IRS Guidance Under Section 529A: Qualified ABLE Programs Summary

Required elements of a qualified ABLE Program:

- Must be established and maintained by the State or State's agency or instrumentality
- Permits the establishment of account only for designated beneficiary who resides in that State or State contracting with that State
- Permits the establishment of account only for designated beneficiary who is an eligible individual
- Limits each designated beneficiary to only one ABLE account
- Permit contributions to the account for the purpose of qualified disability expenses of the designated beneficiary
- Limit the nature (cash only) and amount of contributions
- Require separate accounting for each ABLE account
- Limit investment direction for the ABLE account to no more than two opportunities per year
- Prohibit pledging of interest in an ABLE account as security for a loan

The regulation expressly allows for a qualified ABLE program to contact with one or more Community Development Financial Institution (CDFI) that commonly serves disabled individuals and their families to provide one of more required service, however the State, or its agency or instrumentality must remain actively involved in the administration of the program.

Establishing a qualified ABLE Account:

- May be established only for an eligible individual by:
  1. The eligible individual for his or her own benefit, or
  2. The individual's agent under power of attorney for the eligible individual's benefit, or
  3. By a parent or legal guardian of the eligible individual for the eligible individual's benefit
- Requires a disability certification, which is a certification signed under penalties of perjury by the eligible individual or his or agent, parent or legal guardian that the individual:
  1. Has a medically determinable physical or mental impairment the results in marked and severe functional limitations or is blind (see Social Security Act for guidance), and
  2. The condition is expected to result in death or has lasted or can be expected to last for a continues period of not less than 12 months, and
  3. Such blindness or disability occurred before the date on which the individual attained age 26, and
  4. The individual (or his/her agent, parent or legal guardian) has retained and agrees to produce upon request by the ABLE Program or IRS, a copy of the individual's diagnosis relating the relevant impairment signed by a physician. [Note: Physicians diagnosis is no longer required to be produced at account opening per Notice 2015-81.]

- Requires the beneficiaries:
  1. Name,
  2. Address (for the purposes of mailing, tax filing and establishing qualification under the programs residency requirement), and
  3. TIN (tax ID number)

Maintaining a qualified ABLE account:

- Monitoring for continued eligibility for each tax year by:
  1. Requiring recertification on a periodic bases depending on different types of impairments and considering whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future, or
  2. Imposing an enforceable obligation on the designated beneficiary (or other person with signature authority over the account) to promptly report changes in the designated beneficiary's condition that would result in the beneficiary no longer being an eligible individual.
- Establishing safeguards to prevent excess contributions and excess aggregate contributions by:
  1. Returning all excess contributions to the contributors on a last-in-first-out basis prior to tax filing on the account, providing notice to the designated beneficiary of the return and furnishing an annual statement to the contributors who received returned contributions [Requires the collection of TINs for all contributors], or
  2. Having a system in place that rejects excess contributions [Does not require the collection on TINs for any contributors per Notice 2015-81]
- Report annually on establishments, contributions, distributions and terminations by:
  1. File Form 5498-QA together with Form 1096 with IRS annually reporting total contributions during the year and fair market value of the account (form contains instructions), and
  2. Furnish an annual statement to the designated beneficiary of the account containing substantially the same information as Form 5498-QA (a copy of the filed Form 5498-QA satisfies this requirement), and
  3. File form 1099-QA together with Form 1096 with the IRS annually reporting aggregate amount of distributions, basis and earnings with respect to distributions or returned contributions, rollovers and any program-to-program transfers and whether the return is being furnished to the designated beneficiary or to a contributor (form contains instruction), and
  4. Furnish an annual statement to the designated beneficiary or contributor who received returned contributions containing substantially the same information as Form 1099-QA (a copy of the filed Form 1099-QA satisfies this requirement)
  5. Note per Notice 2015-81: The regulation does not require a program to identify or record whether distributions are made for qualified disability expenses or housing. The

designated beneficiary will have to categorize distributions in order to properly determine federal tax income obligations.

Closing a qualified ABLE account:

- Program-to-program transfer where the entire balance of an ABLE account is transferred into another ABLE account either for the same designated beneficiary or another eligible individual who is a member of the family (sibling) upon which the transferor account is closed upon completion of the transaction.
- Upon loss of qualification as an eligible individual, the account will continue to be an ABLE account, however the program may no longer accept contributions to the account and any disbursements made from the account (including to close the account) are not considered qualified disability expense.
- Upon death of designated beneficiary the balance in the account will be distributed to:
  1. First satisfy all outstanding payments due for qualified disability expenses of deceased beneficiary, then
  2. Pay claims filed by the State against the beneficiary with respect to benefits provided under the State's Medicaid plan.
  3. The remaining balance becomes part of the deceased beneficiary's gross estate for estate tax purposes.

Tax treatment of ABLE Account:

- Distributions from the ABLE account for qualified disability expenses (such as but not limited to: education, housing, transportation, basic living expenses, employment training and support, assistive technology and related services, personal support services, health, preventions and wellness, financial management and support services, legal fees, expenses for oversight and monitoring and funeral and burial expenses) are excluded from the gross income of the designated beneficiary.
- Distributions from the ABLE account that do not meet the definition of qualified disability expenses are included in the gross income of the designated beneficiary and the tax imposed shall be increased by an amount equal to 10% of the includable amount, unless such distributions occurs after the death of the designated beneficiary.
- Rollovers, program-to-program transfers and change in designated beneficiary to a qualified sibling are excluded from the gross income of the designated beneficiary.
- Contributions made to an ABLE account are treated as completed gifts to the designated beneficiary for gift tax purposes, unless the contribution is made by the designated beneficiary.
- Excess contributions and excess aggregate contributions that are not returned to the contributor will result in the imposition of a 6% excise tax on the designated beneficiary.

Additional Notes:

- The State may continue to maintain the ABLE account after a change in residency of the designated beneficiary.
- Electronic furnishing of statements to designated beneficiaries and contributors is permitted so long as the furnishers follows all requirements outlined for electronic statements.

Pending issuance of final regulations, the proposed rules and notices may be relied upon for guidance. To the extent that additional information is required by the final regulations, the final regulations will provide a transition period to facilitate compliance with the additional requirements.