July 29, 2015

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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Internal Revenue Service Rulemaking Staff:

We commend the Treasury on issuing proposed regulations for Section 529A state-sponsored savings programs, and for its stated objective, in Notice 2015-18 and in the preamble to the proposed regulations, of not having its rulemaking timetable prevent or delay states from establishing ABLE programs and thereby making their benefits available to individuals with disabilities as promptly as feasible. In the spirit of achieving that objective, which we share, we are writing to alert you that, from the perspective of the state programs, the June 22, 2015 proposed regulations include some unexpected provisions that place unclear and unnecessary burdens on state administrators of such programs. Furthermore, these unexpected provisions are being interpreted differently by different state agencies entrusted with establishing ABLE programs, which has caused confusion that is impeding the progress of ABLE implementation.

We understand that there will be opportunity for comment on the proposed regulations, but there are three provisions which, if not clarified now – in advance of the completion of the formal regulatory process, may substantially slow down and perhaps even halt the launch of ABLE programs anxiously awaited by families of individuals with disabilities. The three provisions are (1) the filing of eligibility certifications with the state ABLE agency, (2) the requirement that the ABLE agency establish safeguards to distinguish among qualified, non-qualified, and housing distributions, and (3) the requirement to obtain TINs of all ABLE account contributors. We urge Treasury to take prompt action, on which states can rely, to clarify these three provisions.

As discussed in greater detail below, all states are concerned about the administrative burden these proposals would impose and believe that, even if well-intended, they are unnecessary and a shift of responsibility from Treasury and the Social Security Administration to the state agencies. States are especially surprised by and strongly opposed to the requirement that they collect and maintain disability-related information. The 28 states that have passed ABLE legislation to date used the ABLE Act as a guide in developing their statutes. Significant variances in state requirements from those included in the Act could result in conflicts with state legislation.

STATEMENT OF INTEREST

The College Savings Plans Network is an affiliate of the National Association of State Treasurers and represents the state agencies and their private sector partners that offer 529 college savings programs throughout the nation.

The ABLE Act is modeled on IRC Section 529, which provides for tax-advantaged college savings programs. Many of the states that are planning or considering implementation of the ABLE Act anticipate the program being offered by the same agency administering their state's 529 program, and CSPN is serving as a forum for such agencies to exchange views and provide input on issues relating to the establishment and operation of ABLE programs. We believe our 529 expertise and knowledge, as well as our familiarity with operational and other issues relating to prospective ABLE programs, can help to inform policy and procedure development for ABLE and we stand ready to assist, in any way needed, the Department in adopting final regulations.

STATES' IMMEDIATE CONCERNS

1) Filing of Eligibility Certifications

Section 529A as enacted provides two methods for an individual with disabilities to prove eligibility to open and maintain an ABLE account. The first is eligibility for disability benefits under the Social Security Act for a disability that occurred before age 26. The second is the filing "with the [Treasury] Secretary" of a disability certification "to the satisfaction of the [Treasury] Secretary" and containing a physician-signed disability diagnosis. The proposed regulations shift to the state programs the Treasury Department's statutory responsibility to receive, and perhaps assess the facial adequacy of, a disability certification. Under the proposed regulations, "a disability certification will be deemed to be filed with the [Treasury] Secretary once the qualified ABLE program has received the disability certification:"

The preamble to this proposed regulation suggests that the "deeming" of a state program to be the U.S. Treasury is intended to facilitate the opening of ABLE accounts. But it has the effect of imposing on state programs the administrative burden of collecting thousands or millions of disability certifications containing sensitive medical information, a burden expressly assigned by statute to the U.S. Treasury. The state programs, which have investment expertise but no disability-determination expertise, are not intended by the ABLE statute to be repositories of such certifications nor to have any role in assessing disability status. Requiring such state programs to staff up to receive and protect the privacy of such certifications, or to retain private contractors for such purpose, constitutes an uncontemplated and unauthorized shift of the related expenses from the federal government to the state programs administering ABLE investment programs. Uncertainty over the status of such a potentially major financial commitment may impede or delay the launch of ABLE programs. And if this expense is inflicted on state programs, it will significantly increase the expense of such programs to the detriment of the disabled community they were designed to serve.

<u>Solution:</u> The portion of the proposed regulations "deeming" disability certifications filed with Treasury when filed with a state program should be withdrawn and replaced with required filings with Treasury as specified by the ABLE statute. If Treasury wishes to expedite account opening, it should expressly authorize state ABLE agencies to rely on a "check the box" certification by the eligible individual or the person with signature authority that the certification, including the required physician's diagnosis, has been filed with Treasury. Similarly, Treasury should expressly authorize state ABLE agencies to rely on a "check the box" certification by the eligible individual or the person with signature authority that the proposed account owner is eligible for SSI or SSDI benefits.

It should be noted that there is no reason to believe that a person who is not disabled will misrepresent disability status – the tax advantages of an ABLE account are equally available under a Section 529 account, which requires no upfront eligibility determination, and the exclusion of ABLE account investments for purposes of SSI and SSDI eligibility is only meaningful if the account owner is in fact disabled and eligible for such benefits. The administrative burdens of requiring states to receive, review and store documentation such as physician diagnoses and SSI eligibility letters, on the other hand, are real, and, in our view, not required by the ABLE statute.

2) Distinguishing Among Types of Distributions.

The proposed regulations state that "[a] qualified ABLE 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…." In addition, the preamble to the proposed regulations states "that States should work with the Commissioner of Social Security to identify data elements for the monthly reports required to be submitted to the Commissioner [of Social Security], including the type of qualified disability expenses." We understand that the impetus for requiring the states to distinguish among qualified, housing, and non-qualified withdrawals may be coming primarily from the Social Security Administration ("SSA"). Nonetheless, the requirement is inconsistent with the ABLE legislation and will complicate, and thereby increase the cost of, record keeping systems that will be needed to implement ABLE.

Under the ABLE statute and the proposed regulations, an ABLE account owner may request account distributions in advance of paying expenses, at the time expenses are paid or subsequent to the payment of expenses. Accordingly it is logistically impossible for a state to determine at the time a distribution is made for what purpose the distribution is applied, including whether that purpose constitutes a qualified disability expense. The proposed regulations mandating the establishment of safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of housing expenses are inconsistent with both the ABLE statute and the tax treatment provisions in the proposed regulations (1.529A-3) requiring a comparison of the aggregate qualified disability expenses incurred during the tax year with aggregate distributions from an ABLE account during that tax year – not a transaction-by-transaction tracing of particular account distributions to particular qualified disability expenses.

Moreover, to the extent the regulations require states to make a determination of whether disbursements are qualified, qualified for housing or non-qualified, the states will be placed in the uncomfortable and unintended position of contributing to and dealing with account owner confusion as to the discrepancy between the IRS's methodology, which does not require a link between a particular withdrawal and a particular expenditure, and the Social Security Administration's (SSA) requirement of attribution of particular withdrawals to particular expenditures. Moreover, any requirement that states attribute withdrawals to qualified, qualified for housing or non-qualified categories creates the risk of differing interpretations among the states of federal tax law and Social Security Act terms. For Section 529 qualified tuition programs, the states make no determination of whether a withdrawal is for a qualified expense. Instead this issue is left between the taxpayer and the IRS. Similarly, the determination of how Section 529A ABLE account withdrawals have been applied should be left between the taxpayer and the IRS for tax purposes and between the benefits claimant and the SSA for SSI/SSDI purposes.

As is the case with the transfer of responsibility for front-end administrative duties relating to disability certifications described in item 1) above, these provisions are not only at odds with the ABLE statute, they shift to state programs determinations that are properly the responsibility of a federal agency. Again, requiring state programs to staff up for the impracticable task of tracking down how thousands or millions of account distributions have been spent or will be spent and classifying those expenditures will impede or delay the launch of ABLE programs, substantially increase the expense of such programs, and convert programs intended to provide a simple, widely available saving program into a costly and perhaps risky administrative morass.

Although the ABLE statute treats housing and unqualified distributions differently for SSI eligibility purposes versus non-housing qualified distributions, it is a burdensome overreach for SSA to shift to the state programs its obligation to ask the ABLE account owner to report any such distributions in adequate detail. The state programs expect to, and are willing to, report distribution amounts to SSA on a timely basis. But the state programs have no ability or reason to determine how the withdrawal will be applied, and would need to rely exclusively on representations made by the account owner. The SSA is equally able to ask the relevant questions, to rely on the relevant representations and, if it chooses to do so, to ask for any documentation it chooses - there is no reason other than inappropriate shifting of administrative expense for SSA to shift that function to state ABLE programs. Furthermore, SSA can focus its obligations on ABLE account owners who actually are applying for or receiving SSI benefits, without mandating the collection of information as to type of withdrawal by state programs for all withdrawals, including those made by ABLE account owners with no connection to SSI benefits.

Solution: The portion of the proposed regulations requiring state programs to identify distributions for qualified disability expenses and for housing expenses should be deleted, as should the preamble's suggestion that monthly reporting to the SSA should include such information.

Alternatively, if Treasury does not eliminate the requirement that ABLE programs provide safeguards to distinguish between qualified and non-qualified withdrawals and to require identification of housing expenses, Treasury should acknowledge that this requirement will be met if a program requires the account owner/beneficiary to self-certify, under penalty of perjury, that, at the time of a withdrawal, the withdrawal will be applied for (i) housing expense, (ii) other qualified disability expense and/or (iii) non-qualified expenses and the amount of the withdrawal applied to each category.

3) Requirement to obtain TINs for all contributors

Proposed regulation 1.529A-6(d) requires the state ABLE program to request the TIN for each contributor to an ABLE account at the time the contribution is made. This is an unrealistic, unworkable, and unnecessary requirement.

Because the ABLE Act requires that the account owner be an individual with a disability, it is likely that many if not most ABLE accounts will be funded primarily or exclusively by family members and friends of eligible individuals and other third-party contributors. Contributions will be received in many forms including checks and electronic fund transfers and may come from numerous sources, unaccompanied by TINs, given that, in contrast to the account owner, a third-party contributor is not required to establish an account or have any ongoing relationship with the program. It is unrealistic to expect the state ABLE programs to trace every third party contribution to the individual or entity making the contribution and capture and retain the TIN of each contributor and separately track any growth associated with the relevant contributions. In addition, requiring the TIN when a contribution is made may discourage some from contributing. Based on experience with Section 529 college saving programs, some individuals are reluctant to provide their TINs even when opening an account; requiring them to do so when simply making a $25 contribution for a birthday gift will be met with considerable resistance.

It appears that this obligation is being imposed for the purpose of reporting to the IRS, the beneficiary and contributor the return to the contributor of any excess contributions and allocable investment earnings. There is no need to obtain the TIN if excess contributions simply are not accepted by the program in the first place.

Solution: Collecting a third-party contributor's TIN should be required only if a program does not have systems in place that prevent acceptance and investment of excess contributions, and only if and when an excess contribution is returned to the contributor.

We appreciate the opportunity to propose these changes and look forward to working with you on these important initiatives. Please contact us through Chris Hunter at Chris@statetreasurers.org or 859-721-2181 for any follow-up or additional information or discussion.

Sincerely,

Betty Lochner

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