

## ABLE Act – Review of Proposed IRS Regs

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## Proposed IRS Regulations

The IRS recently released a notice that provides advance notification of a provision anticipated to be included in the proposed regulations to be issued under section 529A of the Internal Revenue Code.

A public hearing has been scheduled for **October 14, 2015**, beginning at **10:00 am** in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

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## Proposed IRS Regulations

For purposes of this presentation – if the slide has this in the corner – this is copied straight out of the proposed regulation.



If it doesn't – it is commentary

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ACHIEVING INDEPENDENCE

**WHAT HAPPENS IF ACCOUNT HOLDER NO LONGER MEETS THE DEFINITION OF BEING DISABLED?**

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ACHIEVING INDEPENDENCE

**Change in eligible individual status**

Example

- Erica has been on SSI for many years and has set up an ABLE Account that Uncle Steve and Aunt Terri has been contributing into annually. This year they contributed \$10,000 and the account now has \$50,000.
- Erica gets a job, and is being paid a salary of \$34,000 a year.
- Therefore she no longer meets the definition of being disabled under the first category because no longer receiving supplemental security income benefits or disability benefits under Title II of the Social Security Act.

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 **Who Qualifies?**

**1. Persons Diagnosed as Disabled Before Age 26 and Receiving SSI or SSDI**

- Any individual who has been diagnosed with a disability before the age of 26 years old, and who is receiving, deemed to be, or treated as receiving supplemental security income benefits or disability benefits under Title II of the Social Security Act.

Or

**2. Persons Diagnosed as Disabled Before Age 26 and Certified as Meeting Conditions Similar to that Required by SSI or SSDI**

- Any individual who has been diagnosed with a disability before the age of 26 years old, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 month or is blind, **and** provides a copy of their diagnosis signed by a physician.

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 **Change in eligible individual status**

She **MAY** qualify under the second category as Certified as eligible if she who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 month or is blind, **and** provides a copy of their diagnosis signed by a physician.

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 **Change in eligible individual status** 

Therefore, **if** at any time a designated **beneficiary no longer meets the definition of an eligible individual**, his or her **ABLE account remains an ABLE account** to which all of the provisions of the ABLE Act continue to apply, **and no (taxable) distribution of the account balance is deemed to occur.**

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 **Change in eligible individual status** 

In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLE account (and preserve the account's qualification as an ABLE account for all purposes) if, **for example, the disease that caused the impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual.**

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 **Change in eligible individual status** 

**Note that expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of §1.529A-1(b)(9)(A) or §1.529A-2(e)(1)(i).**

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 **Change in eligible individual status** 

However, the proposed regulations provide that, beginning on **the first day of the taxable year following the taxable year** in which the designated beneficiary ceased to be an eligible individual, **no contributions to the ABLE account may be accepted.**

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 **Change in eligible individual status** 

**If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits**

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 **Change in eligible individual status**

- What this tells us is that that the ABLE Account does not automatically become taxable just because she does not meet the definition of being disabled.
- Uncle Steve can no longer make contributions to the ABLE Account next year **IF ERICA DOES NOT QUALIFY UNDER A CERTIFICATION**, but he could contribute \$4,000 this year – assuming no one else contributed

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 **Change in eligible individual status**

- What this tells us is that that the ABLE Account does not automatically become taxable just because she does not meet the definition of being disabled.
- Any distributions during this period are likely to be taxable to Erica during any period when she is not an eligible individual.
- Uncle Steve can no longer make contributions to the ABLE Account next year **IF ERICA DOES NOT QUALIFY UNDER A CERTIFICATION**, but he could contribute \$4,000 this year – assuming no one else contributed

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**WHAT HAPPENS IF A STATE PASSES LAWS BEFORE REGS ARE IMPLEMENTED?**

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**What Happens if State Passes Laws Before Regs are Implemented?**

The Treasury Department and the IRS reiterate that States that enact legislation creating an ABLE program in accordance with section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, **will not fail** to receive the benefits of section 529A **merely because the legislation or the account documents do not fully comport with the final regulations when they are issued.**

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**What Happens if State Passes Laws Before Regs Issue?**

The Treasury Department and **the IRS intend to provide transition relief** to enable those State programs and accounts to be brought into compliance with the requirements in the final regulations, including **providing sufficient time after issuance of the final regulations in order for changes to be implemented.**

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**WHO IS IN CHARGE OF THE ABLE ACCOUNT?**

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**Who owns the ABLE Account?**

The proposed regulations also presumes that the designated beneficiary is the owner of that account and manages the distributions.

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**What if Account Holder Lacks Capacity?**

The Treasury Department and the IRS recognize, however, that **certain eligible individuals may be unable to establish an account themselves.**

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 **What if Account Holder Lacks Capacity?** 

Therefore, the proposed regulations clarify that, if the eligible individual cannot establish the account, **the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual.**

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 **What if Account Holder Lacks Capacity?** 

For purposes of these proposed regulations, because each of these individuals would be acting on behalf of the designated beneficiary, **references to actions of the designated beneficiary, such as opening or managing the ABLE account, are deemed to include the actions of any other such individual with signature authority over the ABLE account.**

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 **What if Account Holder Lacks Capacity?** 

The proposed regulations also provide that, consistent with Notice 2015-18, a person other than the designated beneficiary with signature authority over the account of the designated beneficiary **may neither have, nor acquire, any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.**

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 **Definition of Designated Beneficiary** 

**If the designated beneficiary is not able to exercise signature authority over his or her ABLE account** or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's **agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.** 25

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 **Practice Tip**

- If the eligible individual under an ABLE Account has capacity – it is best to have the individual sign a power of attorney immediately.
- Also – if these rules are adopted and the eligible individual want for instance a to have a sibling have signature authority – then the power of attorney is the method to make this happen.

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 **POST-DEATH PAYMENTS – THE MEDICAID LIEN** 

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## Post-death Payments

A qualified ABLE program must provide that a portion or **all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself** with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act.

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## Commentary

- Could the account be used for funeral expenses even if arrangements were not made prior to the death of the account holder?
- What if the contract is signed, payable upon death.

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## CAN A TRADITIONAL 529 PLAN BE ROLLED INTO AN ABLE ACCOUNT?

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 **Can a Traditional 529 Plan be Rolled into an ABLE Account?** 

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

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**ISSUES CONCERNING QUALIFIED DISABILITY EXPENSES, CELL PHONES AND HOUSING EXAMPLES**

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**Qualified Disability Expenses**

- Qualified disability expenses are any expenses made for the designated beneficiary related to their disability, including:
  - education,
  - **housing**,
  - transportation,
  - employment training and support,
  - assistive technology and personal support services, health,
  - prevention and wellness,
  - financial management and administrative services,
  - legal fees, expenses for oversight and
  - monitoring, funeral and burial expenses.

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### Qualified disability expenses

In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term “**qualified disability expenses**” **should be broadly construed** to permit the inclusion of basic living expenses and **should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual.**

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### Qualified disability expenses

For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism.

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### Housing

- One question we all have is whether utilization of expenses for housing will cause a reduction in SSI.
- Currently under SSI – payments from a trust for housing from a family member or a trust cause a reduction in benefits by \$264.66
- There are POMS that go the other direction.

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## RESIDENCY REQUIREMENTS

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 **The ABLE Accounts Must Be Opened in the State Beneficiary Resides**

- Qualified individuals or their families **must open ABLE account in the state in which the beneficiary resides or in a state that has a memorandum of understanding** with another state to provide accounts.
- There is a limit of one ABLE account per eligible individual



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 **Residency requirements** 

If a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents. **The statute is silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence.**

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## Residency requirements

The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, **the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State.**

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## COMMENTS AND PUBLIC HEARING

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## Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the “Addresses” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules.

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### Comments and Public Hearing

A public hearing has been scheduled for **October 14, 2015**, beginning at **10:00 am** in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

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### What's Next?

- SSA for SSI and CMS for Medicaid are working on new regulations for ABLE Account.
- This will be a good opportunity to look at all rules of distributions for persons with disabilities, be it from family and friends, special needs trusts, or ABLE Accounts.

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