September 21, 2015

CC:PA:LPD:PR (REG -102837-15)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

VIA electronic submission:
http://www.regulations.gov (IRS REG-102837-15)

Re: Guidance under Section 529A: Qualified ABLE Programs

Thank you for the opportunity to provide comments regarding the proposed regulations under new §529A of the Internal Revenue Code (IRC) created by the passage of the Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014 (ABLE Act). The ABLE Act created a framework for states or state agencies and instrumentalities to establish and maintain tax-advantaged and federal benefit-advantaged savings accounts for persons with a disability. This comment letter is submitted by the College Savings Plans Network (CSPN), an affiliate of the National Association of State Treasurers (NAST), which represents state agencies and their partners in administering § 529 qualified tuition programs (QTP) across the country. Members of CSPN worked with members of Congress, Congressional staff and committees on the ABLE Act and continue to be engaged on issues related to the establishment and implementation of ABLE programs.

Section 529A is modeled after IRC §529 in many respects and, in fact, many comments herein request that the final regulations be amended to allow for the administration of ABLE programs by states in a manner more like that of QTPs. Thirty-one states already have adopted ABLE legislation and a number of bills remain pending in state legislatures around the country. In fact, our research shows that only eight states have not yet introduced legislation to create an ABLE program. The rapid adoption of legislation authorizing states to implement ABLE programs is a sign of the commitment to quickly develop and offer such programs across the country. In many states, responsibility for the development and administration of an ABLE program is placed with the agency currently administering that state's QTP, which is the reason that CSPN is so involved in the process and is filing this comment letter.

A number of states are likely to submit individual comment letters and their individual letters may provide a different approach with respect to various aspects of certification and documentation. This letter represents the consensus judgment of CSPN members about the most pressing aspects of the proposed regulations requiring further consideration by the U. S. Department of the Treasury (Treasury). CSPN's comments are made with the goal of producing regulations which permit maximum flexibility and ease of administration so that states may offer efficient, affordable ABLE programs to persons with disabilities. In making these remarks, we have collectively drawn on almost twenty years' experience of administering QTPs.

We hope these comments will be received in the spirit in which they are provided, that is continuing an open dialogue and discussion. We greatly appreciate the opportunities already afforded by Treasury for our members to express concerns about the proposed regulations and the receptiveness of Treasury to those concerns. Clearly, all parties to this process share the same goal – to allow states to deliver effective, simple and low-cost options to foster saving for the future by persons with a disability and their families and friends.

Various aspects of the proposed regulations reflect thoughtful consideration by Treasury of how to implement §529A and the ABLE Act in a manner that delivers the statutorily intended benefits while minimizing potentially disruptive documentation requirements, and we applaud the evident effort and sensitivity of Treasury to making the regulations workable. Of necessity this letter focuses on certain provisions of the proposed regulations which we believe need to be modified to avoid significant impairment of the states' ability to implement effective ABLE programs. The comments contained in this letter are based on the collective experience of member states in running QTPs – starting in the late-1980s with prepaid programs which were the precursor to §529 and QTPs. We understand the complexity – and attendant costs – of building savings programs that comply with applicable federal and state laws and the reporting requirements related to such programs.

To aid in your consideration of these comments, we review pertinent sections of the proposed regulations in the order in which they are addressed by the regulations, without prioritizing the points addressed. CSPN has outlined our primary areas of concern in brief letters submitted in advance of this formal comment letter; this letter is intended to supplement the points made in those letters (dated July 29, 2015 and August 21, 2015; copies attached) and to address additional areas of concern. As stated before and discussed fully in this letter, the primary areas of concern involve (i) the requirement that documentation be submitted to support a claim of eligibility, (ii) the requirement to have safeguards regarding whether a distribution is qualified and whether a distribution is used for housing and (iii) the requirement to collect taxpayer identification numbers (TIN) for all persons making a contribution to an ABLE account.

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

Designated Beneficiary. Paragraph 4 of § 1.529A-1 defines a Designated Beneficiary of an ABLE account. The definition notes that someone else may exercise signature authority (the "authorized signatory") under two circumstances: (1) the designated beneficiary is not able to exercise signature authority or (2) the designated beneficiary has chosen to establish an account but not to exercise signature authority. CSPN appreciates acknowledgement that someone else can act on behalf of the designated beneficiary, but requests that this definition be amended to allow an account to be opened by an authorized signatory even if the eligible individual has the legal capacity to open the account himself or herself but chooses to have someone else open it. This suggestion could be accomplished by defining the Designated Beneficiary as the "individual who is the **beneficial** owner of the ABLE account and who either **(i)** established the account at a time when he or she was an eligible individual or **(ii) on whose behalf an account was opened when he or she was an eligible individual, or (iii)** who has succeeded the former designated beneficiary **of an existing account** (successor designated beneficiary).” [emphasis added to show changes to the proposed regulation]. This change in the proposed regulation would acknowledge that a designated beneficiary may choose to have someone else act on his or her behalf even at the time of account opening.

Additionally, CSPN requests that those who may act on behalf of the designated beneficiary as an authorized signatory be broadened from what is currently included in the proposed regulation, and that the hierarchy of permitted authorized signatories be deleted, to avoid putting state programs in the position of, for example, establishing the non-existence of an agent with power of attorney if a parent seeks signature authority. One possible extension would authorize “such other party as may be recognized or authorized under state or federal law to act on behalf of the designated beneficiary as a representative party or by other designation.” Alternatively or additionally, the list of authorized signatories could be expanded to include: trustees of a trust for which the designated beneficiary is the trust beneficiary; designated representative payees of the designated beneficiary as recognized by the Social Security Administration (SSA); custodians and others designated by the designated beneficiary or, if incapacitated, by the parents or guardian of the designated beneficiary. The purpose for this requested flexibility is to allow for simple administration of an ABLE account by family members or others involved in the welfare of a designated beneficiary unable to act on his or her own behalf or who chooses to have others act on his or her behalf, without requiring costly or cumbersome guardianships or conservatorships.

Lastly, CSPN requests that the authorized signatory’s right to act on behalf of the designated beneficiary (including, when applicable, to establish the status of the designated beneficiary as incapable of exercising signature authority) be permitted to be established by the authorized signatory’s certification, under penalty of perjury.

Disability Certification. Both §1.529A-1(b)(5) and §1.529A-2(e) address and attempt to define “disability certification,” making it difficult to understand the interplay between the two provisions. Our suggestion is to change the definition in §1.529A-1(b)(5) to merely refer to §1.529A-2(e) to avoid confusion and competing certification provisions. For example, it could read simply: “Disability certification means a certification meeting the criteria outlined in §1.529A-2(e).”

Impact of Distributions on SSI Eligibility. The ABLE Act makes clear that, subject to stated limitations, ABLE account balances, contributions, and distributions for qualified disability expenses are disregarded in determining eligibility for and the amount of benefits under means-tested Federal programs. Although, as advocated elsewhere in these comments, ABLE programs should have no responsibility for determinations regarding the characterization of distributions for tax or SSA purposes, clarity about the circumstances under which the application of ABLE distributions may jeopardize Supplemental Security Income (SSI) benefits or benefits under other federal means-tested programs. Such clarity will enable actual and prospective ABLE designated beneficiaries to consider and avoid, and ABLE programs to provide disclosure in their program materials regarding, circumstances that might result in an inadvertent loss of benefits under SSI or other federal means-tested programs.

In particular, regulatory clarity is needed as to whether, for means-testing purposes (as distinct from federal tax purposes) there is any time limit within which a distribution from an ABLE Account must be used for a qualified disability expense. The concept is key to ensure that distributions are for qualified disability expenses. CSPN suggests affirmative clarification that there is no time limit. If Treasury or the SSA, as applicable, determine there is a time limit within which distributions must be applied, we request the §529A regulations contain a clear safe harbor. Likewise, regulatory clarity also is required as to what constitutes a "basic living expense" and what constitutes a "housing" expense. In preliminary discussions with SSA representatives, it appears that SSA believes regulatory clarification on at least some of these matters must come from Treasury, not from SSA. CSPN has no position on the source or content of such guidance, but believe it is important that such guidance be provided. ABLE account beneficiaries need clarity on any timing constraints between receipt of an ABLE distribution and use of those funds for qualified disability expenses and on what types of qualified disability expenses will constitute a distribution for housing expenses.

Eligible Individual. We remark on the provisions of paragraph (9) of §1.529A-1 only to note that this provision, which refers to the filing of a disability certification with the Secretary, relates to the major concern of CSPN discussed in detail with respect to §1.529A-2(d), in which a disability certification is deemed filed with the Secretary once received by the ABLE program.

Excess Aggregate Contributions. Paragraph (11) of §1.529A-1 addresses the concept of an "excess aggregate contribution" which mirrors the "maximum contribution amount" in QTPs, and references the safe harbor provided in §1.529A-2(g)(3) The safe harbor allows additional contributions once an ABLE account balance falls below the limit of §529(b)(6). CSPN is very appreciative of the safe harbor. We believe this is the correct rule, that additional contributions are allowed when an account is depleted, for whatever reason, below the §529(b)(6) amount as long as no additional contributions are accepted whenever the maximum amount is in the ABLE account or that would cause such maximum amount to be exceeded. This safe harbor will help minimize the cost of administration by allowing processes already develop for QTPs to be used for ABLE programs.

Program-to-Program Transfer. We note that the regulations distinguish between two types of rollovers both of which are authorized under §529A(1)(c)(i): those in which the assets are transferred directly from one ABLE program to another, which the regulations define as "program-to-program transfers"; and those in which assets are distributed to the designated beneficiary who then contributes them to a different ABLE program within 60 days, which the regulations define as "rollovers". Because the ABLE Act authorizes both types of transfers, we recommend that the regulations continue to allow both direct transfers and rollovers, providing more flexibility and better serving the interests of the designated beneficiary in some circumstances – including for those who are not SSI recipients. CSPN shares the Department's concern regarding how the assets held during the 60 day transition period in a "rollover" might be treated for SSI purposes. We have begun discussions on this issue with SSA representatives who are considering our requested interpretation that assets held during such a transition period will not negatively impact benefits, which we believe is the intent of the ABLE Act.

§ 1.529A-2: Qualified ABLE program

Residency. With respect to the provisions of paragraph (a)(2), CSPN appreciates the determination of residency being left to state law. We note that, if an eligible individual has more than one state of residence, he or she may choose among the ABLE programs offered by those states. We request clarification that, as with other fact-based determinations in which the proposed regulations permit reliance on certifications under penalties of perjury, an ABLE program may rely on a certification under penalties of perjury to establish that the residency requirement has been satisfied. Particularly in the case of minors and individuals with certain types of disabilities, driver's licenses, tax filings and other common means of documenting residence in a state may not be available to the designated beneficiary.

Single ABLE Account. CSPN requests that paragraph (a)(3), be amended to allow state ABLE programs to have subaccounts within a single master account. CSPN reiterates the request made in its May 27, 2015 letter to Treasury (copy attached). The regulations should interpret the requirement that there be one ABLE account per beneficiary to give state ABLE agencies discretion to establish one master account record containing the formal record of all transactions relating to a single designated beneficiary, consisting of sub-account records that may have different individuals with signature authority. Alternatively, we ask Treasury to provide some other mechanism that would allow more than one person to have signature authority over separate portions of the beneficiary's account. The reasoning for this request is discussed further in paragraph (7) of the May 27, 2015 letter.

Establishment of an ABLE account. With respect to §1.529A-2(c)(1), we note that the provisions for who may establish an ABLE account on behalf of a designated beneficiary are too restrictive and should recognize others as discussed fully above with respect to §1.529A-1(b)(4) of the proposed regulations.

Beneficial interest. Section 1.529A-2(c)(3) is one of the key provisions in the proposed regulations and addresses some of the issues related to ownership and signature authority on an ABLE account. As long as the designated beneficiary is the beneficial owner of the account, many potential pitfalls are avoided and we appreciate the inclusion of this provision.

Eligible Individual and Disability Certification. As noted in prior letters to and meetings with Treasury, as drafted, the provisions in paragraphs (d) and (e) of §1.529A-2 are two of the most problematic for CSPN from a programmatic standpoint. These two sections establish the bulk of the administrative burden and complexity for states and program managers in establishing ABLE programs. As noted in our July 29, 2015 letter, Section 529A of the ABLE Act as enacted provides two methods for individuals with disabilities to prove their eligibility to open and maintain an ABLE account. The first is eligibility for certain 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 including 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." This provision has the effect of imposing on state programs the administrative burden of collecting thousands or millions of disability certifications containing sensitive medical information, a responsibility expressly assigned by statute to the U.S. Treasury. The state programs, most of which have investment expertise but no disability-determination expertise, were not intended by the ABLE Act to be repositories of such certifications nor to have any role in assessing disability status. We request that NO documents be required to establish an ABLE account and that ABLE programs be authorized to rely on self-certifications under penalty of perjury or such other sanction as may be appropriate under pertinent state law that the designated beneficiary by whom or on whose behalf the ABLE account is established meets the eligibility requirements of the Act. The self-certification would need to confirm the existence of the doctor's diagnosis or SSI eligibility determination, as applicable, but the documents demonstrating the diagnosis or SSI eligibility determination would not need to be filed with the ABLE program. Treasury and the Commissioner could request copies of the relevant documents upon audit or, if they so desire, establish an independent means to confirm the existence of such documents, as long as the regulations are modified to remove any requirement for the receipt of such documents by the ABLE programs.

The deemed-filing language is acceptable to CSPN as long as the certification is a certification only, without documents required to support the certification. The majority of states and program managers who will be administering ABLE program have no ability to store, review or make any kind of sufficiency determination with respect to eligibility documents that might be provided by a designated beneficiary, and so we request that those provisions be removed from the regulations.

As we have discussed previously, the collection of certain data points relevant to an eligibility certification (for example the date of the latest SSI/SSDI letter of a designated beneficiary or the doctor's name and date of diagnosis) is a feasible requirement that would support the self-certification and provide the basis for any future audits of eligibility. One suggested safe harbor would be for a program to collect the information according to the codes included in proposed Form 5498-QA as to both the basis of eligibility (A – SSDI, B – SSI, C – disability certification) and disability type (Codes 1-7), as certified by the designated beneficiary.

As to the annual recertification requirement, as discussed previously in our meetings and letters, we agree that it is appropriate to permit an ABLE program to meet the requirement by imposing an enforceable obligation on the designated beneficiary to promptly report changes in status and relying on such obligation until the end of the year, if any, in which such a report of a change in status is received. To that end, the language contained in the final sentence in paragraph (2)(ii) is appropriate and we appreciate its inclusion.

As discussed above, the provisions of paragraph (e)(1)(i) and (ii) are appropriate; subparagraph (iii) should be eliminated.

Section 1.529A-2(e)(2), with respect to the meaning of the phrase “marked and severe functional limitations,” raises a key question. The reliance on various provisions of the Code of Federal Regulations relating to the SSA disability standard appear appropriate with one major exception – they seem to preclude the ability of an adult individual with an ABLE account to engage “in substantial gainful activity” as that ability is a disqualifying event for SSA purposes (20 CFR 416.906). We do not believe this was the intent of the Act and request clarification of this section. Because this point is addressed in the preamble to the proposed regulations, we believe our interpretation is correct and that it is a hallmark of the ABLE Act to allow eligible individuals to be gainfully employed.

Although, as discussed in several sections above, ABLE programs should not be responsible for determinations regarding eligibility, it is important for the eligibility criteria to be clear so that they may be clearly disclosed to actual and prospective designated beneficiaries of ABLE programs and their representatives.

Change of designated beneficiary. Paragraph (f) of §1.529A-2 addresses a change in the designated beneficiary. In response to the Department’s request for comments on this issue, CSPN notes that there is no benefit to allowing a change of beneficiary to an eligible individual who is not a family member of the designated beneficiary. Accordingly, we recommend that such a change be prohibited and that this provision be amended to add at the end thereof “and a family member of the designated beneficiary.”

Additionally, CSPN suggests, for clarity in reading the regulations, adding a cross reference to the provision later in the proposed regulations in 1.529A-3(b)(3) which provides the various rules for a change in designated beneficiary.

Annual contribution limit. Congress made Section 529A effective Jan. 1, 2015, evidencing the ABLE Act’s intent that eligible individuals have the opportunity to benefit from its provisions commencing in calendar year 2015. Due to regulatory timetables and other complexities, it now appears that no ABLE programs will be open in calendar year 2015. CSPN believes it is consistent with Congressional intent for Treasury to reflect in the ABLE regulations a transition rule allowing ABLE account beneficiaries to carry forward to 2016 the unused annual contribution limit of $14,000 for 2015. The effect of the transitional rule is that, in 2016 only, the maximum contribution to an account would be $28,000 – the $14,000 of unused capacity for 2015 and the $14,000 permitted for 2016. CSPN believes it is equitable and statutorily permissible to allow eligible individuals with disabilities and their families and friends to fund ABLE accounts at the pace Congress intended when it established the January 1, 2015 effective date for Section 529A. CSPN urges that the final regulations include the following sentence at the end of §1.529A-2(g)(2):

“Solely for purposes of such annual contributions limit, in the case of any qualified ABLE program that did not accept contributions in 2015, the first $14,000 in contributions made to each ABLE account in such program in 2016 shall be deemed contributions made during the designated beneficiary’s taxable year beginning in 2015 and shall not count against the annual contributions limit for the designated beneficiary's taxable year beginning in 2016."

Qualified disability expenses. CSPN's second major concern, previously communicated to Treasury in our letters and meetings, is the language in §1.529A-2(h) related to qualified disability expenses. The proposed regulations, as drafted, place an unreasonable burden on an ABLE program to "establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses for purposes of the Supplemental Security Income (SSI) program of the Social Security Administration (SSA)." (§1.529A-2(h)(1)) The language mandating the establishment of safeguards to accomplish these tasks could be interpreted to place an affirmative burden on the states to make a determination whether a distribution is qualified and whether it is used for housing. Even requiring some kind of certification as to the intended use of a distribution is not practicable in the context of ABLE accounts as we anticipate that at least some accounts will use debit cards for disbursements, providing no ability on the part of the ABLE program to capture information on the proposed use of funds or a certification. This requirement is not feasible for many reasons in addition to the debit card example including that (i) the designated beneficiary may not have identified the exact use of funds at the time of distribution, (ii) even if the requirement is satisfied by reliance on the designated beneficiary's certification, it puts the program in the position of having to field questions as to whether particular types of expenditures are "housing" or "qualified" which it is in no position to and should not be required to answer and (iii) the costs and administrative burdens of compliance would be substantial and produce no better information for SSA than it could obtain directly from the designated beneficiary.

It is our understanding that any designated beneficiary receiving benefits is already required to promptly report information to SSA about circumstances that would impact SSI benefits It is therefore appropriate to fold into the existing reporting process from the designated beneficiary to SSA prompt reporting of detail as to how ABLE account distributions are expended, which would permit SSA to assess whether a particular distribution is applied for a housing purpose or a non-qualified purpose. .

As is the case with disclosure for QTP programs, the disclosure documents to be developed by ABLE programs will remind participants that they need to retain receipts and invoices to establish, if applicable, that distributions were for non-housing qualified expenses. Placing any responsibility for an affirmative determination with respect to distributions on ABLE programs raises substantial unanswered feasibility issues, is beyond the scope of what the program should be expected to do and, even if feasible, would jeopardize a program's affordability and operational efficiency.

Investment direction. §1.529A-2(l) limits investment direction to twice per year. A similar rule applies to 529 college savings program. For ABLE account purposes it is extremely important that the definition exclude transfer of funds from an investment type option to an option designed primarily for distributions, such as checking accounts and money market accounts. Because ABLE accounts may be used for such a wide variety of expenses including basic living expenses, distributions are likely to be needed much more frequently than in 529 college savings accounts. Also, because designated beneficiaries who receive SSI benefits are limited in the assets they may have outside of ABLE accounts, they may need to withdraw smaller amounts more often. To maximize the potential for garnering investment gains, while making assets readily available through a product such as a checking account, frequent transfers from an investment-type option to an option designed more for disbursements is important and should be permitted by regulation.

Post-Death Payments. Finally, with respect to §1.529A-2(p), CSPN requests confirmation that ABLE programs, which are required to make payments to state Medicaid agencies that make a claim, have no obligation to determine the validity of such a claim. And, further we request confirmation that any disbursement request made by the estate of the designated beneficiary or the authorized signatory can be honored at any time prior to the receipt of a claim from the state Medicaid agency without liability to the program. Because the designated beneficiary is the beneficial owner of any ABLE account, upon his or her death the proceeds of the account become an asset of the decedent's estate and the proceeds are properly applied to final qualified expenses and then to other debts and obligations of the designated beneficiary, including a state Medicaid claim. The ABLE program should be removed from any responsibility or liability for the distribution of ABLE account proceeds or their proper application as that responsibility rests with the executor or personal representative of the estate of the deceased designated beneficiary.

§1.529A-3 Taxation of distributions.

With regard to the taxation of distributions, CSPN reiterates the request made in its May 27, 2015 letter to Treasury that the Secretary exercise his authority to change the manner and timing in which the earnings and principal (earnings ratio) are determined. The controlling statutory language for ABLE is identical to the statutory language for 529 college savings program and requires that all distributions made during the year be treated as a single distribution with earnings and principal being determined as of the last day of the tax year. However, through IRS Notice 2001-81, this operating rule has been changed for 529 college savings programs to require that the earnings ratio be determined and applied for each separate distribution as of the date of the distribution. As noted, elsewhere in these comments, it is important for ABLE and 529 program requirements to be the same wherever possible. This is once such instance. There is no reason that the two programs' operating rules should be different. Making the ABLE rules consistent with the 529 college savings program rules will enable already developed processes to be used for ABLE, thus minimizing development costs.

CSPN also requests that §1.529A-3(a) be revised to permit a beneficiary, in calculating the income tax treatment of ABLE account distributions received in a particular year, to include qualified disability expenses incurred prior to April 15 of the calendar year following the applicable tax year as expenses incurred in the tax year. A distribution towards the end of a tax year should not result in taxable income to the beneficiary merely because the related qualified expenditure did not occur until early in the following year and prior to the due date of the tax return for the applicable tax year.

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

If, as CSPN recommends, changes in beneficiaries are limited to individuals who are both eligible and a family member of the designated beneficiary, the proposed rules on gift, estate, and generation skipping transfer taxes can be simplified by eliminating the rules regarding a change to a non-family member.

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

Collection of Tax Identification Numbers. Our final comment on the proposed regulations relates to the third major issue previously addressed in our letters and in meetings, related to the requirement in §1.529A-6(d) that an ABLE program collect the taxpayer identification number (TIN) of ALL contributors to an ABLE account. This requirement is unduly burdensome, not feasible and will have a chilling effect on contributions to ABLE accounts by friends and family members of the designated beneficiary. We understand that the purpose of this requirement is to ensure the proper application of taxes in the event an excess contribution is accepted into an ABLE account, with consequent earnings on any subsequent distribution. Since excess contributions are returned to the person who made the contribution, it would be necessary to include them in any tax reporting and therefore have their TIN. However, as we have explained previously, all QTPs have system controls in place to address excess contributions and prevent such contributions or reverse such contributions as of the day received, without gain or loss. We do not believe this will be an issue in the vast majority of cases and to require collection of a TIN for every contributor on the chance that an occasional excess contribution will briefly reside in an ABLE account is not reasonable. Our suggestion is to provide that, in the event an excess contribution is received into an ABLE account such that tax reporting to a non-designated beneficiary contributor is required, the program would make all reasonable efforts to collect the TIN as a part of exception processing.

Conclusion and Request for Public Hearing

Pursuant to the instructions in the “Comments and Public Hearing” section, we request a public hearing or hearings be held on the matters discussed above. Also, pursuant to 26 CFR 601.601(a)(3), we wish to present oral comments at all hearings related to this matter including, but not limited to, the public hearing scheduled for October 14, 2015 at 10:00 a.m. (ET). As required, we attach to this letter an outline of the topics to be discussed in our comments and the time devoted to each. Eight copies of the outline are also being sent under separate cover.

We look forward to working with Treasury, SSA, and all other necessary parties to create efficient, affordable, and beneficial ABLE programs for individuals with disabilities. We especially appreciate the cooperative spirit fostered in these endeavors by Catherine Hughes and other Treasury staff. Their willingness to listen and work with the state agencies tasked with creating and running ABLE programs has generated much good will and fostered a very positive working environment. Please feel free to contact us with any questions or comments you might have to Chris Hunter, Deputy Executive Director, College Savings Plans Network at chris@statetreasurers.org or (859) 721-2181.

Sincerely,

Betty Lochner
Chair, College Savings Plans Network

Enclosures: (1) May 27, 2015 CSPN letter to Treasury
(2) July 29, 2015 CSPN letter to Treasury
(3) August 21, 2015 CSPN letter to Treasury
(4) Outline for Public Comment, October 14, 2015

Cc (w/encl.): Catherine Hughes

CSPN | COLLEGE SAVINGS PLANS NETWORK

May 27, 2015

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Dear Ms. Hughes and Mr. Barnett:

In drafting regulations to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act), the College Savings Plans Network (CSPN) urges the Department to adopt the guiding principles and address the issues below in the manner suggested.

STATEMENT OF INTEREST

CSPN 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.

As was noted in IRS Notice 2015-18, 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. We believe our 529 expertise and knowledge can help to inform policy and procedure development for ABLE and we stand ready to assist, in any way needed, the Department in developing regulations.

GUIDING PRINCIPLES

In writing regulations, we encourage the Department to be guided by the following principles.

1. **IRC Section 529A should be interpreted to be as consistent as possible with the interpretation and current operation of IRC Section 529.**

Because Congress chose to model ABLE on 529 college savings plans, the clear Congressional intent is that the two provisions (Section 529A and Section 529) should be interpreted in the same manner in all respects except those few areas in which there are clear significant statutory differences. We appreciate your issuance of Notice 2015-18 encouraging states to move forward with implementing ABLE programs even in advance of your promulgating regulations. Some states may be comfortable doing so in anticipation of the Department's consistent interpretation of the two provisions. ABLE programs can be offered most quickly and economically if they can utilize some of the existing infrastructure of 529 programs. For this to occur, it is important that the Department's interpretation of ABLE be parallel to its interpretation of 529 in all comparable aspects.

2. IRC 529A should be interpreted to minimize the administrative burden on the states and attendant costs to individuals with disabilities and their families.

Most, if not all, states that create and maintain ABLE programs will require that such programs be self-funded. That is, state general fund revenues will likely not be available to cover on-going administrative costs. Accordingly, the administrative costs will likely be borne by those saving through ABLE accounts. Given the additional restrictions on ABLE accounts that do not apply to 529 college savings accounts, we anticipate that it will take a great deal of time for ABLE accounts to grow to the size necessary to achieve economies of scale now enjoyed in 529 programs. The more administrative requirements imposed on states, the greater the cost to those with disabilities and their families and the less that ABLE will be the viable, meaningful benefit that Congress intended.

3. IRC 529A should be interpreted to avoid the states having medical information.

Federal law and many state laws rightly provide great protection for the privacy of individuals' medical information. We believe that the states' responsibilities under Section 529A can be satisfied without their obtaining any medical information and urge the Department to issue regulations ensuring that. Needing to comply with any applicable laws protecting medical information would add significant costs.

4. IRC 529A should be interpreted to provide the greatest benefits to individuals with disabilities and their families.

The purposes section of the ABLE Act clearly indicate that Congress intended the law to be interpreted broadly to benefit individuals with disabilities. The law was enacted to improve the lives of individuals with disabilities by providing for savings "to maintain health, independence and quality of life." And, as expressly stated in the purposes section, the savings are to "supplement, but not supplant" other benefits and sources of funding on which many individuals with disabilities rely. The regulations should advance these goals to the greatest extent possible.

SPECIFIC REGULATORY PROVISIONS

We urge the Department to address the following in the manner suggested:

1. Whether an individual is eligible is a matter between the Department and the taxpayer; the state ABLE agency has no responsibility to independently verify or obtain documentation of eligibility.

The regulations should acknowledge that the states have no obligation to independently verify or obtain documentation that a beneficiary is an eligible individual (i.e., disabled within the meaning of Section 529A) (i) at the time an account is established, (ii) in the tax year in which a contribution to the account is made, or (iii) when there is a change in the designated beneficiary. Pursuant to the Act, the responsibility for determining eligibility lies with the Department, which will have access to the information necessary to make that determination. ABLE agencies will provide information on eligibility requirements in the program materials provided to prospective account owners prior to the establishment of accounts. But ultimately the issue of whether a specific individual is eligible would be between the Department and the taxpayer. At most, a state ABLE agency might be required to obtain a signed averment, subject to perjury laws, from the beneficiary or person with signature authority at the time an account is established or at the time the beneficiary is changed, that the beneficiary is an eligible individual.

In further support of this position, we request that you consider the following:

A. ABLE agencies do not have and should not be given information necessary to verify eligibility.

Under Section 529A(e)(1), eligibility status is established either by (i) the individual being entitled to SSI or SSDI benefits for blindness or disability which occurred prior to age 26 or (ii) the individual's filing with the Secretary of the Treasury of a certification indicating that the individual is blind or disabled within the statutory definition and that such condition occurred prior to age 26, together with a signed physician's diagnosis of the relevant impairment. The state ABLE agency is not involved in either the dispensing of the SSI or SSDI benefits or the receipt of the applicable certification and diagnosis. Accordingly, to verify eligibility, an ABLE agency would need to check with the Social Security Administration and/or the Treasury Department. It is unclear that either the Social Security Administration or the Treasury Department would be authorized to release the required information to the ABLE agency. And, privacy and security of information concerns would suggest that such information should not be shared.

B. The divergence between when an eligibility determination or verification can be made and when contributions can be made would make it practically impossible and extremely burdensome for the state ABLE agency to verify eligibility before accepting contributions.

Under Section 529A(e)(1), eligibility status for a taxable year can be established at any time during the applicable taxable year. For example, an individual could file the required certification with the Secretary of the Treasury on the last day of a taxable year and be eligible for that entire taxable year. This means that, even if the ABLE agency checked with the Secretary at the time an ABLE account is opened or a contribution to an account is received, and even if the Secretary were authorized to inform the ABLE agency of eligibility for the applicable taxable year, the absence of a certification as of a particular date within the taxable year would not establish ineligibility for such taxable year. Similarly, the absence of SSI disability or SSDI benefit eligibility at some point during a taxable year would not preclude such eligibility at another point in such taxable year.

While in theory the opening of an ABLE account could be conditioned on the applicable individual establishing eligibility prior to opening the account, it would be unworkable to require a program to reject contributions to such account in subsequent taxable years unless at the time the contribution is received the beneficiary's eligibility for such taxable year has been established. It is highly likely that contributions to an ABLE account will come predominantly from third party contributors rather than from the disabled individual. Such third party contributors may have no knowledge as to whether, in the particular taxable year, the beneficiary is entitled to SSI or SSDI benefits or has filed the required disability certification. The ABLE agency, if required to establish eligibility each taxable year and unable to do so at the time a contribution is received, would need to reject the contribution, even though the beneficiary may establish eligibility later in the applicable taxable year. This would discourage contributions to ABLE accounts that Section 529A is intended to encourage and a return of presented contributions might result in a disruption of the beneficiary's SSI benefits that the beneficiary would otherwise receive.

C. Requiring an ABLE agency to verify eligibility would unnecessarily increase the cost of ABLE programs.

Any ongoing eligibility verification requirement imposed upon a program would require additional personnel and expense, which will reduce the cost-effectiveness of the ABLE program for its intended beneficiaries. As noted, any such verification would be required not only when an account is established, but potentially multiple times in subsequent tax years as additional contributions are received.

D. Federal agencies are better able to verify eligibility.

Federal agencies are in a much better position to coordinate on whether a particular individual is eligible in a particular tax year than an ABLE agency is. The IRS, in particular, may require that proof of eligibility be filed with annual federal tax returns, for those account owners/beneficiaries that have not already filed an eligibility certification with Treasury for the applicable tax year. A requirement that state ABLE agencies interact with federal agencies to verify eligibility would be duplicative, inefficient, and costly.

E. Not involving the state ABLE agency in eligibility verification is consistent with the manner in which 529 programs are administered.

In connection with Section 529 programs, there are multiple aspects of tax treatment of Section 529 accounts that are determined between the taxpayer and the IRS, without involvement by the state agency, and none that require independent verification by the state agency of data not in the state agency's possession. As noted in the guiding principles above, Section 529A programs should operate in similar fashion. The ABLE agency should provide the investment program and enforce those requirements of Section 529A that are within the program's control. The Department can, by regulation, impose adverse consequences on accounts or account owners for failure to comply with the statutory eligibility requirement, without burdening the state ABLE agency with administratively difficult and costly eligibility verifications.

2. If the state ABLE agency has any obligation to ensure that an ABLE account is opened in the home state (or contracting state) of the beneficiary, that obligation is satisfied by obtaining a signed averment of residency.

The ABLE Act requires that a "qualified ABLE program" allow an account to be opened only for a beneficiary that resides in the state that established the program (the "home state") or in another state that has no such program and has contracted with the home state to permit such other state's residents to use that state's program (the "host" state). (Section 529A(b)(1)(c).) The regulations should specify that state ABLE agencies satisfy this requirement by obtaining, at the time the account is opened, a certification from the beneficiary or the person who has signature authority for the account as to the beneficiary's state of residence.

A disabled beneficiary may not have a driver's license, tax returns, or other conclusive proof of residency that can be submitted at the time an account is established. The ABLE agency can make the beneficiary or the person acting on his/her behalf aware of the residency requirement, and obtain a signed averment, subject to state perjury laws, that the beneficiary is a resident of the applicable state. Imposing any additional documentation/verification requirements on the state ABLE agency at the time an account is established may either result in rejection of beneficiaries who, for legitimate reasons, lack the applicable proof of residence, or may necessitate submission of documentation that is not inherently more conclusive on residency than a signed averment. The Department can, by regulation, impose adverse consequences on accounts or account owners for failure to comply with the statutory residency requirement, without burdening the ABLE agency with administratively difficult and potentially unavailable residency verifications.

3. A new ABLE account can be opened if a previously established ABLE account has been permanently closed.

Section 529A(c)(4) provides that "[i]f an ABLE account is established for a designated beneficiary, no account subsequently established for such beneficiary shall be treated as an ABLE account." The regulations should acknowledge that this limitation only applies if the designated beneficiary has more than one ABLE account open concurrently.

Section 529A(c)(4) provides a limited exception for rollovers from one ABLE account to another ABLE account if the transferor ABLE account is closed within 60 days of the rollover. However, if an ABLE account has been opened for a designated beneficiary, fully drawn down and closed, there is no reason that same eligible individual should be precluded from subsequently opening a new ABLE account.

Designated beneficiaries may open an ABLE account for a variety of reasons (e.g., management of funds, tax deferred investment returns, or to participate in family estate planning for the benefit of the designated beneficiary). Designated beneficiaries also may desire to close an ABLE account for a variety of reasons (e.g., switching to a special needs trust, administrative costs are prohibitive for the current account balance, or does not need an ABLE account presently). If a designated beneficiary closes an ABLE account and years later wishes to open a new ABLE account, the designated beneficiary should be able to establish a new ABLE account.

4. The establishment date of an account for Medicaid reimbursement claims is the date the current ABLE account was established.

Section 529A(f) provides that, upon the death of the designated beneficiary, a state may file a claim for the net medical assistance paid for the designated beneficiary "after the establishment of the account." We urge the Department to acknowledge that the establishment date is the date the current account was opened.

5. Whether a distribution is for qualified disability expenses is a matter between the Department and the taxpayer and the state ABLE agency will have no responsibility to verify whether distributions are for qualified expenses.

The regulations should acknowledge that state ABLE agencies are not required to independently verify or obtain documentation that a distribution is for qualified disability expenses within the meaning of Section 529A)(e)(5). An ABLE agency's duty with respect to whether a distribution is for qualified disability expenses should be limited to providing information on what constitutes a qualified disability expense and the tax consequences for taking a distribution that is not for qualified disability expenses (a "nonqualified withdrawal") in the program materials provided to prospective account owners prior to the establishment of accounts. In addition to concerns about maintaining the privacy of the individual, it would greatly increase program expenses for ABLE agencies to retain personnel with sufficient knowledge to be able to verify that withdrawals meet the requirement of qualified disability expenses especially as they relate to medical expenses.

Keeping the issue of whether a distribution is for qualified disability expenses between the taxpayer and the Department is consistent with the manner in which 529 programs are currently administered. 529 program administrators have no duty to determine whether a distribution is for qualified higher education purposes. Rather the issue of whether a distribution was for higher education purposes is a matter left to the taxpayer and the IRS. As noted in the guiding principles above, Section 529A programs should operate in similar fashion.

6. Who has signature authority on an account for an eligible individual should be determined by state law.

We welcome the interpretation given in Notice 2015-18, that an individual other than the beneficiary may have signature authority for the account provided such person neither has nor acquires any beneficial interest in the account and administers that account for the benefit of the designated beneficiary. The regulations should further clarify that who may exercise signature authority and how such authority may be established and revoked should be left to state law. Most states have established laws regarding who can act on behalf of another individual including, but not limited to, laws governing powers of attorney, guardianship, trusts, custodial accounts and parental rights. Such state-specific laws should control.

7. Allow the one-account requirement to be met by having one master account record per beneficiary with sub-account records for different individuals each of whom has signature authority over a designated portion of the account.

The regulations should interpret the requirement that there be one ABLE account per beneficiary to give state ABLE agencies discretion to establish one master account record containing the formal record of all transactions relating to a single designated beneficiary, consisting of sub-accounts records that have different individuals with signature authority. Or, as an alternative, we ask the Department to provide some other mechanism that would allow more than one person to have signature authority over separate portions of the beneficiary's account.

Section 529A(b)(1)(B) defines a "qualified ABLE program" as a program "which limits a designated beneficiary to 1 ABLE account for purposes of this section." And, Section 529A(e)(3) requires that the one account be owned by the designated beneficiary. Notice 2015-18 recognizes that there will be accounts for which another individual will need to have signature authority. It is possible that more than one relative (e.g., divorced parents) will wish to have signature authority for the same beneficiary. It should be permissible for an "account" to include separate subaccounts with different authorized signatures, all of which are consolidated into one account for tax purposes. The beneficiary would be the tax owner and the funding limits set forth in Section 529(b)(2)(B) and Section 529(b)(6) would be applied to the account, including all subaccounts. Otherwise, the first relative to establish an account will have exclusive signatory control of the funds, including contributions, if any, made by third-parties such as other relatives. If states are not given the discretion to allow subaccounts, fewer individuals would be willing to contribute to a beneficiary's account because they would not have signatory authority over the manner in which the contributions were used for the beneficiary. Separate subaccounts for a single beneficiary can be permitted without affecting the statutory maximum contributions to the applicable tax account.

8. Interpret the "operating rules" provision in the same way that the operating rules provision for Section 529 is interpreted.

Section 529A(c)(1)(D) (i) and (ii) provide operating rules that are identical to Section 529 (c)(3)(D)(ii) and (iii). They provide that "except to the extent provided by the Secretary," every distribution made in one tax year should be treated as a single distribution with all valuations computed as of the end of the year. For 529 programs, the Secretary has provided different rules. Treasury/IRS Notice 2001-81 provided guidance that the earnings and basis calculation on each distribution in a tax year should be computed as of the date of each rather than as one distribution valued at the close of the year. In addition, legislation has passed the U.S. House of Representatives (H.R. 529) that would delete Section 529(c)(1)(D). We request that the Secretary interpret Section 529A's operating rules the same way that Section 529's operating rules are interpreted or amended.

Although there are some substantive differences between Section 529 and Section 529A, there is no reason that methodologies for calculating the earnings and basis component of a withdrawal from an ABLE account should differ from those applicable to withdrawals from Section 529 accounts. In many states, the state sponsor and program administrator for the ABLE program will likely be the same entity as the state sponsor and program administrator for the state's Section 529 program. It would be inefficient and costly to impose different operating rules for Section 529A distributions than those applicable to Section 529 distributions, as systems programming and personnel training would have to encompass two differing methodologies.

9. Minimize the frequency of state ABLE agency reports to federal agencies and clarify the content of the monthly report.

Section 529A(d)(5) provides that the Secretary shall establish timing requirements for the reporting required from ABLE programs under Section 529A(d)(1)(2) and (3). We request that the Secretary require such reports no more frequently than on a quarterly basis.

The greater the frequency of required reporting, the greater the burden and cost imposed on participants in the state's ABLE program. Quarterly (or even semi-annual or annual) reporting should suffice for all relevant purposes.

The reports required by the Secretary should be limited to providing information that is similar to information collected now by 529 college savings programs. That information would include such things as the identity of the beneficiary; address of the beneficiary; the amount of contributions, account values, and distributions; and whether and how much excess contributions were returned. However, it would not include any information regarding diagnosis or the type of qualified disability expenses paid for from the account, for example.

With regard to the monthly report to the Commissioner of Social Security required by Section 529A(d)(4), we request clarification regarding whether the information on distributions and account balances "from all ABLE accounts" is to be aggregate data combining all distributions and balances for all accounts established in that state's ABLE program or account specific data. If the reports to the Commissioner of Social Security are required to be account specific, we request that the total of all distributions made during the month and the end-of-month account balance be reported rather than activity throughout the month.

10. Clarify when eligibility must be established in relationship to when contributions may be made.
As noted above, the Act is ambiguous regarding at what point in a tax year eligibility can be determined in relationship to when contributions to the account may be made. Section 529A(e)(1) provides that "[a]n individual is an eligible individual for a taxable year if during such taxable year" the SSI/SSDI benefit test is met or disability certification is filed. The regulations should clarify whether an individual is eligible with respect to an ABLE account when opened, or at the time a contribution to an ABLE account is made, during a taxable year prior to the beneficiary satisfying one of the two tests, as long as one of the two tests is satisfied at any subsequent time in the taxable year.

While we urge the Department to issue regulations acknowledging that the state ABLE agencies have no responsibility regarding eligibility determinations, nonetheless, beneficiaries and contributors need a clear understanding of the relationship between establishing eligibility "during a taxable year" and the permissible timing of establishing and contributing to an ABLE account. For example, a beneficiary may have established eligibility during the taxable year in which an ABLE account was opened by filing a certification with the Treasury Secretary. Other people may send contributions to the ABLE account in subsequent taxable years, before the beneficiary has submitted an updated certification (which may or may not require an updated medical diagnosis, which should also be clarified by regulation) to the Treasury Secretary for that taxable year. Although guidance of any nature is requested to provide certainty and accurate disclosure to beneficiaries, the statutory language appears consistent with eligibility for the entire taxable year even if eligibility is not established until late in the applicable taxable year.

11. Acknowledge that the total contribution limit may be determined by limiting additional contributions once the state-specified 529 limit is reached.
The Act requires the ABLE program to have 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)." This language should be interpreted in a manner that permits states to preclude additional contributions that would cause the 529A account balance to be exceeded, versus requiring a methodology that simply tallies historic contributions without regard to investment results. This approach recognizes that a focus on contributions alone might permit unnecessary additional contributions at a time when account balances, due to investment gains, are already at the prescribed limit and, conversely, could preclude additional contributions at a time when losses have caused the total account value to be less than the prescribed limit. Section 529A already contains an annual limit on the amount of contributions. The additional "excess contribution" limit should not be read in a manner that penalizes disabled beneficiaries who have accounts that are invested during periods of negative returns. An equal amount of contributions may, depending on market trends and the selected investment option, produce substantially different account balances available for qualified disability expenses. If the account balance, due to market losses, is substantially below the prescribed dollar limit, additional contributions, the amount of which is already constrained by the annual contribution limit, cannot and should not be viewed as "excessive." The Department's regulations should acknowledge that ABLE programs may

determine the total contribution limitation of Section 529A(b)(6) by precluding additional contributions that exceed the prescribed limit.

12. Clarify the time frame in which a withdrawal from an ABLE account must be used to pay for qualified disability expenses in order to be protected from consideration for means-tested federal benefits.

One of the main benefits of ABLE is that individuals with disabilities can own financial assets earmarked for meeting qualified disability expenses without jeopardizing their eligibility for federal means-tested benefits. Section 103 of the ABLE Act protects distributions from an ABLE account for qualified disability expenses from being considered in determining eligibility for federal means-tested benefits, including, with limitations, SSI disability benefits, for "***any period*** during which such individual . . . receives distributions from such ABLE account . . . ." (Emphasis added.) Regulations should clarify the period of time between when the distribution is made from the ABLE account and when the distribution is used to pay for qualified disability expenses during which the amount distributed is protected from being counted for means-tested benefits. Will the protection apply as long as the qualified disability expenses are paid within the same tax year in which the distribution is taken or will some specified time frame apply? We urge the Department to consider as long a period as reasonably possible.

Many individuals are likely to want to use their ABLE accounts to meet numerous current qualified disability expenses. So, unlike qualified higher education expenses, which typically are incurred only two or three times per year, there may be repeated monthly, or even weekly, expenses that can be covered by the ABLE account. If the time between when the disbursement is made and when it must be used in order to be protected for means-tested benefits purposes is short, the number of disbursements is likely to be much greater, which will result in the administrative cost being significantly higher.

If the Department sets a specified time frame, we request the Department to consider at least nine months. That period is consistent with the period used by the Social Security Administration for allowing a non-owner beneficiary of a Section 529 college savings account to use a distribution from the 529 account for educational purposes without the distribution being treated as income affecting Medicaid eligibility. (See Social Security Program Operations Manual System SI 01140.150.) It is also consistent with the time period in which a retroactive SSI or SSDI payment may be excluded from resources. (See Social Security Program Operations Manual System SI 01130.600.) A regulation allowing a qualified ABLE withdrawal to be used within nine months would minimize administrative costs while allowing a beneficiary to use the ABLE account to cover frequent and routine qualified disability expenses.

Conclusion

We would welcome an opportunity to discuss these guidelines and requested interpretations with you; as well as to discuss any other aspects of regulations on Section 529A that you are developing. We are committed to bringing ABLE programs to all individuals who may benefit from them. Our experience in offering 529 college savings programs can be a great resource in the development of ABLE programs. We look forward to a continuing dialogue with you to fulfill the intent of Congress in enacting ABLE.

Sincerely,

Betty Lochner

Betty Lochner
Director, Guaranteed Education Tuition Program &
Chairman, College Savings Plans Network

July 29, 2015

CC:PA:LPD:PR (REG—102837—15)
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.

<u>Solution:</u> 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

Betty Lochner
Director, Guaranteed Education Tuition Program
Chair, College Savings Plans Network

Cc: Catherine Hughes
Terri Harris
Sean Barnett

August 21, 2015

CC:PA:LPD:PR (REG—102837—15)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Treasury and Internal Revenue Service Rulemaking Staff:

Thank you for meeting with College Savings Plans Network representatives on August 12 regarding the proposed ABLE regulations. We appreciated the opportunity to discuss the three threshold issues that we described in our letter to you of July 29, 2015. As we outlined in our meeting, to make ABLE programs available on a timely basis to individuals with disabilities, the states implementing ABLE Programs require advance guidance with respect to the threshold issues. Absent an advance notice or similar advance guidance addressing these issues, we believe that most states will be forced to defer structuring a program until the proposed regulations are finalized, and the opening of programs will lag even further. Given the timeframe for finalizing regulations, even on an expedited basis, the absence of advance guidance may delay many states from opening programs until 2017, even if the final regulations make the requested changes. As you requested, we are following-up with the additional suggestions and information you indicated would be helpful, in advance of our anticipated formal comment letter.

1. **Filing of Eligibility Certifications**

With regard to the first issue discussed in our July 29, 2015, letter, eligibility certification, we suggest that the states could collect appropriate data provided by the beneficiary or authorized signatory that is certified under penalty of perjury rather than requiring beneficiaries to produce and states to store and safeguard medical and other sensitive documentation. The certified data could be as extensive as you think is necessary. However, we caution that the more detailed and extensive the requested data is the more it will become an obstacle for opening accounts.

We suggest that the collected certified data should include:

1. Whether ABLE eligibility is established by
    a. Entitlement to benefits under Title II of the Social Security Act (SSDI); or
    b. Entitlement to benefits under Title XVI of the Social Security Act (SSI); or
    c. A disability certification of eligibility (which could be made on the account application) that states:
        i. that the individual is blind; or

   ii. the individual has a medically determinable physical or mental impairment that:
      1. has resulted in marked and severe functional limitations; and
      2. is expected to result in death, or has lasted or is expected to last for a continuous period of not less than 12 months;
   iii. the individual possesses a written diagnosis signed by a physician
2. A statement (which could be made on the account application) that the blindness or disability occurred before the individual's 26th birthday
3. An indication (check box) of the category(ies) listed on IRS Form 5498-QA in which the diagnosis falls.

If you desire to have more detailed information certified, the states could also require certification (which could be made on the account application) of the following:

1. For eligibility established by entitlement to Social Security Act benefits, a certification by the beneficiary or authorized signatory of the date of the most recent entitlement letter;
2. For eligibility established by a disability certification, a certification by the beneficiary or authorized signatory of the name of the physician and the date of the written diagnosis.

There was some discussion at our meeting about including the physician license number in the certifications, but we are concerned that such license number might not be readily available to the beneficiary or authorized signatory and could delay or impede the account being opened.

We welcome your suggestions on what other data you might want to have collected during the enrollment process that would be readily known by the beneficiary or the authorized signatory.

2. Distinguishing Among Types of Distributions

We understand that the proposed regulations' requirement that an ABLE program "establish safeguards to distinguish" between qualified and non-qualified distributions and to identify the amount of qualified distributions used for housing is more for purposes of the Social Security Administration's (SSA) administration of the SSI program rather than for Treasury/IRS. As you suggested, what information SSA needs from programs, as opposed to from SSI or SSDI recipients, is a matter for SSA to determine, not for the tax regulations. As we discussed at our meeting, Section 529A(d)(4) merely requires monthly statements of "relevant distributions," a requirement which we believe is satisfied by providing to SSA the amount of distributions, other than distributions that are irrelevant to SSI-eligibility determinations, such as rollover distributions, distributions upon the beneficiary's death and, potentially, distributions for beneficiaries who are not SSI recipients.

As we indicated at our meeting, the exact application of distributions from an ABLE account may not be known by the program or the beneficiary at the time of the distribution. If expenditures via debit card or checks are to be permitted, as advocates for individuals with disabilities are suggesting they should be, it would not be feasible for a program to delay payment until the beneficiary has informed the program whether the expenditure should be categorized as non-qualified, qualified non-housing or housing. Similarly, if the beneficiary withdraws an amount from an ABLE account prior to expenditure, as Section 529A permits, the beneficiary may not know at the time of withdrawal into which category the ultimate expenditure will belong.

Furthermore, if a program were to require, as a condition of withdrawal, a certification by the recipient as to whether the expenditure is or will be a non-qualified, qualified non-housing or housing expenditure, it will need to be in a position to respond to inquiries as to the appropriate category for a particular expenditure. State programs and their program managers cannot be expected to shoulder the expense or potential liability associated with responding to questions as to whether particular expenditures constitute "basic living expenses" and the myriad other nuanced questions likely to arise in interpreting whether certain expenditures are qualified, qualified housing or non-qualified. That expertise lies with SSA, not the programs, and, as long as programs notify SSA on a monthly basis that a specified amount has been distributed from the ABLE account, SSA has sufficient information to require any further information as to such distribution from the ABLE account beneficiary.

We have reached out to SSA to expedite a dialogue with them. Our suggestion to them will be that they should collect the information they want in their periodic collection of other data from recipients, and that the states cannot provide, and should not be expected to provide, categorical breakdowns of ABLE account distributions.

You indicated in our meeting that you were open to revisiting the "safeguards" sentence in the proposed regulations, which we appreciate. For the above reasons, we strongly urge the removal of that sentence. We will keep you apprised of our discussions with SSA, and will seek to obtain SSA's concurrence with our suggested approach. However, we believe the potential impediments or delays to the launching of ABLE programs posed by the "safeguards" sentence would be addressed by including in the requested advance notice a statement that the final regulations will remove the "safeguards" sentence and that the monthly reporting requirements to SSA will be governed by Section 529A(d)(4) and such further guidance as may be provided by SSA pursuant to Section 529A(d)(4).

We note that SSA already requires SSI recipients to report to SSA, within 10 days after any month in which changes affecting eligibility for or the amount of SSI benefits occur, the details of such change. http://www.ssa.gov/ssi/text-report-ussi.htm. It may be appropriate for SSA to include in such self-reporting requirements details as to an SSI recipient's expenditures of ABLE account distributions. SSA also may determine, upon receipt from an ABLE program of data indicating that a distribution to an SSI recipient has occurred, to make routine or occasional inquiries to the SSI recipient regarding the manner of application of the distribution. There is no reason, however, for tax regulations to address this topic or to require programs to act as middlemen in the transmission of such information from SSI recipients to SSA, particularly as such an unnecessary and burdensome requirement may be detrimental to the Congressional objective of making ABLE programs a reality.

3. **Requirement to obtain TINs for all contributors**

Many, 529 college savings programs currently have systems in place to reject excess contributions before they are credited to individual accounts. Some may initially deposit an excess contribution into the account but quickly remove it as of the same day it was credited resulting in neither a gain nor loss. In other words, it would be unusual for an excess contribution to be placed in an individual's account at all and even more unusual for it to remain in the account for any measurable period of time. We anticipate that ABLE programs will be similarly designed. In light of this, we believe it is unnecessary for a program to request the TIN for each contributor at the time a contribution is made. As explained in our July 29 letter, doing so would be difficult, costly, and is likely to discourage occasional contributors. Therefore, we suggest that the requirement to request the TIN of every contributor be eliminated and be replaced with the obligation to request a contributor's TIN only in the unlikely circumstance that an excess contribution has been deposited in an individual's account and has accrued earnings or losses; in which case, the TIN would be obtained before the contribution, with any gains or losses, is returned. If necessary, the excess contribution could be removed from the individual account and held in a "suspension" account until the TIN is obtained.

Again, we greatly appreciate your receptiveness to our concerns and suggestions and we look forward to continuing dialogue as we work towards our joint goal of making robust ABLE programs available to individuals with disabilities and their families in furtherance of Congressional intent.

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
Director, Guaranteed Education Tuition Program
Chair, College Savings Plans Network

Cc: Catherine Hughes

CSPN | COLLEGE SAVINGS PLANS NETWORK

September 21, 2015

CC:PA:LPD:PR (REG -102837-15)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

VIA electronic submission:
http://www.regulations.gov (IRS REG-102837-15)

Re: Outline of Topics for CSPN's Comments for the October 14, 2015 Public Hearing

Pursuant to the Notice of Proposed Rulemaking and Notice of Public Hearing in the above-referenced matter ("Notice") and 26 CFR 601.601(a)(3), the College Savings Plans Network ("CSPN") submits the following outline contemporaneous with its written comments. The outline's time frames are in conformity with the ten minute limit set in Notice.

I. The Role of CSPN Members in Creating and Running ABLE Programs. (2 min)

II. The Need for a Streamlined Eligibility Certification Process (2 min)

III. Efficient/Cost-Effective Processing of Distribution Requests (2 min)

IV. Efficient/Cost-Effective Processing of Contributions (2 min)

V. Other Matters discussed in CSPN's Letters to the IRS on this Matter (2 min)

Should you have any questions, please do not hesitate to call Chris Hunter at 859-721-2181.

Sincerely,

Betty Lochner

Betty Lochner
Chair, College Savings Plans Network