ABLE to $ave

By Jillian L. Sherman, ACP

Financial planning experts suggest that individuals should save three to six months of expenses in an emergency fund. Until recently, individuals with disabilities receiving need-based benefits were limited in how much they could save before their benefits would be affected. Frequently, savings accumulated by the families of these individuals were also counted. With the current cost of living, it is impossible to create an adequate emergency fund for anyone, much less save toward milestones, dreams, and extraordinary medical expenses.

Then on December 19, 2014, Congress enacted the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE). ABLE was a grassroots, bipartisan effort to allow individuals and families of individuals with disabilities to save for the unusual financial needs of raising a child with a disability, without jeopardizing need-based government benefits. ABLE was initially part of IRC Section 529 regarding qualified tuition programs, but ultimately became Section 529A instead, due to several amendments accepted before ABLE passed.

ABLE's enactment allows each state to determine whether it will offer ABLE accounts. As of June 30, 2015, 23 states had passed enabling legislation. Another 18 states have bills in the legislature or awaiting signature. So far, Alaska, Kentucky, New Hampshire, and New Mexico completed their legislative sessions without passing introduced ABLE bills. South Carolina's legislature also did not pass its ABLE bill; however, a budget proviso permits an ABLE program to be created in that state for one year but it is unclear if any money has been appropriated for the program.

Outside ABLE, if an individual receives Supplemental Security Income (SSI), Medicaid, or other government benefits, he or she is only allowed to have approximately $2,000 in savings, depending on the benefit. Within an ABLE account, a beneficiary can accumulate up to the state's maximum account balance, and the first $100,000 will not affect benefits. More than $100,000 will reduce benefits on a pro rata basis.

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Most distributions for qualified expenses from an ABLE account are not counted as resources for benefit purposes, allowing individuals and families to save for extraordinary medical and living expenses separately from their savings toward lifetime goals. For Supplemental Security Income (SSI), distributions from an ABLE account for certain housing expenses are included when calculating resources.

Section 529A provides multiple stipulations regarding opening an account. A person with a disability who is the beneficiary of the account must have been diagnosed prior to age 26, and may have only one account. Assets in other ABLE accounts opened on behalf of the beneficiary will not be protected from inclusion when calculating eligibility for government benefits. The account must be opened in the state in which the beneficiary is a resident, or a state contracted to provide ABLE accounts on behalf of the state in which the beneficiary is a resident.

Reporting Challenges

Possibly one of the biggest implementation challenges will be the reporting. Under Section 529, qualified tuition program contributions are limited only to the maximum account balance per beneficiary, as established by the state. Under Section 529A, ABLE account contributions are limited to not only the maximum account balance but also to an annual contribution limit, currently the annual per-donee gift tax exclusion under IRC Section 2503(b) in effect for that calendar year. This is additional record-keeping that is not required for qualified tuition programs. Assuming contributions of the maximum annual amount (currently $14,000), it would take more than seven years with no distributions to reach the $100,000 threshold before the account affects means-tested federal benefits.

The IRS issued a Notice of Proposed Rulemaking (Notice) on ABLE Accounts, which posted in the Federal Register on June 22 (80 FR 35602, Doc. No. 2015-15280). Along with suggested regulations, the Notice advises that a public hearing will be held on October 14, 2015, regarding the proposed regulations.

The Notice touches on several features that make ABLE accounts different from qualified tuition program accounts. The owner of an ABLE account is always the beneficiary—the person with a disability on whose behalf the account is opened. The person with signature authority may be either the beneficiary or another person. If the signature authority is not the beneficiary, he or she has no beneficial interest in the account and must administer the account for the benefit of the designated beneficiary. The proposed regulations stipulate that only the beneficiary may establish an account, or, if the beneficiary cannot establish the account, the power of attorney or parent or legal guardian of the beneficiary may establish the account. Under Section 529, however, anyone may establish a qualified tuition account for any beneficiary, and the beneficiary is rarely the account owner.

Additionally, a state is required to limit a beneficiary to only one ABLE account, except in specific rollover or program-to-program transfer situations, and only in the state the beneficiary resides. Although the ABLE account assets are only protected for accounts that are established properly and only the first account is correctly an ABLE account if more than one is established, it would be difficult for a state to ascertain that a beneficiary who has moved does not already have account without additional reporting to a federal level. The proposed regulations allow a beneficiary who has moved to maintain an ABLE account in the state it was originally opened.

At account opening, the beneficiary or representative must submit certification of an eligible disability. Section 529A allows for submission of a Social Security Administration benefit verification letter or other evidence, a disability certification already on file with the Secretary, or submission of a disability certification at the time the ABLE account is opened. The certification must include a copy of the individual's diagnosis, signed by a licensed physician.

Annual Certification

Annual CertificationAdditionally, ABLE requires annual recertification. The Department of Treasury proposes to allow an ABLE program to consider an individual with a permanent disability to have fulfilled the requirement for annual recertification, require a statement that nothing has changed, create a list of certain disabilities that will be deemed to have made the annual recertification, or some other form of recertification that is less burdensome than a complete recertification. Proposed regulations allow the certification to be deemed received by the Secretary upon filing with the ABLE program. The ABLE program then must communicate that certification to the Secretary.

The Notice recognizes that in some cases, certifications may not be easily verifiable. The proposed regulations note that the Treasury Department, IRS, and the Commissioner of Social Security have agreed to use the standard of disability in the Social Security Act for children receiving benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program. (See 20 CFR 416.906, 416.924 and 416.926a). The Notice also provides that conditions

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listed in the Compassionate Allowances Conditions list maintained by the Social Security Administration are sufficient for certification without a physician's diagnosis if present before the beneficiary reached age 26. The Notice specifically requests comments on other conditions that should be deemed to meet the requirements of Section 529A(e)(2)(A)(i).

Proposed Regulations

The proposed regulations suggest a potential solution for some of the additional administrative burden. They allow an ABLE program or its contractors to contract with a Community Development Financial Institution (CDFI) that commonly serves individuals with disabilities and their families. The Notice suggests that CDFIs could handle screening and verification of disabilities, certification of the purpose of distributions, debit card services, and social data collection and reporting. These are all requirements of ABLE that do not affect college savings accounts. States may find it appealing that a CDFI may receive financial assistance from the Treasury Department that can be used toward the administrative costs of the program, presumably reducing the cost to the state.

Proposed regulations for Section 529A ABLE accounts and the pre-existing proposed regulations for Section 529 qualified tuition programs require reporting to the IRS regarding contributions, distributions, returns of excess contributions, and income earned. However, proposed ABLE regulations also require significant reporting on each account established, including the beneficiary's name, residence, and relevant diagnosis information. States will also be required to report statements on distributions and account balances from all accounts on a monthly basis to the Commissioner of Social Security. It may be challenging to find a CDFI willing to take on these reporting requirements, which would leave them to budget-strapped states.

Roll-over Possibilities

Treasury and the IRS were asked whether amounts held in a Section 529 college savings account could be rolled over into an ABLE account for the same beneficiary. In the Notice, Treasury indicates that because a distribution to an ABLE account is not a qualified higher education expense under Section 529, such rollovers would not be allowed without tax implications.

This is unfortunate, since ABLE accounts are intended for higher education expenses, as well as medical and other qualified expenses. Section 529A(e)(5) includes expenses such as education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses as identified by regulation. Treasury concludes in the Notice that qualified disability expenses should permit basic living expenses, and requests comments on other expenses that should be considered.

Changes in Eligibility

The Notice also addresses how to handle situations such as a change in eligibility, excess contributions and the resultant income, gift and generation-skipping tax application, and distribution upon the death of the beneficiary, as well as unrelated business taxable income for an ABLE program, which have not been discussed here. It also advises that Treasury and the IRS intend to propose regulations under IRC Section 4973, as part of planned IRA regulations, to reflect that ABLE accounts are subject to that section.

Even though states are beginning to design ABLE programs, it is likely that final IRS guidance will change the structure of implemented programs. There is no expected date for release of final regulations. Some states have been hesitant to implement an ABLE program without regulations; in March, Treasury encouraged states to proceed before final regulations are issued. The Notice references intended transition relief for programs that do not comply with final regulations. The next step is the October 14 hearing on proposed regulations. Anyone interested in attending the 10 a.m. hearing in Washington, DC, should call Regina Johnson at 202-317-6901 to be placed on the building access list.

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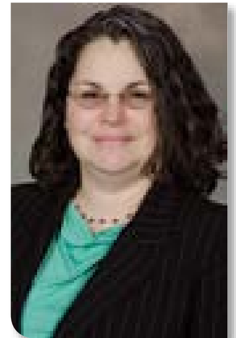

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