) and as otherwise permitted by  
21 Section 529A, Internal Revenue Code.

22 (b) If the designated beneficiary of the account is a minor  
23 or has a custodian or other fiduciary appointed for the purpose of  
24 managing the minor's financial affairs, the parent or custodian or  
25 other fiduciary of the beneficiary may serve as the participant if  
26 that form of ownership is permitted or not prohibited by Section  
27 529A, Internal Revenue Code.

1       (c) A designated beneficiary may own only one ABLE account,  
2 and each ABLE account may have only one owner, except as otherwise  
3 permitted by Section 529A, Internal Revenue Code.

4       Sec. 54.911. VERIFICATION UNDER OATH. The board may  
5 require a participant to verify under oath:

6           (1) the participant's certification as an eligible  
7 individual;

8           (2) the participant's selection to change a designated  
9 beneficiary;

10          (3) the participant's selection to cancel a  
11 participation agreement; and

12           (4) any other information the board may require.

13       Sec. 54.912. CANCELLATION. (a) A participant may cancel a  
14 participation agreement at will.

15       (b) Each participation agreement must provide that the  
16 agreement may be canceled on the terms and conditions and on payment  
17 of applicable fees and costs as provided by rule.

18       Sec. 54.913. REPORTS. (a) The board shall comply with the  
19 reporting requirements in Section 529A, Internal Revenue Code.

20       (b) The board shall report financial information related to  
21 the ABLE program in an annual financial report in accordance with  
22 the comptroller's requirements and guidelines for state agencies.

23       (c) The board shall include financial information for the  
24 ABLE program in the board's annual report posted on the board's  
25 website.

26       (d) The board shall prepare any other reports required by  
27 state or federal rules and regulations.

1       Sec. 54.914. CONFIDENTIALITY OF RECORDS. (a) Except as  
2 otherwise provided by this section, all information relating to the  
3 program is public and subject to disclosure under Chapter 552,  
4 Government Code.

5       (b) Information relating to a prospective or current  
6 participant or designated beneficiary or to a participation  
7 agreement, including any personally identifiable information, is  
8 confidential except that the board may disclose that information  
9 to:

10           (1) a participant regarding the participant's account;

11 or

12           (2) a state or federal agency as necessary to  
13 administer the program or as required by Section 529A, Internal  
14 Revenue Code, or other federal or state requirements.

15       Sec. 54.915. PROGRAM LIMITATIONS. (a) Nothing in this  
16 subchapter or in any participation agreement entered into under  
17 this subchapter may be construed to guarantee that amounts saved  
18 under the program will be sufficient to cover the qualified  
19 disability expenses of a designated beneficiary.

20       (b) Nothing in this subchapter or in any participation  
21 agreement entered into under this subchapter may be construed to  
22 create any obligation of the state, any agency or instrumentality  
23 of the state, or a plan manager to guarantee for the benefit of a  
24 participant:

25           (1) the return of any amount contributed to an  
26 account;

27           (2) the rate of interest or other return on an account;

1 or

2 (3) the payment of interest or other return on an  
3 account.

4 (c) The board by rule shall require that informational  
5 materials used in connection with a contribution to an ABLE account  
6 clearly indicate that the account is not insured by this state and  
7 that neither the principal deposited nor the investment return is  
8 guaranteed by the state.

9 Sec. 54.916. TERMINATION OR MODIFICATION OF PROGRAM.

10 (a) If the comptroller determines that the ABLE program is not  
11 financially feasible, the comptroller shall notify the governor and  
12 the legislature and recommend that the board not administer an ABLE  
13 program or that the program be modified or terminated. The program  
14 may be terminated only by the legislature.

15 (b) If the comptroller determines that the ABLE program is  
16 not financially feasible, the board may adjust the terms of  
17 participation agreements as necessary to ensure the financial  
18 feasibility of the program.

19 (c) If the legislature terminates the ABLE program, the  
20 balance of each ABLE account shall be paid to the participant, to  
21 the extent possible.

22 Sec. 54.917. ABLE PROGRAM ADVISORY COMMITTEE. (a) The  
23 ABLE program advisory committee is established to review rules and  
24 procedures related to the ABLE program, to provide guidance,  
25 suggest changes, and make recommendations for the administration of  
26 the program, and to provide assistance as needed to the board and  
27 comptroller during the creation of the program.

1       (b) The comptroller shall appoint at least five and not more  
2 than seven members to the advisory committee, including at least  
3 one member from each of the following groups:

4           (1) persons with a disability who qualify for the  
5 program;

6           (2) family members of a person with a disability who  
7 qualifies for the program;

8           (3) representatives of disability advocacy  
9 organizations; and

10          (4) representatives of the financial community.

11       (c) The comptroller shall appoint a presiding officer.

12       (d) The advisory committee shall meet quarterly or more  
13 frequently as the presiding officer determines is necessary to  
14 carry out the responsibilities of the committee.

15       (e) A member of the advisory committee is not entitled to  
16 compensation or reimbursement for travel expenses.

17       (f) Chapter 2110, Government Code, does not apply to this  
18 section.

19       (g) This section expires and the advisory committee is  
20 abolished December 1, 2019.

21       SECTION 3. If before implementing any provision of this Act  
22 a state agency determines that a waiver or authorization from a  
23 federal agency is necessary for implementation of that provision,  
24 the agency affected by the provision shall request the waiver or  
25 authorization and may delay implementing that provision until the  
26 waiver or authorization is granted.

27       SECTION 4. The Prepaid Higher Education Tuition Board may

1 begin enrollment in the ABLE program as soon as reasonably  
2 practical to allow sufficient time for successful development and  
3 implementation of the ABLE program.

4 SECTION 5. Not later than December 1, 2015, the comptroller  
5 shall appoint the members of the ABLE program advisory committee as  
6 required by Section 54.917, Education Code, as added by this Act.

7 SECTION 6. This Act takes effect immediately if it receives  
8 a vote of two-thirds of all the members elected to each house, as  
9 provided by Section 39, Article III, Texas Constitution. If this  
10 Act does not receive the vote necessary for immediate effect, this  
11 Act takes effect September 1, 2015.

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 1664 passed the Senate on April 15, 2015, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendments on May 28, 2015, by the following vote: Yeas 31, Nays 0.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 1664 passed the House, with amendments, on May 24, 2015, by the following vote: Yeas 138, Nays 1, two present not voting.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor

*airtraffic/air\_traffic/publications/airspace\_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267-9677, to request a copy of Advisory circular No. 11-2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

#### Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, and effective September 15, 2014. FAA Order 7400.9Y is publicly available as listed in the **ADDRESSES** section of this proposed rule. FAA Order 7400.9Y lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

#### The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Poplarville-Pearl River County Airport, Poplarville, MS., providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for Poplarville-Pearl River County Airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9Y, dated August 6, 2014, and effective September 15, 2014, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

#### Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to

keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal.

Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### Environmental Review

This proposal would be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

#### Lists of Subjects in 14 CFR Part 71:

Airspace, Incorporation by reference, Navigation (Air).

#### The Proposed Amendment:

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

#### **PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

- 1. The authority citation for Part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

#### **§ 71.1 [Amended]**

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, effective September 15, 2014, is amended as follows:

*Paragraph 6005. Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth*

\* \* \* \* \*

#### **ASO MS E5 Poplarville, MS [Amended]**

Poplarville-Pearl River County Airport (lat. 30°47'13" N., long. 89°30'16" W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Poplarville-Pearl River County Airport.

Issued in College Park, Georgia, on June 10, 2015.

**Gerald E. Lynch,**

*Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2015-15133 Filed 6-19-15; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1, 25, 26, and 301

[REG-102837-15]

RIN 1545-BM68

#### Guidance Under Section 529A: Qualified ABLE Programs

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations under section 529A of the Internal Revenue Code that provide guidance regarding programs under The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014. Section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a new type of tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. In addition, these proposed regulations provide corresponding amendments to regulations under sections 511 and 513, with respect to unrelated business taxable income, sections 2501, 2503, 2511, 2642 and 2652, with respect to gift and generation-skipping transfer taxes, and section 6011, with respect to reporting requirements. This document also provides notice of a public hearing on these proposed regulations.

**DATES:** Comments must be received by September 21, 2015. Outlines of topics to be discussed at the public hearing scheduled for October 14, 2015, at 10 a.m., must be received by September 21, 2015.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-102837-15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-102837-

15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-102837-15). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations under section 529A, Taina Edlund or Terri Harris, (202) 317-4541, or Sean Barnett, (202) 317-5800; concerning the proposed estate and gift tax regulations, Theresa Melchiorre, (202) 317-4643; concerning the reporting provisions under section 529A, Mark Bond, (202) 317-6844; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, call Regina Johnson, (202) 317-6901 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by August 21, 2015.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in the proposed regulations is in §§ 1.529A-2,

1.529A-5, 1.529A-6 and 1.529A-7. The collection of information flows from sections 529A(d)(1), (d)(2), (d)(3), (e)(1) and (e)(2) of the Internal Revenue Code (Code). Section 529A(d)(1) requires qualified ABLÉ programs to provide reports to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require. Section 529(d)(2) provides that the Secretary shall make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLÉ program. Section 529(d)(3) requires qualified ABLÉ programs to provide notice to the Secretary upon the establishment of an ABLÉ account, containing the name and State of residence of the designated beneficiary and such other information as the Secretary may require. Section 529A(e)(1) requires that a disability certification with respect to certain individuals be filed with the Secretary. Section 529A(e)(2) provides that the disability certification include a certification to the satisfaction of the Secretary that the individual has a medically determinable physical or mental impairment that occurred before the date on which the individual attained age 26 and also include a copy of a physician's diagnosis. The burden under §§ 1.529A-5 and 1.529A-6 is reflected in the burden under the new Form 5498-QA, "ABLE Account Contribution Information," and the new Form 1099-QA, "Distributions from ABLÉ Accounts," respectively.

The expected recordkeepers are programs described in section 529A, established and maintained by a State or a State agency or instrumentality and individuals with ABLÉ accounts.

*Estimated number of recordkeepers:* 10,050.

*Estimated average annual burden hours per recordkeeper:* 1.6 hours.

*Estimated total annual recordkeeping burden:* 16,080.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

**Background**

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, enacted on December 19, 2014, as part of The Tax Increase Prevention Act of 2014 (Pub. L. 113-295), added section 529A to the Internal Revenue Code. Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the disabled person's lifetime. Section 101 of the ABLE Act confirms that one of the purposes of the Act is to "provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits" otherwise available to those individuals, whether through private sources, employment, public programs, or otherwise. Prior to the enactment of the ABLE Act, various types of tax-advantaged savings arrangements existed, but none adequately served the goal of promoting saving for these financial needs. Section 529A allows the creation of a qualified ABLE program by a State (or agency or instrumentality thereof) under which a separate ABLE account may be established for a disabled individual who is the designated beneficiary and owner of that account. Generally, contributions to that account are subject to both an annual and a cumulative limit, and, when made by a person other than the designated beneficiary, are treated as non-taxable gifts to the designated beneficiary. Distributions made from an ABLE account for qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. The earnings portion of distributions from the ABLE account in excess of the qualified disability expenses is includible in the gross income of the designated beneficiary. An ABLE account may be used for the long-term benefit and/or short-term needs of the designated beneficiary. Section 103 of the ABLE Act, while not a tax provision, is critical to achieving the goal of the ABLE Act of providing financial resources for the benefit of disabled individuals. Because so many of the programs that provide essential financial, occupational, and other resources and services to disabled individuals are available only to persons whose resources and income do not exceed relatively low dollar limits, section 103 generally provides that a designated beneficiary's ABLE account (specifically, its account balance, contributions to the account, and

distributions from the account) is disregarded for purposes of determining the designated beneficiary's eligibility for and the amount of any assistance or benefit provided under certain means-tested Federal programs. However, in the case of the Supplemental Security Income program under title XVI of the Social Security Act, distributions for certain housing expenses are not disregarded, and the balance (including earnings) in an ABL account is considered a resource of the designated beneficiary to the extent that balance exceeds \$100,000. Section 103 also addresses the impact of an excess balance in an ABL account on the designated beneficiary's eligibility under the Supplemental Security Income program and Medicaid.

Finally, section 104 of the ABL Act addresses the treatment of ABL accounts in bankruptcy proceedings.

Notice 2015-18, 2015-12 IRB 765 (March 23, 2015), provides that the section 529A guidance will confirm that the owner of the ABL account is the designated beneficiary of the account, and that the person with signature authority over (if not the designated beneficiary of) the account may neither have nor acquire any beneficial interest in the ABL account and must administer that account for the benefit of the designated beneficiary of that account. The Notice further provides that, in the event that state legislation creating ABL programs enacted in accordance with section 529A prior to issuance of guidance does not fully comport with the guidance when issued, the Treasury Department and the IRS intend to provide transition relief to provide sufficient time to allow States to implement the changes necessary to avoid the disqualification of the program and of the ABL accounts already established under the program.

The Treasury Department and the IRS reiterate that States that enact legislation creating an ABL program in accordance with section 529A, and those individuals establishing ABL 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 they are issued. The Treasury Department and the IRS intend to provide transition relief to enable those State programs and accounts to be brought into compliance with the requirements in the final regulations, including providing sufficient time after issuance of the final regulations in order for changes to be implemented.

## Explanation of Provisions

### *Qualification as an ABL program*

The proposed regulations provide guidance on the requirements a program must satisfy in order to be a qualified ABL program described in section 529A. Specifically, in addition to other requirements, the program must: Be established and maintained by a State or a State's agency or instrumentality; permit the establishment of an ABL account only for a designated beneficiary who is a resident of that State, or a State contracting with that State for purposes of the ABL program; permit the establishment of an ABL account only for a designated beneficiary who is an eligible individual; limit a designated beneficiary to only one ABL account, wherever located; permit contributions to an ABL 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 ABL account; require a separate accounting for the ABL account of each designated beneficiary with an ABL 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 ABL account; and prohibit the pledging of an interest in an ABL account as security for a loan.

Because each qualified ABL 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 ABL accounts is likely to be far greater than those made from qualified tuition accounts, the proposed regulations expressly allow a qualified ABL 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 promote

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

### *Established and Maintained*

The proposed regulations provide 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. A program is maintained by a State or its agency or instrumentality if: All the terms and conditions of the program are set by the State or its agency or instrumentality, and the State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising all decisions relating to the investment of assets contributed to the program. The proposed regulations set forth factors that are relevant in determining whether a State, or its agency or instrumentality, is actively involved in the administration of the program. Included in the factors is the manner and extent to which it is permissible for the program to contract out for professional and financial services.

### *Establishment of an ABL Account*

The proposed regulations provide that, consistent with the definition of a designated beneficiary in section 529A(e)(3), the designated beneficiary of an ABL account is the eligible individual who establishes the account or an eligible individual who succeeded the original designated beneficiary. The proposed regulations also provide that the designated beneficiary is the owner of that account.

The Treasury Department and the IRS recognize, however, that certain eligible individuals may be unable to establish an account themselves. Therefore, 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 ABL account for that eligible individual. For purposes of these proposed regulations, because each of these individuals would be acting on behalf of the designated beneficiary, references to actions of the designated beneficiary, such as opening or managing the ABL account, are deemed to include the actions of any other such individual with signature authority over the ABL account. The proposed regulations also provide that, consistent with Notice 2015-18, a person other than the designated beneficiary with signature authority

over the account of the designated beneficiary may neither have, nor acquire, any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.

At the time an ABLE account is created for a designated beneficiary, the designated beneficiary must provide evidence that the designated beneficiary is an eligible individual as defined in section 529A(e)(1). Section 529A(e)(1) 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 date on which the individual attained age 26, or a disability certification meeting specified requirements is filed with the Secretary. If an individual is asserting he or she 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 date on which the individual attained age 26, the proposed regulations provide that each qualified ABLE program may determine the evidence required to establish the individual's eligibility. For example, a qualified ABLE program could require the individual to provide a copy of a benefit verification letter from the Social Security Administration and allow the individual to certify, under penalties of perjury, that the blindness or disability occurred before the date on which the individual attained age 26.

Alternatively, the designated beneficiary must submit the disability certification when opening the ABLE account. Consistent with section 529A(e)(2), the proposed regulations provide that a disability certification is a certification by the designated beneficiary that he or she: (1) Has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which (i) can be expected to result in death or (ii) has lasted or can be expected to last for a continuous period of not less than 12 months; or (2) is blind (within the meaning of section 1614(a)(2) of the Social Security Act) and that such blindness or disability occurred before the date on which the individual attained age 26. The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a licensed physician (as defined in section 1861(r) of the Social Security Act, 42 U.S.C. 1395x(r)). Consistent with other IRS

filing requirements, the proposed regulations also provide that the certification must be signed under penalties of perjury.

While evidence of an individual's eligibility based on entitlement to Social Security benefits should be objectively verifiable, the sufficiency of a disability certification that an individual is an eligible individual for purposes of section 529A might not be as easy to establish. Nevertheless, the Treasury Department and the IRS wish to facilitate an eligible individual's ability to establish an ABLE account without undue delay. Therefore, the proposed regulations provide that an eligible individual must present the disability certification, accompanied by the diagnosis, to the qualified ABLE program to demonstrate eligibility to establish an ABLE account. The proposed regulations further provide that the disability certification will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program, as discussed further below, will file with the IRS in accordance with the filing requirements under § 1.529A-5(c)(2)(iv).

#### *Disability Determination*

Consistent with section 529A(g)(4), the Treasury Department and the IRS have consulted with the Commissioner of Social Security regarding disability certifications and determinations of disability. For purposes of the disability certification, the proposed regulations provide that the phrase "marked and severe functional limitations" means the standard of disability in 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 individual. This phrase refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments (the listings) in appendix 1 of subpart P of 20 CFR part 404. (See 20 CFR 416.906, 416.924 and 416.926a). This listing developed and used by the Social Security Administration describes for each of the major body systems impairments that cause marked and severe functional limitations. Most body system sections are in two parts: an introduction, followed by the specific listings. The introduction contains information relevant to the use of the listings with respect to that body

system, such as examples of common impairments in the body system and definitions used in the listings for that body system. The introduction may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that an impairment satisfies the criteria of a particular listing with respect to the body system. The specific listings that follow the introduction for each body system specify the objective medical and other findings needed to satisfy the criteria of that listing. Most of the listed impairments are permanent or expected to result in death, although some listings state a specific period of time for which an impairment will meet the listing.

An impairment is medically equivalent to a listing if it is at least equal in severity and duration to the severity and duration of any listing. An impairment that does not meet or medically equal any listing may result in limitations that functionally equal the listings if it results in marked limitations in two domains of functioning or an extreme limitation in one domain of functioning, as explained in 20 CFR 416.926a. In addition, the proposed regulations provide that certain conditions, specifically those listed in the Compassionate Allowances Conditions list maintained by the Social Security Administration, are deemed to meet the requirements of an impairment sufficient for a disability certification without a physician's diagnosis, provided that the condition was present before the date on which the individual attained age 26. The proposed regulations also provide the flexibility from time to time to identify additional impairments that will be deemed to meet these requirements. The Treasury Department and the IRS request comments on what other conditions should be deemed to meet the requirements of section 529A(e)(2)(A)(i).

#### *Change in Eligible Individual Status*

The Treasury Department and the IRS recognize that there may be circumstances in which a designated beneficiary ceases to be an eligible individual but subsequently regains that status. Consequently, the Treasury Department and the IRS believe that it is appropriate to permit continuation of the ABLE account (albeit with some changes in the applicable rules) during the period in which a designated beneficiary is not an eligible individual as long as the designated beneficiary was an eligible individual when the account was established. Therefore, if at any time a designated beneficiary no longer meets the definition of an eligible

individual, his or her ABLÉ account remains an ABLÉ account to which all of the provisions of the ABLÉ Act continue to apply, and no (taxable) distribution of the account balance is deemed to occur. However, the proposed regulations provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLÉ account may be accepted. If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits. In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLÉ account (and preserve the account's qualification as an ABLÉ account for all purposes) if, for example, the disease that caused the impairment goes into a temporary remission, and to preserve the ABLÉ account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual. Note that expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A-1(b)(9)(A) or § 1.529A-2(e)(1)(i).

The proposed regulations provide flexibility regarding annual recertifications. A qualified ABLÉ program generally must require annual recertifications that the designated beneficiary continues to satisfy the definition of an eligible individual. However, a qualified ABLÉ program may deem an annual recertification to have been provided in appropriate circumstances. For example, a qualified ABLÉ program may permit certification by an individual that he or she has a permanent disability to be considered to meet the annual requirement to present a certification to the qualified ABLÉ program. In other cases, a program may require all of the same evidence needed for the initial disability certification when the account was established, may require a statement under penalties of perjury that nothing has changed that would change the original disability certification, or may incorporate some other method of ensuring that the designated beneficiary continuously qualifies as an eligible individual. Alternatively, a qualified ABLÉ program may identify certain impairments or categories of impairments for which recertifications will be deemed to have been made annually to the qualified

ABLÉ program unless and until the qualified ABLÉ program provides otherwise (for example, if a cure is discovered for a disease that causes an impairment). An initial certification or recertification that meets the requirements of the qualified ABLÉ program will be deemed to have met the requirement of section 529A(e)(1)(B). The Treasury Department and the IRS request comments regarding how a qualified ABLÉ program will be able to demonstrate eligibility in subsequent years if it allows deemed recertifications.

#### *Contributions to an ABLÉ Account*

The proposed regulations provide that, as a general rule, all contributions to an ABLÉ account must be made in cash. The proposed regulations provide that a qualified ABLÉ program may accept cash contributions in the form of cash or a check, money order, credit card payment, or other similar method of payment. In addition, the proposed regulations provide that the total contributions to an ABLÉ account in the designated beneficiary's taxable year, other than amounts received in rollovers and program-to-program transfers, must not exceed the amount of the annual per-donee gift tax exclusion under section 2503(b) in effect for that calendar year (currently \$14,000) in which the designated beneficiary's taxable year begins. Finally, a qualified ABLÉ program must provide adequate safeguards to ensure that total contributions to an ABLÉ account (including the proceeds from a preexisting ABLÉ account) do not exceed that State's limit for aggregate contributions under its qualified tuition program.

To implement these requirements, the proposed regulations provide that a qualified ABLÉ program must return contributions in excess of the annual gift tax exclusion (excess contributions) to the contributor(s), along with all net income attributable to those excess contributions. Similarly, the proposed regulations also require the return of all contributions, along with all net income attributable to those contributions, that caused an ABLÉ account to exceed the limit established by the State for its qualified tuition program (excess aggregate contributions). If an excess contribution or excess aggregate contribution is returned to a contributor other than the designated beneficiary, the qualified ABLÉ program must notify the designated beneficiary of such return at the time of the return. The proposed regulations further provide that such returns of excess contributions and excess aggregate contributions must

be received by the contributor(s) on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess contributions were made or in the year the excess aggregate contributions caused amounts in the ABLÉ account to exceed the limit in effect under section 529A(b)(6), respectively. The proposed regulations provide rules for determining the net income attributable to a contribution made to an ABLÉ account, and also provide that these excess contributions and excess aggregate contributions must be returned to contributors on a last-in, first-out basis. In the case of contributions that exceed the annual gift tax exclusion, a failure to return such excess contributions within the time period discussed in this paragraph will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess contributions. As part of a planned revision of IRA regulations, the Treasury Department and the IRS intend to propose regulations under section 4973 to reflect that ABLÉ accounts are subject to section 4973.

#### *Application of Gift Tax to Contributions to an ABLÉ Account*

Gift tax consequences may arise from contributions to an ABLÉ account even though the aggregate amount of such contributions to an ABLÉ account from all contributors may not exceed the annual exclusion amount under section 2503(b) applicable to any single contributor. Specifically, if a contributor makes other gifts to a designated beneficiary in addition to the gift to the designated beneficiary's ABLÉ account, the contributor's total gifts made to the designated beneficiary in that year could give rise to a gift tax liability.

Contributions may be made by any person. The term *person* is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, association, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person would include an individual and each of the entities described in section 7701(a)(1). Under section 2501(a)(1), the gift tax applies only to gifts by individuals, but it also applies to gifts made directly or indirectly. As a result, a gift made by a trust, estate, association, company, corporation, or partnership is treated as having been made by the owner(s) of that entity. For example, a gift from a corporation to a designated beneficiary is treated as a gift from the shareholders of the corporation to the designated beneficiary. *See Example (1) of*

§ 25.2511-1(h). Accordingly, the proposed regulations provide that, for purposes of sections 529A(b)(1)(A) and 529A(c)(1)(C), a contribution by a corporation is treated as a gift by its shareholders and a contribution by a partnership is treated as a gift by its partners. This rule also applies to trusts, estates, associations, and companies. See section 2511 and § 25.2511-1(c).

The legislative history of section 529A suggests that a “person” described in section 529A(b)(1)(A) includes the designated beneficiary of an ABLÉ account. See 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014). A person may transfer his or her property into an account, such as a bank account or a trust, for his or her benefit and retain dominion and control over the property transferred. Because an individual cannot make a transfer of property to himself or herself and a transfer of property is a fundamental requirement for a completed gift, this type of transfer from a person’s own property cannot be treated as a completed gift for tax purposes. See § 25.2511-2(b) and (c). Therefore, the proposed regulations provide that any contribution by a designated beneficiary to a qualified ABLÉ program benefitting the designated beneficiary is not treated as a completed gift. Because the designated beneficiary remains the owner of the account for purposes of chapter 12, if the designated beneficiary transfers the funds in the account to another person as permitted under these proposed regulations, the designated beneficiary making the transfer is the donor for purposes of chapter 12 and the transferor for generation-skipping transfer tax purposes of chapter 13.

#### *Distributions*

If distributions from an ABLÉ account do not exceed the designated beneficiary’s qualified disability expenses, no amount is includible in the designated beneficiary’s gross income. Otherwise, the earnings portion of the distributions from the ABLÉ account as determined in the manner provided under section 72, reduced by the product of such earnings portion and the ratio of the amount of the distributions for qualified disability expenses to total distributions, is includible in the gross income of the designated beneficiary to the extent not otherwise excluded from gross income. As required by section 529A(c)(1)(D), the proposed regulations provide that, for purposes of applying section 72 to amounts distributed from an ABLÉ account: (1) all distributions during a taxable year are treated as one distribution; and (2) the value of the

contract, income on the contract, and investment in the contract are computed as of the close of the calendar year in which the designated beneficiary’s taxable year begins.

The proposed regulations also provide that, in addition to the income tax on the portion of a distribution included in gross income, an additional tax of 10 percent of the amount includible in gross income is imposed. This additional tax does not apply, however, to distributions on or after the designated beneficiary’s death or to returns of excess contributions, excess aggregate contributions, or contributions to additional purported ABLÉ accounts made by the due date (including extensions) of the designated beneficiary’s tax return for the year in which the relevant contributions were made.

Section 529A(c)(1)(C) addresses the tax consequences of the rollover of an ABLÉ account to an ABLÉ account for the same designated beneficiary maintained under a different State’s qualified ABLÉ program, as well as a change of designated beneficiary. The proposed regulations describe with respect to these two situations the circumstances in which amounts will not be includible in income. The first is any change of designated beneficiary if the new designated beneficiary is both (1) an eligible individual for his or her taxable year in which the change is made and (2) a sibling of the former designated beneficiary. For purposes of these proposed regulations, a sibling also includes step-siblings and half-siblings, whether by blood or by adoption. The proposed regulations provide that a qualified ABLÉ program must permit a change of designated beneficiary, as long as the change is made prior to the death of the former designated beneficiary and as long as the successor designated beneficiary is an eligible individual. Because the designated beneficiary will be subject to gift and/or generation-skipping transfer tax if the successor designated beneficiary is not a sibling of the designated beneficiary, the Treasury Department and the IRS request comments regarding whether the final regulations should permit States to require that a successor designated beneficiary also must be a sibling of the designated beneficiary.

The second situation in which a distribution is not included in gross income arises if a distribution to the designated beneficiary of the ABLÉ account is paid, not later than the 60th day after the date of the distribution, to another (or the same) ABLÉ account for the benefit of the designated beneficiary

or for the benefit of an eligible individual who is a sibling of the designated beneficiary. However, the preceding sentence does not apply to such a distribution that occurs within 12 months of a previous rollover to another ABLÉ account for the same designated beneficiary.

The Treasury Department and the IRS have been asked whether a qualified tuition account under section 529 may be rolled into an ABLÉ account for the same designated beneficiary free of tax. Because such a distribution to the ABLÉ account would not constitute a qualified higher education expense under section 529, the Treasury Department and the IRS do not believe they have the authority to allow such a transfer on a tax-free basis.

In addition, the proposed regulations authorize a qualified ABLÉ program to allow program-to-program transfers to effectuate a change of qualified ABLÉ program or a change of designated beneficiary to another eligible individual. Such a direct transfer is neither a distribution taxed in accordance with section 72 nor an excess contribution. A program-to-program transfer also could be accomplished, if permitted by the qualified ABLÉ program, through a check delivered to the designated beneficiary but negotiable only by the qualified State program under which the new ABLÉ account is being established.

The Treasury Department and the IRS recognize that moving funds by use of a program-to-program transfer may be preferable to moving them by a rollover because a rollover, even if made within the permissible 60-day period, may jeopardize the designated beneficiary’s eligibility for certain benefits under various means-tested programs. Moreover, a direct program-to-program transfer could facilitate the efficient transfer of all relevant information regarding the application of contribution limits and the total amount of accumulated earnings that will also apply to the new account. The Treasury Department and the IRS request comments as to whether and to what extent a qualified ABLÉ program should be permitted to require that funds from another State’s ABLÉ program be accepted only through program-to-program transfers.

#### *Qualified Disability Expenses*

Section 529A(e)(5) defines a *qualified disability expense*. Consistent with that subsection, 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 for 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 that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. As previously stated, expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of the proposed regulations are not qualified disability expenses.

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 or which provide no benefits to others in addition to the benefit to the eligible individual. For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism. The Treasury Department and the IRS request comments regarding what types of expenses should be considered qualified disability expenses and under what circumstances. The proposed regulations authorize the identification of additional types of qualified disability expenses in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2). A qualified ABLÉ program must 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 that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

#### *Limitation on Number of ABLÉ Accounts of a Designated Beneficiary*

Section 529A(c)(4) generally provides that, except with respect to certain rollovers, once an ABLÉ account has been established for a designated beneficiary, no account subsequently established for that same designated

beneficiary may qualify as an ABLÉ account. The proposed regulations provide that, except with respect to rollovers and program-to-program transfers, no designated beneficiary may have more than one ABLÉ account in existence at the same time, but provides that a prior ABLÉ account that has been closed does not prohibit the subsequent creation of another ABLÉ account for the same designated beneficiary. A qualified ABLÉ program must obtain a verification from the eligible individual, signed under penalties of perjury, that he or she has no other ABLÉ account (except in the case of a rollover or program-to-program transfer). The proposed regulations provide that, in the event that any additional ABLÉ account is opened for a designated beneficiary with an ABLÉ account already in existence, only the first such account created for that designated beneficiary qualifies as an ABLÉ account, and each other account is treated for all purposes as being an account of the designated beneficiary that is not an ABLÉ account under a qualified ABLÉ program. The proposed regulations also provide, however, that a return, in accordance with the rules that apply to returns of excess contributions and excess aggregate contributions under § 1.529A–2(g)(4), of the entire balance of a second or other subsequent account received by the contributor(s) on or before the due date (including extensions) for filing the designated beneficiary’s income tax return for the year in which the account was opened and contributions to the second or subsequent account were made will not be treated as a gift or distribution to the designated beneficiary for purposes of section 529A.

The prohibition of multiple ABLÉ accounts, however, does not apply to prevent a timely rollover or program-to-program transfer of the designated beneficiary’s account to an ABLÉ account under a different qualified ABLÉ program.

#### *Residency Requirements*

Consistent with section 529A(b)(1)(C), the proposed regulations require that an ABLÉ account for a designated beneficiary may be established only under the qualified ABLÉ program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary’s residence has contracted for the provision of ABLÉ accounts. If a State does not establish and maintain a qualified ABLÉ program, it may contract with another State to provide an ABLÉ program for its residents. The statute is

silent as to whether a designated beneficiary must move his or her existing ABLÉ account when the designated beneficiary changes his or her residence. The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, the proposed regulations provide that a qualified ABLÉ program may permit a designated beneficiary to continue to maintain his or her ABLÉ account that was created in that State, even after the designated beneficiary is no longer a resident of that State. However, in order to enforce the one ABLÉ account limitation and in accordance with section 529A(g)(1), the proposed regulations provide that, other than in the case of a rollover or a program-to-program transfer of a designated beneficiary’s ABLÉ account, a qualified ABLÉ program must require the designated beneficiary to verify, under penalties of perjury, when creating an ABLÉ account that the account being established is the designated beneficiary’s only ABLÉ account. For example, the eligible individual could be required to check a box providing such verification on a form used to establish the account. The Treasury Department and the IRS are concerned that without such safeguards individuals could inadvertently establish two accounts with adverse tax consequences due to the loss of ABLÉ account status for the second account and expect qualified ABLÉ programs to establish safeguards to ensure that the required limit of one ABLÉ account per designated beneficiary is not violated.

#### *Investment Direction*

Section 529A(b)(4) states that a program shall not be treated as a qualified ABLÉ program unless it provides that the designated beneficiary may directly or indirectly direct the investment of any contributions to the program or any earnings thereon no more than two times in any calendar year. A program will not violate this requirement merely because it permits a designated beneficiary or a person with signature authority over a designated beneficiary’s account to serve as one of the program’s board members or employees, or as a board member or employee of a contractor that the program hires to perform administrative services.

#### *Cap on Contributions*

Section 529A(b)(6) provides that a qualified ABLÉ program must provide adequate safeguards to prevent aggregate

contributions on behalf of a designated beneficiary in excess of the limit established by the State under section 529(b)(6) relating to Qualified State Tuition Programs. The proposed regulations provide a safe harbor that permits a qualified ABLE program to satisfy this requirement regarding total cumulative contributions if the program prohibits any additional contributions to an account as soon as the account balance reaches the specified contribution limit under such State's program established under section 529. Once the account balance falls below the prescribed limit, contributions may resume, subject to the same limitation. The Treasury Department and the IRS believe that recommencement of contributions is appropriate based on the nature and purposes of the ABLE program.

#### *Gift and Generation-Skipping Transfer (GST) Taxes*

The proposed regulations provide that 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 that such gifts are neither gifts of a future interest nor a qualified transfer under section 2503(e). Accordingly, no distribution from an ABLE account to the designated beneficiary of that account is treated as a taxable gift. Finally, neither gift nor GST taxes apply to the change of designated beneficiary of an ABLE account, as long as the new designated beneficiary is an eligible individual who is a sibling of the former designated beneficiary.

#### *Distribution on Death*

The proposed regulations provide that, upon the death of the designated beneficiary, all amounts remaining in the ABLE account are includible in the designated beneficiary's gross estate for purposes of the estate tax. See section 2031. Further, the proposed regulations cross-reference section 2053 for purposes of determining the deductibility by the designated beneficiary's estate of amounts payable from the ABLE account to satisfy claims by creditors such as a State and also cross-reference section 2652(a)(1) for treatment of the deceased designated beneficiary as the transferor of any property remaining in the ABLE account that may pass to a beneficiary.

Pursuant to section 529A(f), a qualified ABLE program must provide that, upon the designated beneficiary's death, any State may file a claim (either with the person with signature authority over the ABLE account or the executor

of the designated beneficiary's estate as defined in section 2203) for the amount of the total medical assistance paid for the designated beneficiary under the State's Medicaid plan after the establishment of the ABLE account. The amount paid in satisfaction of such a claim is not a taxable distribution from the ABLE account. Further, the amount 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.

#### *Unrelated Business Taxable Income and Filing Requirements*

A qualified ABLE program generally is exempt from income taxation. A qualified ABLE program, however, is subject to the taxes imposed by section 511 relating to the imposition of tax on unrelated business taxable income ("UBTI"). For purposes of this tax, certain administrative and other fees do not constitute unrelated business income to the ABLE program. A qualified ABLE program is not required to file Form 990, "Return of Organization Exempt From Income Tax," but will be required to file Form 990-T, "Exempt Organization Business Income Tax Return," if a filing would be required under the rules of §§ 1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

#### *Reporting Requirements*

The proposed regulations set forth recordkeeping and reporting requirements. A qualified ABLE program must maintain records that enable the program to account to the Secretary with respect to all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLE account. In addition, a qualified ABLE program must report to the Secretary the establishment of each ABLE account, including the name and residence of the designated beneficiary, and other relevant information regarding the account that is included on the new Form 5498-QA, "ABLE Account Contribution Information." It is anticipated that the qualified ABLE program will report if the eligible individual has presented an adequate disability certification, accompanied by a diagnosis, to demonstrate eligibility to establish an account. Information regarding

distributions will be reported on the new Form 1099-QA, "Distributions from ABLE Accounts." The proposed regulations contain more detail on how the information must be reported.

In addition, section 529A(b)(3) requires that a qualified ABLE program provide separate accounting for each designated beneficiary. Separate accounting requires that contributions for the benefit of a designated beneficiary, as well as earnings attributable to those contributions, are allocated to that designated beneficiary's account. Whether or not a program ordinarily provides each designated beneficiary an annual account statement showing the income and transactions related to the account, the program must give this information to the designated beneficiary upon request.

Section 529A(d)(4) provides that States are required to submit electronically to the Commissioner of Social Security, on a monthly basis and in the manner specified by the Commissioner of Social Security, statements on relevant distributions and account balances from all ABLE accounts. The report of the Committee on Ways and Means (H.R. Rep. No. 113-614, pt. 1, at 15 (2014)) indicates that States should work with the Commissioner of Social Security to identify data elements for the monthly reports, including the type of qualified disability expenses.

#### **Effective Date/Applicability Date**

These regulations are proposed to be effective as of the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. These rules, when adopted as final regulations, will apply to taxable years beginning after December 31, 2014. The reporting requirements of §§ 1.529A-5 through 1.529A-7 will apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015. Until the issuance of final regulations, taxpayers and qualified ABLE programs may rely on these proposed regulations.

#### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation and, because the regulation does not impose a collection of information on small

entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. This regulation, if adopted, would primarily affect states and individuals and therefore would not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the "Addresses" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

A public hearing has been scheduled for October 14, 2015, beginning at 10:00 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments by September 21, 2015, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 21, 2015. Submit a signed paper original and eight (8) copies or an electronic copy. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the

agenda will be available free of charge at the hearing.

### Drafting Information

The principal authors of these regulations are Terri Harris and Sean Barnett, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

### List of Subjects

#### 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### 26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

#### 26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

#### 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 25, 26 and 301 are proposed to be amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Sections 1.529A-1 through 1.529A-7 also issued under 26 U.S.C. 529A(g). \* \* \*

■ **Par. 2.** Section 1.511-2 is amended by adding paragraph (e) to read as follows:

#### § 1.511-2 Organizations subject to tax.

\* \* \* \* \*

(e) *ABLE programs*—(1) *Unrelated business taxable income.* A qualified ABLE program described in section 529A generally is exempt from income taxation, but is subject to taxes imposed by section 511 relating to the imposition of tax on unrelated business income. A qualified ABLE program is required to file Form 990-T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§ 1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

(2) *Effective/applicability dates.* This paragraph (e) applies to taxable years beginning after December 31, 2014.

■ **Par. 3.** Section 1.513-1 is amended by adding *Example 4* to paragraph (d)(4)(i) to read as follows:

#### § 1.513-1 Definition of unrelated trade or business.

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(i) \* \* \*

*Example 4.* P is a qualified ABLE program described in section 529A. P receives amounts in order to open or maintain ABLE accounts, as administrative or maintenance fees and other similar fees including service charges. Because the payment of these amounts are essential to the operation of a qualified ABLE program, the income generated from the activity does not constitute gross income from an unrelated trade or business.

\* \* \* \* \*

■ **Par. 4.** An undesignated center heading is added immediately following § 1.528-10 and §§ 1.529A-0 through 1.529A-7 are added to read as follows:

\* \* \* \* \*

#### Qualified Able Programs

1.529A-0 Table of contents.

1.529A-1 Exempt status of qualified ABLE program and definitions.

1.529A-2 Qualified ABLE program.

1.529A-3 Tax treatment.

1.529A-4 Gift, estate, and generation-skipping transfer taxes.

1.529A-5 Reporting of the establishment of and contributions to an ABLE account.

1.529A-6 Reporting of distributions from and termination of an ABLE account.

1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.

\* \* \* \* \*

#### § 1.529A-0 Table of contents.

This section lists the following captions contained in §§ 1.529A-1 through 1.529A-7.

#### § 1.529A-1 Exempt status of qualified ABLE program and definitions.

(a) In general.

(b) Definitions.

(1) ABLE account.

(2) Contracting State.

(3) Contribution.

(4) Designated beneficiary.

(5) Disability certification.

(6) Distribution.

(7) Earnings.

(8) Earnings ratio.

(9) Eligible individual.

(10) Excess contribution.

(11) Excess aggregate contribution.

(12) Investment in the account.

(13) Member of the family.

(14) Program-to-program transfer.

(15) Qualified ABLE program.

(16) Qualified disability expenses.

(17) Rollover.

(c) Effective/applicability date.

**§ 1.529A-2 Qualified ABLÉ program.**

(a) In general.

(b) Established and maintained by a State or agency or instrumentality of a State.

(1) Established.

(2) Maintained.

(3) Community Development Financial Institutions (CDFIs).

(c) Establishment of an ABLÉ account.

(1) In general.

(2) Only one ABLÉ account.

(3) Beneficial interest.

(d) Eligible individual.

(1) In general.

(2) Frequency of recertification.

(3) Loss of qualification as an eligible individual.

(e) Disability certification.

(1) In general.

(2) Marked and severe functional limitations.

(3) Compassionate allowance list.

(4) Additional guidance.

(5) Restriction on use of certification.

(f) Change of designated beneficiary.

(g) Contributions.

(1) Permissible property.

(2) Annual contributions limit.

(3) Cumulative limit.

(4) Return of excess contributions and excess aggregate contributions.

(h) Qualified disability expenses.

(1) In general.

(2) Example.

(i) Separate accounting.

(j) Program-to-program transfers.

(k) Carryover of attributes.

(l) Investment direction.

(m) No pledging of interest as security.

(n) No sale or exchange.

(o) Change of residence.

(p) Post-death payments.

(q) Reporting requirements.

(r) Effective/applicability date.

**§ 1.529A-3 Tax treatment.**

(a) Taxation of distributions.

(b) Additional exclusions from gross income.

(1) Rollover.

(2) Program-to-program transfers.

(3) Change in designated beneficiary.

(4) Payments to creditors post-death.

(c) Computation of earnings.

(d) Additional tax on amounts includible in gross income.

(1) In general.

(2) Exceptions.

(e) Tax on excess contributions.

(f) Filing requirements.

(g) Effective/applicability date.

**§ 1.529A-4 Gift, estate, and generation-skipping transfer taxes.**

(a) Contributions.

(1) In general.

(2) Generation-skipping transfer (GST) tax.

(3) Designated beneficiary as contributor.

(b) Distributions.

(c) Change of designated beneficiary.

(d) Transfer tax on death of designated beneficiary.

(e) Effective/applicability date.

**§ 1.529A-5 Reporting of the establishment of and contributions to an ABLÉ account.**

(a) In general.

(b) Additional definitions.

(1) Filer.

(2) TIN.

(c) Requirement to file return.

(1) Form of return.

(2) Information included on return.

(3) Time and manner of filing return.

(d) Requirement to furnish statement.

(1) In general.

(2) Time and manner of furnishing statement.

(3) Copy of Form 5498-QA.

(e) Request for TIN of designated beneficiary.

(f) Penalties.

(1) Failure to file return.

(2) Failure to furnish TIN.

(g) Effective/applicability date.

**§ 1.529A-6 Reporting of distributions from and termination of an ABLÉ account.**

(a) In general.

(b) Requirement to file return.

(1) Form of return.

(2) Information included on return.

(3) Time and manner of filing return.

(c) Requirement to furnish statement.

(1) In general.

(2) Time and manner of furnishing statement.

(3) Copy of Form 1099-QA.

(d) Request for TIN of contributor(s).

(e) Penalties.

(1) Failure to file return.

(2) Failure to furnish TIN.

(f) Effective/applicability date.

**§ 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.**

(a) Electronic furnishing of statements.

(1) In general.

(2) Consent.

(3) Required disclosures.

(4) Format.

(5) Notice.

(6) Access period.

(b) Effective/applicability date.

**§ 1.529A-1 Exempt status of qualified ABLÉ program and definitions.**

(a) *In general.* A qualified ABLÉ program described in section 529A is exempt from income tax, except for the tax imposed under section 511 on the

unrelated business taxable income of that program.

(b) *Definitions.* For purposes of section 529A, this section and §§ 1.529A-2 through 1.529A-7—

(1) *ABLE account* means an account established under a qualified ABLÉ program and owned by the designated beneficiary of that account.

(2) *Contracting State* means a State without a qualified ABLÉ program of its own, which, in order to make ABLÉ accounts available to its residents who are eligible individuals, contracts with another State having such a program.

(3) *Contribution* means any payment directly allocated to an ABLÉ account for the benefit of a designated beneficiary.

(4) *Designated beneficiary* means the individual who is the owner of the ABLÉ account and who either established the account at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). If the designated beneficiary is not able to exercise signature authority over his or her ABLÉ account or chooses to establish an ABLÉ account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

(5) *Disability certification* means a certification deemed sufficient by the Secretary to establish a certain level of physical or mental impairment that meets the requirements described in § 1.529A-2(e).

(6) *Distribution* means any payment from an ABLÉ account. A *program-to-program transfer* is not a distribution.

(7) *Earnings* attributable to an account are the excess of the total account balance on a particular date over the *investment in the account* as of that date.

(8) *Earnings ratio* means the amount of earnings attributable to the account as of the last day of the calendar year in which the designated beneficiary's taxable year begins, divided by the total account balance on that same date, after taking into account all distributions made during that calendar year and all contributions received during that same year other than those (if any) returned in accordance with § 1.529A-2(g)(4).

(9) *Eligible individual* for a taxable year means an individual who either:

(i) Is entitled during that taxable year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such

blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); or

(ii) Is the subject of a disability certification filed with the Secretary for that taxable year.

(10) *Excess contribution* means the amount by which the amount contributed during the taxable year of the designated beneficiary to an ABLE account exceeds the limit in effect under section 2503(b) for the calendar year in which the taxable year of the designated beneficiary begins.

(11) *Excess aggregate contribution* means the amount contributed during the taxable year of the designated beneficiary that causes the total of amounts contributed since the establishment of the ABLE account (or of an ABLE account for the same designated beneficiary that was rolled into the current ABLE account) to exceed the limit in effect under section 529(b)(6). In the context of the safe harbor in § 1.529A-2(g)(3), however, excess aggregate contribution means a contribution that causes the account balance to exceed the limit in effect under section 529(b)(6).

(12) *Investment in the account* means the sum of all contributions made to the account, reduced by the aggregate amount of contributions included in distributions, if any, made from the account. In the case of a rollover into an ABLE account the amount included as investment in the recipient account is not the full amount of the rollover contribution, but instead is equal to the amount of the rollover contribution that constituted the investment in the account from which the rollover was made.

(13) *Member of the family* means a sibling, whether by blood or by adoption. Such term includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.

(14) *Program-to-program transfer* means the direct transfer of the entire balance of an ABLE account into an ABLE account of the same designated beneficiary in which the transferor ABLE account is closed upon completion of the transfer, or of part or all of the balance to an ABLE account of another eligible individual who is a member of the family of the former designated beneficiary, without any intervening distribution or deemed distribution to the designated beneficiary.

(15) *Qualified ABLE program* means a program established and maintained by a State, or agency or instrumentality of a State, under which an ABLE account

may be established by and for the benefit of the account's designated beneficiary who is an eligible individual, and that meets the requirements described in § 1.529A-2.

(16) *Qualified disability expenses* means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See § 1.529A-2(h). Any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529-1(b)(9)(A) or § 1.529-2(e)(1)(i) are not qualified disability expenses.

(17) *Rollover* means a contribution to an ABLE account of a designated beneficiary (or of an eligible individual who is a member of the family of the designated beneficiary) of all or a portion of an amount withdrawn from the designated beneficiary's ABLE account, provided the contribution is made within 60 days of the date of the withdrawal and, in the case of a rollover to the designated beneficiary's ABLE account, no rollover has been made to an ABLE account of the designated beneficiary within the prior 12 months.

(c) *Effective/applicability date*. This section applies to taxable years beginning after December 31, 2014.

#### § 1.529A-2 Qualified ABLE program.

(a) *In general*. A qualified ABLE program is a program established and maintained by a State, or an agency or instrumentality of a State, that satisfies all of the requirements of this section and under which—

(1) An ABLE account may be established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;

(2) The designated beneficiary must be a resident of such State or a resident of a Contracting State (as residence is determined under the law of the State of the designated beneficiary's residence);

(3) A designated beneficiary is limited to only one ABLE account at a time except as otherwise provided with respect to program-to-program transfers and rollovers;

(4) Any person may make contributions to such an ABLE account, subject to the limitations described in paragraph (g) of this section; and

(5) Distributions (other than rollovers and returns of contributions as described in paragraph (g)(4) of this section) may be made only to or for the

benefit of the designated beneficiary of the ABLE account.

(b) *Established and maintained by a State or agency or instrumentality of a State*—(1) *Established*. 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.

(2) *Maintained*. A program is maintained by a State or an agency or instrumentality of a State if—

(i) The State or its agency or instrumentality sets all of the terms and conditions of the program, including but not limited to who may contribute to the program, who may be a designated beneficiary of the program, and what benefits the program may provide; and

(ii) The State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising the implementation of decisions relating to the investment of assets contributed under the program. Factors that are relevant in determining whether a State or its agency or instrumentality is actively involved in the administration of the program include, but are not limited to: Whether the State or its agency or instrumentality provides services to designated beneficiaries that are not provided to persons who are not designated beneficiaries; whether the State or its agency or instrumentality establishes detailed operating rules for administering the program; whether officials of the State or its agency or instrumentality play a substantial role in the operation of the program, including selecting, supervising, monitoring, auditing, and terminating the relationship with any private contractors that provide services under the program; whether the State or its agency or instrumentality holds the private contractors that provide services under the program to the same standards and requirements that apply when private contractors handle funds that belong to the State or its agency or instrumentality or provide services to the State or its agency or instrumentality; whether the State or its agency or instrumentality provides funding for the program; and whether the State or its agency or instrumentality acts as trustee or holds program assets directly or for the benefit of the designated beneficiaries. For example, if the State or its agency or instrumentality thereof exercises the same authority over the funds invested in the program as it does over the investments in or pool of funds of a State employees' defined benefit pension plan, then the

State or its agency or instrumentality will be considered actively involved on an ongoing basis in the administration of the program.

(3) *Community Development Financial Institutions (CDFIs)*. Some or all of the services described in paragraphs (b)(2)(i) and (ii) of this section may be performed by one or more Community Development Financial Institutions (CDFIs) with whom the State (or its agency or instrumentality) contracts for that purpose.

(c) *Establishment of an ABLE account*—(1) *In general*. Except as otherwise provided in this paragraph (c), a qualified ABL program must provide that an ABL account may be established only for an eligible individual under a qualified ABL program of the State in which the eligible individual is a resident. The qualified ABL program also may allow the establishment of an ABL account for an eligible individual who is a resident of a *Contracting State* as defined in § 1.529A-1(b)(2). If an eligible individual is unable to establish an ABL account on his or her own behalf, the ABL 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 a parent or legal guardian of the eligible individual.

(2) *Only one ABL account*—(i) *In general*. Except in the case of rollovers or program-to-program transfers, a designated beneficiary is limited to one ABL account at a time, regardless of where located. To ensure that this requirement is met, a qualified ABL program must obtain a verification, signed under penalties of perjury, that the eligible individual has no other existing ABL account (other than an ABL account that will terminate with the rollover or program-to-program transfer into the new ABL account) before that program can permit the establishment of an ABL account for that eligible individual. In the case of a rollover, the ABL account from which amounts were rolled must be closed as of the 60th day after the amount was distributed from the ABL account in order for the account that received the rollover to be treated as an ABL account.

(ii) *Treatment of additional accounts*. Except in the case of rollovers or program-to-program transfers, if an ABL account is established for a designated beneficiary who already has an ABL account in existence, an additional account will not be treated as an ABL account. However, if all contributions made to that account are

returned in accordance with the rules that apply to excess contributions and excess aggregate contributions under paragraph (g)(4) of this section, the additional account will be treated as never having been established.

(3) *Beneficial interest*. The eligible individual for whose benefit an ABL account is established is the designated beneficiary of the account. A person other than the designated beneficiary with signature authority over the account of the designated beneficiary may neither have nor acquire any beneficial interest in the account during the lifetime of the designated beneficiary and must administer the account for the benefit of the designated beneficiary of the account.

(d) *Eligible individual*—(1) *In general*. Whether an individual is an eligible individual (as defined in § 1.529A-1(b)(9)) is determined for each taxable year, and that determination applies for the entire year. A qualified ABL program must specify the documentation that an individual must provide, both at the time an ABL account is established for that individual and thereafter, in order to ensure that the designated beneficiary of the ABL account is, and continues to be, an eligible individual. For purposes of determining whether an individual is an eligible individual, a disability certification will be deemed to be filed with the Secretary once the qualified ABL program has received the disability certification (as described in paragraph (e) of this section) or a disability certification has been deemed to have been received under the rules of the qualified ABL program, which information the qualified ABL program will file in accordance with the filing requirements under § 1.529A-5(c)(2)(iv).

(2) *Frequency of recertification*—(i) *In general*. A qualified ABL program may choose different methods of ensuring a designated beneficiary's status as an eligible individual and may impose different periodic recertification requirements for different types of impairments.

(ii) *Considerations*. In developing its rules on recertification, a qualified ABL program may take into consideration whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future. For example, a qualified ABL program may provide that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment. If the qualified ABL program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABL account to promptly

report changes in the designated beneficiary's condition that would result in the designated beneficiary's failing to satisfy the definition of eligible individual, the program also may provide that a certification is valid until the end of the taxable year in which the change in the designated beneficiary's condition occurred.

(3) *Loss of qualification as an eligible individual*. If the designated beneficiary of an ABL account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABL account, the designated beneficiary will continue to be the designated beneficiary of the ABL account (and will be referred to as such), and the ABL 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 the designated beneficiary does not satisfy the definition of an eligible individual, additional contributions to the designated beneficiary's ABL account must not be accepted by the qualified ABL program. Additionally, no amounts incurred during that year and each subsequent year in which the designated beneficiary does not satisfy the definition of an eligible individual will be qualified disability expenses. If the designated beneficiary subsequently again becomes an eligible individual, contributions to the designated beneficiary's ABL account again may be accepted subject to the contribution limits under section 529A, and expenses incurred that meet the definition of a qualified disability expense will be qualified disability expenses.

(e) *Disability certification*—(1) *In general*. Except as provided in paragraph (e)(3) of this section or additional guidance described in paragraph (e)(4) of this section, a disability certification with respect to an individual is a certification signed under penalties of perjury by the individual, or by the other individual establishing (or with signature authority over) the ABL account for the individual, that—

(i) The individual—

(A) Has a medically determinable physical or mental impairment that results in marked and severe functional limitations (as defined in paragraph (e)(2) of this section), and that—

(1) Can be expected to result in death; or

(2) Has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) Is blind (within the meaning of section 1614(a)(2) of the Social Security Act);

(ii) Such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); and

(iii) Includes a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)).

(2) *Marked and severe functional limitations.* For purposes of paragraph (e)(1) of this section, the phrase "marked and severe functional limitations" means 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 (see 20 CFR 416.906). Specifically, this is a level of severity that meets, medically equals, or functionally equals the severity of any listing in appendix 1 of subpart P of 20 CFR part 404, but without regard to age. (See 20 CFR 416.906, 416.924 and 416.926a.) Such phrase also includes any impairment or standard of disability identified in future guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). Consistent with the regulations of the Social Security Administration, the level of severity is determined by taking into account the effect of the individual's prescribed treatment. (See 20 CFR 416.930.)

(3) *Compassionate allowance list.* Conditions listed in the "List of Compassionate Allowances Conditions" maintained by the Social Security Administration (at [www.socialsecurity.gov/compassionateallowances/conditions.htm](http://www.socialsecurity.gov/compassionateallowances/conditions.htm)) 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. To establish that an individual with such a condition meets the definition of an eligible individual, the individual must identify the condition and certify to the qualified ABLE program both the presence of the condition and its onset prior to age 26, in a manner specified by the qualified ABLE program.

(4) *Additional guidance.* Additional guidance on conditions deemed to meet the requirements of section 529A(e)(1)(B) may be identified in future guidance published in the

Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

(5) *Restriction on use of certification.* No inference may be drawn from a disability certification described in this paragraph (e) for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(f) *Change of designated beneficiary.* A qualified ABLE program must permit a change in the designated beneficiary of an ABLE account, but only during the life of the designated beneficiary. At the time of the change, the successor designated beneficiary must be an eligible individual.

(g) *Contributions—(1) Permissible property.* Except in the case of program-to-program transfers, contributions to an ABLE account may only be made in cash. A qualified ABLE program may allow cash contributions to be made in the form of a check, money order, credit card, electronic transfer, or similar method.

(2) *Annual contributions limit.* A qualified ABLE program must provide that no contribution to an ABLE account will be accepted to the extent such contribution, when added to all other contributions (whether from the designated beneficiary or one or more other persons) to that ABLE account made during the designated beneficiary's taxable year causes the total of such contributions to exceed the amount in effect under section 2503(b) for the calendar year in which the designated beneficiary's taxable year begins. For this purpose, contributions do not include rollovers or program-to-program transfers.

(3) *Cumulative limit—(i) In general.* A qualified ABLE program maintained by a State or its agency or instrumentality must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by that State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions include contributions to any prior ABLE account maintained by any State or its agency or instrumentality for the same designated beneficiary or any prior designated beneficiary.

(ii) *Safe harbor.* A qualified ABLE program maintained by a State or its agency or instrumentality satisfies the requirement in paragraph (g)(3)(i) of this section if it refuses to accept any additional contribution to an ABLE account once the balance in that account reaches the limit established by that State under section 529(b)(6). Once the account balance falls below such limit, additional contributions again

may be accepted, subject to the limits under this paragraph (g)(3)(i) of this section.

(4) *Return of excess contributions and excess aggregate contributions.* If an excess contribution as defined in § 1.529A-1(b)(10) or an excess aggregate contribution as defined in § 1.529A-1(b)(11) is allocated to or deposited into the ABLE account of a designated beneficiary, a qualified ABLE program must return that excess contribution or excess aggregate contribution, including all net income attributable to that excess contribution or excess aggregate contribution, as determined under the rules set forth in § 1.408-11 (treating an IRA as an ABLE account and returned contributions under section 408(d)(4) as excess contributions or excess aggregate contributions), to the person or persons who made that contribution. An excess contribution or excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess contribution or excess aggregate contribution, along with all net income attributable to such contribution, has been returned. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. See § 1.529A-3(e) for income tax considerations for the contributor(s). If an excess contribution or excess aggregate contribution and the net income attributable to the excess contribution or excess aggregate contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return.

(h) *Qualified disability expenses—(1) In general.* Qualified disability expenses, as defined in § 1.529A-1(b)(16), are expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account 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, as well

as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual. A qualified ABLÉ program must 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 that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

(2) *Example.* The following example illustrates this paragraph (h):

*Example.* B, an individual, has a medically determined mental impairment that causes marked and severe limitations on her ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping her to maintain her independence and to improve her quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be considered a qualified disability expense.

(i) *Separate accounting.* A program will not be treated as a qualified ABLÉ program unless it provides separate accounting for each ABLÉ account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) *Program-to-program transfers.* A qualified ABLÉ program may permit a change of qualified ABLÉ program or a change of designated beneficiary by means of a program-to-program transfer as defined in § 1.529A-1(b)(14). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLÉ program, rules similar to the rules of § 1.401(a)(31)-1, Q&A-3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) *Carryover of attributes.* Upon a rollover or program-to-program transfer, all of the attributes of the former ABLÉ account relevant for purposes of

calculating the investment in the account and applying the annual and cumulative limits on contributions are applicable to the recipient ABLÉ account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLÉ account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLÉ account.

(l) *Investment direction.* A program will not be treated as a qualified ABLÉ program unless it provides that the designated beneficiary of an ABLÉ account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year.

(m) *No pledging of interest as security.* A program will not be treated as a qualified ABLÉ program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. This restriction includes, but is not limited to, a prohibition on the use of any interest in the ABLÉ program as security for a loan used to purchase such interest in the program.

(n) *No sale or exchange.* A qualified ABLÉ program must ensure that no interest in an ABLÉ account may be sold or exchanged.

(o) *Change of residence.* A qualified ABLÉ program may continue to maintain the ABLÉ account of a designated beneficiary after that designated beneficiary changes his or her residence to another State.

(p) *Post-death payments.* A qualified ABLÉ program must provide that a portion or all of the balance remaining in the ABLÉ account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLÉ account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLÉ account of all outstanding payments due for his or her qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLÉ account (the

date on which the ABLÉ account, or any ABLÉ account from which amounts were rolled or transferred to the ABLÉ account of the same designated beneficiary, was opened) over the amount of any premiums paid, whether from the ABLÉ account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan.

(q) *Reporting requirements.* A qualified ABLÉ program must comply with all applicable reporting requirements, including without limitation those described in §§ 1.529A-5 through 1.529A-7.

(r) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2014.

### § 1.529A-3 Tax treatment.

(a) *Taxation of distributions.* Each distribution from an ABLÉ account consists of earnings (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLÉ account to or for the benefit of the designated beneficiary of that ABLÉ account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary for that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLÉ account to or for the benefit of the designated beneficiary of that ABLÉ account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary for that year, the distributions from the ABLÉ account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. In such a case, 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 qualified disability expenses during the year bears to the total distributions during the year. For this purpose, all amounts relevant under section 72 are determined as of December 31 of the year in which the designated beneficiary's taxable year begins, and all amounts distributed from an ABLÉ account to or for the benefit of the designated beneficiary during his or her taxable year are treated as one distribution. If an excess contribution or excess aggregate contribution is

returned within the time period required in § 1.529A-2(g)(4), any net income distributed is includible in the gross income of the contributor(s) in the taxable year in which the excess contribution or excess aggregate contribution was made.

(b) *Additional exclusions from gross income*—(1) *Rollover*. A rollover as defined in § 1.529A-1(b)(17) is not includible in gross income under paragraph (a) of this section.

(2) *Program-to-program transfers*. A program-to-program transfer as defined in § 1.529A-1(b)(14) is not a distribution and is not includible in gross income under paragraph (a) of this section.

(3) *Change of designated beneficiary*—(i) *In general*. A change of designated beneficiary of an ABLÉ account is not treated as a distribution for purposes of section 529A, and is not includible in gross income under paragraph (a) of this section, if the successor designated beneficiary is—

(A) An eligible individual for such calendar year; and

(B) A member of the family of the former designated beneficiary.

(ii) *Other designated beneficiary changes*. In the case of any change of designated beneficiary not described in paragraph (b)(3)(i) of this section, the former designated beneficiary of that ABLÉ account will be treated as having received a distribution of the fair market value of the assets in that ABLÉ account on the date on which the change is made to the new designated beneficiary.

(4) *Payments to creditors post-death*. Distributions made after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses of the designated beneficiary are not includible in the gross income of the designated beneficiary or his or her estate. Included among these obligations is the post-death payment of any part of a claim filed against the designated beneficiary or the ABLÉ account by a State under a State Medicaid plan.

(c) *Computation of earnings*. The earnings portion of a distribution is equal to the product of the amount of the distribution and the earnings ratio, as defined in § 1.529A-1(b)(8). The balance of the distribution (the amount of the distribution minus the earnings portion of that distribution) is the portion of that distribution that constitutes the return of investment in the account.

(d) *Additional tax on amounts includible in gross income*—(1) *In general*. If any amount of a distribution from an ABLÉ account is includible in the gross income of a person for any taxable year under paragraph (a) of this

section (the “includible amount”), the tax imposed on that person by Chapter 1 of the Internal Revenue Code shall be increased by an amount equal to 10 percent of the includible amount.

(2) *Exceptions*—(i) *Distributions on or after the death of the designated beneficiary*. Paragraph (d)(1) of this section does not apply to any distribution made from the ABLÉ account 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 a creditor described in paragraph (b)(4) of this section.

(ii) *Returned excess contributions and additional accounts*. Paragraph (d)(1) of this section does not apply to any return made in accordance with § 1.529A-2(g)(4) of an excess contribution, excess aggregate contribution, or additional account.

(e) *Tax on excess contributions*. Under section 4973(h), a contribution to an ABLÉ account in excess of the annual contributions limit described in § 1.529A-2(g)(2) is subject to an excise tax in an amount equal to 6 percent of the excess contribution. However, if the excess contribution is returned in accordance with the provisions of § 1.529A-2(g)(4), it is treated as an amount not contributed.

(f) *Filing requirements*. A qualified ABLÉ program is not required to file Form 990, “Return of Organization Exempt From Income Tax,” Form 1041, “U.S. Income Tax Return for Estates and Trusts,” or Form 1120, “U.S. Corporation Income Tax Return.” However, a qualified ABLÉ program is required to file Form 990-T, “Exempt Organization Business Income Tax Return,” if such filing would be required under the rules of §§ 1.6012-2(e) and 1.6012-3(a)(5) if the ABLÉ program were an organization described in those sections.

(g) *Effective/applicability dates*. This section applies to taxable years beginning after December 31, 2014.

#### **§ 1.529A-4 Gift, estate, and generation-skipping transfer taxes.**

(a) *Contributions*—(1) *In general*. Each contribution by a person to an ABLÉ account other than by the designated beneficiary of that account is treated as a completed gift to the designated beneficiary of the account for gift tax purposes. Under the applicable gift tax rules, a contribution from a corporation, partnership, trust, estate, or other entity is treated as a gift by the shareholders, partners, or other beneficial owners in proportion to their respective ownership interests in the entity. See § 25.2511-1(c) and (h). A gift into an ABLÉ

account is not treated as either a gift of a future interest in property, or a qualified transfer under section 2503(e). To the extent a contributor's gifts to the designated beneficiary, including gifts paid into the designated beneficiary's ABLÉ account, do not exceed the annual limit in section 2503(b), the contribution is not subject to gift tax. This provision, however, does not change any other provision applicable to the transfer. For example, a contribution by the employer of the designated beneficiary's parent continues to constitute earned income to the parent and then a gift by the parent to the designated beneficiary.

(2) *Generation-skipping transfer (GST) tax*. To the extent the contribution into an ABLÉ account is a nontaxable gift for gift tax purposes, the inclusion ratio for purposes of the GST tax will be zero pursuant to section 2642(c)(1).

(3) *Designated beneficiary as contributor*. A designated beneficiary may make a contribution to fund his or her own ABLÉ account. That contribution is not a gift. However, in the event of any change of designated beneficiary, the portion of the then fair market value of the ABLÉ account attributable to that contribution and any earnings attributable to that contribution will constitute a gift by the designated beneficiary to the successor designated beneficiary, and the usual gift and GST tax rules will apply.

(b) *Distributions*. No distribution from an ABLÉ account to or for the benefit of the designated beneficiary is treated as a taxable gift to that designated beneficiary.

(c) *Change of designated beneficiary*. Neither gift tax nor generation-skipping transfer tax applies to a change of designated beneficiary if the successor designated beneficiary is both an eligible individual and a member of the family (as described in § 1.529A-1(b)(13)) of the designated beneficiary. The previous sentence does not apply to any other change of designated beneficiary.

(d) *Transfer tax on death of designated beneficiary*. Upon the death of the designated beneficiary, the designated beneficiary's ABLÉ account is includible in his or her gross estate for estate tax purposes under section 2031. The payment of outstanding qualified disability expenses and the payment of certain claims made by a State under its Medicaid plan may be deductible for estate tax purposes if the requirements of section 2053 are satisfied.

(e) *Effective/applicability date*. This section applies to taxable years beginning after December 31, 2014.

**§ 1.529A-5 Reporting of the establishment of and contributions to an ABLÉ account.**

(a) *In general.* A filer defined in paragraph (b)(1) of this section must, with respect to each ABLÉ account—

(1) File an annual information return, as described in paragraph (c) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (d) of this section, to the designated beneficiary of the ABLÉ account.

(b) *Additional definitions.* In addition to the definitions in § 1.529A-1(b), the following definitions also apply for purposes of this section—

(1) *Filer* means the State or its agency or instrumentality that establishes and maintains the qualified ABLÉ program under which an ABLÉ account is established. The filing may be done by either an officer or employee of the State or its agency or instrumentality having control of the qualified ABLÉ program, or the officer's or employee's designee.

(2) *TIN* means taxpayer identification number as defined in section 7701(a)(41).

(c) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information described in paragraph (c)(2) of this section, the filer must file Form 5498-QA, “ABLE Account Contribution Information,” or any successor form, together with Form 1096, “Annual Summary and Transmittal of U.S. Information Returns.”

(2) *Information included on return.* With respect to each ABLÉ account, the filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLÉ account;

(ii) The name, address, and TIN of the filer;

(iii) Information regarding the establishment of the ABLÉ account, as required by the form and its instructions;

(iv) Information regarding the disability certification or other basis for eligibility of the designated beneficiary, as required by the form and its instructions. For further information regarding eligibility and disability certification, see § 1.529A-2(d) and (e), respectively;

(v) The total amount of any contributions made with respect to the ABLÉ account during the calendar year;

(vi) The fair market value of the ABLÉ account as of the last day of the calendar year; and

(vii) Any other information required by the form, its instructions, or published guidance. See §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, the information returns required under this paragraph must be filed on or before May 31 of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time.* See §§ 1.6081-1 and 1.6081-8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing.* See § 301.6011-2 of this chapter for rules relating to electronic filing.

(iv) *Substitute forms.* The filer may file the returns required under this paragraph (c) on a substitute form. A substitute form must comply with applicable revenue procedures (see § 601.601(d)(2) of this chapter) or other guidance published by the IRS, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(d) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary of the ABLÉ account for which it is required to file a Form 5498-QA (or any successor form). The statement must include—

(i) The information required under paragraph (c)(2) of this section;

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLÉ account to which the Form 5498-QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, the filer must furnish the statement described in paragraph (d)(1) of this section to the designated beneficiary on or before March 15 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the designated beneficiary's last known address. The statement may be furnished electronically, as provided in § 1.529A-7.

(ii) *Extensions of time.* The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. See the instructions to Form 5498-QA.

(3) *Copy of Form 5498-QA.* The filer may satisfy the requirement of this

paragraph (d) by furnishing either a copy of Form 5498-QA (or successor form) or another document that contains the information required by paragraph (d)(1) of this section, if the document complies with applicable revenue procedures (see § 601.601(d)(2) of this chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(e) *Request for TIN of designated beneficiary.* The filer must request the TIN of the designated beneficiary at the time the ABLÉ account is opened if the filer does not already have a record of the designated beneficiary's correct TIN. The filer must clearly notify the designated beneficiary that the law requires the designated beneficiary to furnish a TIN so that it may be included on an information return to be filed by the filer. The designated beneficiary may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, “Request for Taxpayer Identification Number and Certification,” may be used, or the request may be incorporated into the forms related to the establishment of the ABLÉ account.

(f) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to the filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and the regulations thereunder.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any designated beneficiary who fails to furnish his or her TIN to the filer. See section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(g) *Effective/applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015.

**§ 1.529A-6 Reporting of distributions from and termination of an ABLÉ account.**

(a) *In general.* The filer as defined in § 1.529A-5(b)(1) must, with respect to each ABLÉ account from which any distribution is made or which is terminated during the calendar year—

(1) File an annual information return, as described paragraph (b) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (c) of this

section, to the designated beneficiary of the ABLÉ account and to each contributor who received a returned contribution in accordance with § 1.529A-2(g)(4) attributable to the calendar year.

(b) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information in paragraph (b)(2) of this section, the filer must file Form 1099-QA, “Distributions from ABLÉ Accounts,” or any successor form, together with Form 1096, “Annual Summary and Transmittal of U.S. Information Returns.”

(2) *Information included on return.* The filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLÉ account or of any contributor who received a returned contribution in accordance with § 1.529A-2(g)(4) attributable to the calendar year, as applicable;

(ii) The name, address, and TIN of the filer;

(iii) The aggregate amount of distributions from the ABLÉ account during the calendar year;

(iv) Information as to basis and earnings with respect to such distributions or returns of contributions;

(v) Information regarding termination (if any) of the ABLÉ account;

(vi) Information regarding each rollover and any program-to-program transfer to or from the ABLÉ account during the designated beneficiary’s taxable year;

(vii) Whether the return is being furnished to the designated beneficiary or to a contributor; and

(viii) Any other information required by the form, its instructions, or published guidance. *See* §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, the Forms 1099-QA and 1096 must be filed on or before February 28 (March 31 if filing electronically) of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time.* *See* §§ 1.6081-1 and 1.6081-8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing.* *See* § 301.6011-2 of this chapter for rules relating to electronic filing.

(iv) *Substitute forms.* The filer may file the return required under this paragraph (b) on a substitute form. A substitute form must comply with applicable revenue procedures (*see*

§ 601.601(d)(2) of this chapter) or other guidance published by the IRS, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(c) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary and each contributor (if any) of the ABLÉ account for which it is required to file a Form 1099-QA (or any successor form). The statement must include—

(i) The information required under paragraph (b)(2) of this section.

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service;

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLÉ account to which the Form 1099-QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, a filer must furnish the statement described in paragraph (c)(1) of this section to the designated beneficiary on or before January 31 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the recipient’s last known address. The statement may be furnished electronically, as provided in § 1.529A-7.

(ii) *Extensions of time.* The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. *See* the instructions to Form 1099-QA.

(3) *Copy of Form 1099-QA.* A filer may satisfy the requirement of this paragraph (c) by furnishing either a copy of Form 1099-QA (or successor form) or another document that contains the information required by paragraph (c)(1) of this section and that complies with applicable revenue procedures (*see* § 601.601(d)(2) of this chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(d) *Request for TIN of contributor(s).* A filer must request the TIN for each contributor to the ABLÉ account at the time a contribution is made, if the filer does not already have a record of that person’s correct TIN. The filer must clearly notify each contributor to the account that the law requires that person to furnish a TIN so that it may

be included on an information return to be filed by the filer. The contributor may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, “Request for Taxpayer Identification Number and Certification,” may be used, or the request may be incorporated into the forms related to the establishment of the ABLÉ account.

(e) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to a filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. *See* section 6693 and the regulations thereunder.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any contributor who fails to furnish his or her TIN to the filer. *See* section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(f) *Effective/applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015.

#### § 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) *Electronic furnishing of statements*—(1) *In general.* A filer required under § 1.529A-5 or § 1.529A-6 of this chapter to furnish a written statement to a designated beneficiary of or contributor to an ABLÉ account may furnish the statement in an electronic format in lieu of a paper format. A filer who meets the requirements of paragraphs (a)(2) through (6) of this section is treated as furnishing the required statement.

(2) *Consent*—(i) *In general.* The recipient of the statement must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) *Withdrawal of consent.* The consent requirement of this paragraph (a)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before the statement is furnished. The filer may provide that a withdrawal of consent takes effect either on the date it is received by the filer or on another date

no more than 60 days later. The filer also may provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) *Change in hardware or software requirements.* If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the filer must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the filer if the recipient does not want to withdraw the consent. After implementing the revised hardware and software, the filer must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this section, a new consent or confirmation of consent to receive the statement electronically.

(iv) *Examples.* For purposes of the following examples that illustrate the rules of this paragraph (a)(2), assume that the requirements of § 1.529A-7(a)(3) have been met:

*Example 1.* Filer F sends Recipient R a letter stating that R may consent to receive statements required under § 1.529A-5 or § 1.529A-6 electronically on a Web site instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the Web site, downloading the consent document, completing the consent document, and emailing the completed consent back to F. The consent document posted on the Web site uses the same electronic format that F will use for the electronically furnished statements. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

*Example 2.* Filer F sends Recipient R an email stating that R may consent to receive statements required under § 1.529A-5 or § 1.529A-6 electronically instead of in a paper format. The email contains an attachment instructing R how to consent to receive the statements electronically. The email attachment uses the same electronic format that F will use for the electronically furnished statements. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

*Example 3.* Filer F posts a notice on its Web site stating that Recipient R may receive statements required under § 1.529A-5 or § 1.529A-6 electronically instead of in a paper format. The Web site contains

instructions on how R may access a secure Web page and consent to receive the statements electronically. By accessing the secure Web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) *Required disclosures—(i) In general.* Prior to, or at the time of, a recipient's consent, the filer must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (viii) of this section.

(ii) *Paper statement.* The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) *Scope and duration of consent.* The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section, or only to the statement required to be furnished on or before the due date immediately following the date on which the consent is given.

(iv) *Post-consent request for a paper statement.* The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) *Withdrawal of consent.* The recipient must be informed that—

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, and email address is provided in the disclosure statement;

(B) The filer will confirm, in writing (either electronically or on paper), the withdrawal and the date on which it takes effect; and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) *Notice of termination.* The recipient must be informed of the conditions under which a filer will cease furnishing statements electronically to the recipient.

(vii) *Updating information.* The recipient must be informed of the procedures for updating the information needed by the filer to contact the recipient. The filer must inform the

recipient of any change in the filer's contact information.

(viii) *Hardware and software requirements.* The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the Web site.

(4) *Format.* The electronic version of the statement must contain all required information and comply with applicable revenue procedures or other guidance published by the IRS relating to substitute statements to recipients, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(5) *Notice—(i) In general.* If the statement is furnished on a Web site, the filer must notify the recipient that the statement is posted on a Web site. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be on the subject line of the electronic mail.

(ii) *Undeliverable electronic address.* If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the filer's records or from the recipient, then the filer must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) *Corrected statements.* If the filer has corrected a recipient's statement that was furnished electronically, the filer must furnish the corrected statement to the recipient electronically. If the recipient's statement was furnished though a Web site posting and the filer has corrected the statement, the filer must notify the recipient that it has posted the corrected statement on the Web site within 30 days of such posting in the manner described in paragraph (a)(5)(i) of this section. The corrected statement or the notice must be furnished by mail or in person if—

(A) An electronic notice of the Web site posting of an original statement or the corrected statement was returned as undeliverable; and

(B) The recipient has not provided a new email address.

(6) *Access period.* Statements furnished on a Web site must be retained on the Web site through October 15 of the year following the

calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday). The filer must maintain access to corrected statements that are posted on the Web site through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected statements are posted, whichever is later. The rules in this paragraph (a)(6) do not replace the filer's obligation to keep records under section 6001 and § 1.6001-1(a) of this chapter.

(b) *Effective/applicability date.* This section applies to statements required to be furnished after December 31, 2015.

## PART 25—GIFT TAXES

■ **Par. 5.** The authority citation for part 25 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805\* \* \*

■ **Par. 6.** Section 25.2501-1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

### § 25.2501-1 Imposition of Tax.

(a) \* \* \*

(1) \* \* \* For gift tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

\* \* \* \* \*

■ **Par. 7.** Section 25.2503-3 is amended by adding a sentence at the end of paragraph (a) to read as follows:

### § 25.2503-3 Future interests in property.

(a) \* \* \* A contribution to an ABLE account established under section 529A is not a future interest.

\* \* \* \* \*

■ **Par. 8.** Section 25.2503-6 is amended by adding a sentence at the end of paragraph (a) to read as follows:

### § 25.2503-6 Exclusion for certain qualified transfers to tuition or medical expenses.

(a) \* \* \* A contribution to an ABLE account established under section 529A is not a qualified transfer.

\* \* \* \* \*

■ **Par. 9.** Section 25.2511-2 is amended by adding a sentence at the end of paragraph (a) to read as follows:

### § 25.2511-2 Cessation of donor's dominion and control.

(a) \* \* \* For gift tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

\* \* \* \* \*

## PART 26—ESTATE TAXES

■ **Par. 10.** The authority citation for part 26 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805\* \* \*

■ **Par. 11.** Section 26.2642-1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

### § 26.2642-1 Inclusion ratio.

(a) \* \* \* For generation-skipping transfer tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

\* \* \* \* \*

■ **Par. 12.** Section 26.2652-1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

### § 26.2652-1 Transferor defined; other definitions.

(a) \* \* \*

(1) \* \* \* For generation-skipping transfer tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

\* \* \* \* \*

## PART 301—REPORTING AND RECORDKEEPING REQUIREMENTS

■ **Par. 13.** The authority citation for part 301 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805\* \* \*

### § 301.6011-2 [Amended]

■ **Par. 14.** Section 301.6011-2 is amended by adding the word “series” after “5498” in the first sentence of paragraph (b)(1).

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2015-15280 Filed 6-19-15; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 334

#### West Arm Behm Canal, Naval Surface Warfare Center, Ketchikan Alaska; Restricted Areas.

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of proposed amendment and request for comments.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is proposing to amend existing regulations for an existing restricted area near Ketchikan, Alaska to correct inaccuracies in regards to

flashing beacon light descriptions, point of contact changes, and restrictive area distances for small craft.

**DATES:** Written comments must be submitted on or before July 22, 2015.

**ADDRESSES:** You may submit comments, identified by docket number COE-2015-0009, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Email:* [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil). Include the docket number, COE-2015-0009, in the subject line of the message.

*Mail:* U.S. Army Corps of Engineers, Attn: CECW-CO (David B. Olson), 441 G Street NW., Washington, DC 20314-1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE-2015-0009. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or email. The [regulations.gov](http://www.regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through [regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed. Although listed in