INVESTMENT COMPANY INSTITUTE

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September 18, 2015

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

Re: ABLE Act Rulemaking

Dear Treasury and Internal Revenue Service Rulemaking Staff:

The Investment Company Institute[1] appreciates having the opportunity to comment on the regulations proposed by the Internal Revenue Service ("IRS") to implement Section 529A of the Internal Revenue Code (the "Code"), which is also known as the ABLE Act.[2] The Institute supports the proposed regulations' adoption and we commend the IRS for its thorough and thoughtful consideration of the variety of implementation issues arising under the Act. We do, however, recommend various revisions to the proposed regulations in order to better align their requirements with the operations of the states' 529 college savings plans and the operating systems of financial institutions in order to avoid imposing any requirements that are likely to increase the costs and expenses associated with operating ABLE Act accounts.

In summary, the Institute recommends that the IRS substantively revise provisions in the proposed regulations relating to:

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[1] The Investment Company Institute (the "Institute" or "ICI") is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $18.2 trillion and serve more than 90 million U.S. shareholders.

[2] *See Guidance Under Section 529A; Qualified ABLE Programs,* Department of the Treasury REG-102837-15, 80 Fed. Reg. 35602 (June 22, 2015). Earlier this month, the Institute filed a letter with the IRS encouraging it to publish interpretive guidance during the pendency of this rulemaking in order to facilitate implementation of the states' ABLE Act programs. *See* Letter from the undersigned to the IRS dated Sept. 4, 2015.

(1) Determining the eligibility status of an ABLE account owner;
(2) Documenting the use of proceeds withdrawn from an ABLE Act account;
(3) Collecting TINs of contributors to an ABLE Act account; and
(4) The treatment of earnings and the calculation of earnings ratios.

In addition to these substantive revisions, we also recommend that the IRS revise other provisions in the proposed regulations for the sake of either clarifying their meaning or providing programs greater flexibility. Each of these issues is discussed in more detail below.[3]

## I. BACKGROUND

While the IRS's regulations will most directly impact the states in designing and implementing their ABLE Act programs, they will also impact members of the Institute. This is because the states rely on the Institute's members, as financial services industry partners, to assist them in operating their programs – just as they do with their 529 college savings plans.[4] As such, any duties the regulations impose on the states may be delegated by them to their financial industry partners. Accordingly, as the IRS considers adopting final regulations, we recommend that it remain cognizant of two issues.

First, the persons expected to administer and run the states' ABLE Act programs are, in large part, not those persons or agencies that have experience in dealing with disabled individuals or with the variety of regulations at the state and Federal level that govern aid or assistance provided to disabled individuals. Instead, as noted above, the persons with this responsibility are expected to be Federally-registered financial institutions that are in the business of establishing financial accounts, managing money, processing transactions, and complying with state and Federal laws governing the operations of financial institutions – including IRS regulations relating to tax reporting. These financial institutions are not accustomed to receiving or reviewing very personal medical information on owners of financial accounts and they lack the expertise to pass on the validity or adequacy of disability determinations.

Second, due to the limitations of our members' operational systems—which have been designed to accommodate mutual fund, retirement, and 529 plan account transactions—imposing requirements that cannot be accommodated in today's systems may result in needless program inefficiencies, increased costs, and delays before 529A plans can become operational. To ensure the success of ABLE Act programs, and consistent with the Act's purpose to "assist families and disabled individuals in

[3] Please note that our recommendations are presented in the order of the proposed regulations rather than in the order of the importance of the issue to our members.

[4] Our members have a long history of working with the states on helping administer and operate the states' education savings plans accounts under Code section 529.

meeting their financial needs,"[5] we recommend that the IRS do everything possible to enable the states and their financial institution partners to establish and operate these accounts as efficiently, inexpensively, and quickly as possible. We believe each of the recommendations below is a step towards reducing the expenses associated with, and increasing the efficiency of, operating these programs.[6]

## II. PROPOSED REGULATION § 1.529A-1, EXEMPT STATUS OF QUALIFIED ABLE PROGRAM AND DEFINITIONS

### A. "Contracting State"—Proposed Regulation § 1.529A-1(b)(2)

In addition to defining the term "Contracting State," the Institute recommends that this regulation clarify whether a "Contracting State" may contract with only one state or whether, instead, a Contracting State can execute contracts with multiple states to provide its residents multiple program options. This is not currently clear from this provision.

### B. "Earnings Ratio"—Proposed Regulation § 1-529A-1 (b)(8)

The Institute recommends incorporating flexibility to calculate the earnings ratio for an ABLE Act account on a more frequent basis. The earnings ratio is used to determine the earnings portion of a distribution from an ABLE Act account and, under the proposed regulations, is calculated only at year end. The earnings ratio also should be calculated when an account is rolled over to another state.

## III. PROPOSED REGULATION § 1.529A-2, QUALIFIED ABLE PROGRAM

### A. Residency Requirement —Proposed Regulation § 1.529A-2(a)(2)

The Institute supports this provision, which requires a designated beneficiary opening an ABLE Act account to be a resident of the state establishing an ABLE Act program or a contracting state. To facilitate the state's implementation of this requirement, we recommend that the regulation expressly permit a program to rely on an attestation by the designated beneficiary regarding his or her state of residence. This would avoid a program having to verify such information when opening an account.

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[5] *See* HR REP. NO. 113-614 on the ABLE Act of 2014 (2014) (the "House Report") at p. 11.

[6] The Institute has no recommendations relating to proposed regulations section 1.529A-3, relating to Tax Treatment, 1.529A-5, relating to Reporting of the Establishment of and Contributions to an ABLE Account, and proposed regulations section 1.529A-7, relating to Electronic Furnishing of Statements to Designated Beneficiaries and Contributors. We support these proposed regulations in their current form.

**B. Establishment of an ABLE Account—Proposed Regulation § 1.529A-2(c)(1)**

The Institute urges that this provision permit the person with signature authority to designate a successor person with signature authority over the account in the event of death or incapacity of the original person with signature authority. This option would permit the designated beneficiary to continue to benefit fully from the 529A account established for her or his benefit without the need for a court order or other formal proceeding.

**C. Eligible Individuals—Proposed Regulation § 1.529A-2(d)**

Code section 529A(e)(1) defines an "eligible individual" as a person: (1) who is either entitled to benefits based on blindness or disability under Title II or XVI of the Social Securities Act, provided such condition occurred prior to the individual attaining the age of 26; or (2) for whom "a disability certification with respect to such individual is filed with the Secretary [of the Treasury]" for such taxable year." Pursuant to Code section 529A(e)(2), the term "disability certification" means, in general, "a certification to the satisfaction of the Secretary by the individual or the parent or guardian of that individual" that (1) certifies that the individual qualifies as an eligible individual under the Act and (2) includes a copy of the individual's diagnosis, which is signed by a qualified physician. The rationale for putting this responsibility on the Treasury Department, as explained in the Report of the Committee on Ways and Means, was the desire to protect the confidential nature of the very sensitive medical information relating to an eligible individual:

> . . . Treasury is responsible for maintaining the list of eligible individuals, including those who have a Social Security disability determination, *so that the States and the IRS need to contact only one entity to confirm an individual's eligibility status.* The SSA is responsible for providing confirmation of disability determination in the manner specified by Treasury. *This process does not violate the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") because no diagnosis information should be exchanged, only binary information on the result of a disability determination or certification for a given tax year.*[7]

In other words, as envisioned by Congress, the ABLE Act vests in the Secretary of the Treasury the duty to maintain the certifications of disability that verify a person is, in fact, eligible to open an ABLE account. Under the Act's intended design, states would have a single source to consult to determine whether a person opening an ABLE account is an eligible person, thereby avoiding states and the Secretary from having to exchange the account owners'

[7] *See* House Report at pp. 13-14. [Emphasis added.]

personal medical information,[8] thereby protecting such person's privacy interests and thereby also avoiding HIPAA concerns.

Proposed regulations section 1-529A-2(d), however, puts the onus on the states and the state programs to determine eligibility status.[9] Unlike Congress's intent, this construct requires disabled individuals to expose their very personal and private medical information to state workers, financial institutions, and financial institution professionals.[10] This seems wholly inappropriate, unnecessary, and harmful to account owners' privacy interests.

We have very serious concerns with the proposed regulations imposing upon states and their financial institution partners the duty to obtain personal medical information from an account holder in order to establish an ABLE account. We strongly recommend that, if the Department of the Treasury elects not to act as the repository for this information as envisioned by Congress, it instead permit persons opening an ABLE Act account to self-certify their status as an "eligible individual." In particular, the final regulations should permit the designated beneficiary to certify under penalties of perjury that she or he has or would qualify for a "disability certification" as defined in final regulations. This approach would: help ensure that only eligible individuals open ABLE Act accounts; protect eligible individuals' privacy interests; and place the burden for any misrepresentations or material omissions on the person seeking the tax advantages associated with the account. We recommend further that the amount of information required by the self-certification be as limited as possible. Finally, we recommend that the regulations eliminate the need for annual re-certifications. Instead, the designated beneficiary should be required to inform the program whenever the person on longer qualifies as an "eligible individual."

### D. Qualified Disability Expenses—Proposed Regulation § 1.529A-2(h)

The proposed regulations, in part, require a qualified ABLE program to "establish safeguards to distinguish between distributions used for the payment of one or more qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as

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[8] Instead, only information regarding whether the account owner is an "eligible individual" would be exchanged between the Secretary and the states – not the basis for such determination.

[9] *See* Proposed Regulation §1.529A-2 (d) and (e). Presumably this very personal information would also have to be shared with Department of the Treasury, thereby further eroding the eligible individual's privacy interests.

[10] As stated in a letter the College Savings Plan Network ("CSPN") filed with the IRS in July 2015, "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." *See* Letter from Betty Lochner, Director, Guaranteed Education Tuition Program, Chair, CSPN, to the IRS dated July 29, 2015 at p. 2. The same is true of the states' financial institution partners.

that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration." This requirement is just one example of the detailed requirements being proposed to ensure that the ABLE Act is not abused.

Our concern with these detailed requirements is that they may have a particularly negative impact on the eventual availability of section 529A plans. First, financial institutions lack the systems necessary to capture, maintain, and report information regarding *why* money is being withdrawn from an account. Requiring financial institutions to redesign their current processing systems to accommodate this information for the ABLE Act accounts they hold is likely to be unduly costly.[11] Second, even if these systems could be built, it may prove extraordinarily difficult to capture the information when disbursements are made—particularly if disbursements may be made, as many have suggested, through debit cards or section 529A account checks.

Instead, we recommend that the responsibility for establishing the qualified nature of a disbursement should be placed solely on the individual. This approach has worked well in the section 529 plan account context.[12] In addition to recognizing the limitations of financial institutions' processing and recordkeeping systems, this approach has the advantage of ensuring that ABLE Act account owners can access their funds without administrative delays.[13] This approach also will help ensure more accurate recordkeeping of how the funds actually were spent—not how they were intended to be spent.[14]

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[11] The systems in use today do not have this functionality because, to our knowledge, there is no other requirement under state or Federal law that requires financial institutions to obtain information of this sort.

[12] It bears remembering that, when Congress originally enacted Code section 529, it required 529 plans to verify that distributions from 529 college savings accounts were used for the beneficiary's qualified higher education expenses. This requirement proved unduly burdensome for states and most problematic for financial institutions operating the states' 529 plans because it largely resulted in processing distributions manually and not through automated processes, which increased both the processing time and the programs' costs. We were quite pleased when, in December 2001, Congress revised Code section 529 to eliminate this requirement.

[13] As noted by CSPN in a letter it filed with the IRS in August 2015, "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." *See* Letter from Betty Lochner, Director, Guaranteed Education Tuition Program, Chair, CSPN, to the IRS, dated August 21, 2015 at p. 2.

[14] For example, at the time an account owner withdraws money from an ABLE Act account, the owner may intend to use the proceeds for one expense but, due to intervening circumstances, may need to use the money for another entirely different purpose. In such instances, the reason given for withdrawing the funds may no longer be accurate notwithstanding the account owner's intention at the time the funds were withdrawn.

If more detailed reporting is required, we recommend that the IRS clarify how disbursements for expenses (*i.e.,* qualified non-housing, qualified housing, and non-qualified expenses) should be reported and provided to the designated beneficiary, contributors, and the IRS, as applicable. This clarification is important as neither the proposed regulations nor the draft IRS Form 1099-QA appear to provide clear guidance regarding this issue.

Finally, we recommend that the final regulations clarify whether an expense must occur in the same calendar year as a disbursement from the ABLE Act account in order for it to be a qualified expense under the regulations. In our view, and in the interest of providing flexibility to designated beneficiaries, we recommend that the IRS not require the disbursement and the expenditure to be in the same year in order to be deemed a qualified disability expense. To ensure that there is, however, a nexus between a disbursement from an account and payment of a qualified disability expense, we recommend that the IRS build into the regulation a period of time (*e.g.,* 60, 90, or 120 days) after taking a disbursement during which the proceeds must be used to pay for a qualified disability expense.

### E. Return of Excess Contributions—Proposed Regulation § 1.529A-2(g)(4)

To implement the provisions in the ABLE Act that limit account contributions, the proposed regulation would require an ABLE Act account to return any excess contribution[15] "to the person or persons who made that contribution." This requirement is problematic, particularly if more than one person contributes to the account, because of the recordkeeping burdens of tracking the amount, source, and timing of contributions—all of which would be required to determine to whom excess contributions should be returned. It would be much simpler to return the excess contribution to the designated beneficiary and make that person responsible for returning the excess contribution to the appropriate contributor (most likely a family member). This approach would reduce substantially, if not eliminate, the recordkeeping requirements for contributions.[16]

We understand that this recommendation may be problematic for those designated beneficiaries who rely on benefits administered by the Social Security Administration. This is because, treating such excess contributions as the property of the designated beneficiary may result in the disqualifying the beneficiary for such benefits. To address this concern and avoid adversely impacting such designated beneficiaries, we recommend that the IRS regulations require that such excess contributions be treated as the property of the beneficiary *unless,* when the account is opened (or thereafter), the beneficiary agrees upon request of the program to provide the program the contact

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[15] The term "excess contribution" is defined in proposed regulations section 1.529A-1(b)(10) as "the amount by which the amount contributed during the taxable year of the designated beneficiary to an ABLE account exceeds the limit in effect under section 2503(b) for the calendar year in which the taxable year of the designated beneficiary begins."

[16] This would include the recordkeeping associated with capturing and maintaining contributors' TINs, which, as discussed below, would be quite problematic. Our recommended approach could be used for excess contributions without regard to whether they are returned to the designated beneficiary prior to or after being invested in the account.

information and TIN of any person making an excess contribution. This approach would preserve the beneficiary's social security benefits while addressing our concerns with programs having to capture and retain TINs on all contributors.

### F. Investment Direction—Proposed Regulation § 1.529A-2(l)

Consistent with the language of the ABLE Act, proposed regulations section 1.529A-2(l) would prohibit a designated beneficiary from directing the investment of any contributions to an ABLE Act program more than twice in a calendar year. While we support the regulations including this limitation, we recommend that the IRS clarify that this prohibition will not prohibit designated beneficiaries from transferring account assets between any investment portion of the account and a related financial account (*e.g.,* a money market fund) that is maintained through the ABLE Act program and used to facilitate the timely payment of redemptions. So, for example, assume that, in order to provide designated beneficiaries ready access to their account proceeds, a state's program is designed to automatically transfer assets from the account's investment assets into a related money market, checking, or similar financial account that is operated by the program and linked to the investment account and used by the beneficiary exclusively to facilitate payments through a debit card or check. We do not believe that such transfers—which would occur in lieu of the designated beneficiary having to request a redemption via a check issued by the program—should be treated as an investment direction. Instead, they should be treated as a redemption option for the designated beneficiary, which will provide the beneficiary more immediate access to funds in order to meet qualified disability expenses.

### G. No Pledging of Interest—Proposed Regulation § 1.529A-2(m)

The proposed regulations implement the Act's prohibition against any interest in an ABLE Act account being used as security for a loan. We urge that the final regulations clarify that advancing funds from an account to the designated beneficiary or at the designated beneficiary's request—such as through checking account or debit card privileges connected to the account—is neither a loan nor security for a loan.[17] This clarification will enable the program to provide the beneficiary more timely access to account proceeds without raising concerns about whether such accommodation is viewed as a pledging of an interest in the account.

### H. Post-Death Payments—Proposed Regulation § 1.529A-2(p)

This provision requires a state's program to distribute all or a portion of the balance remaining in an ABLE Act account to a state that files a claim against the account or the beneficiary following the

[17] We presume that the program would not advance any funds – through a debit card or check written by the designated beneficiary – in excess of the amount in the ABLE Act account, thereby precluding the program from making a loan to the designated beneficiary.

beneficiary's death. The Institute supports this provision but recommends that, in the event that it is triggered, the regulation clarify how the payment—which is not a taxable distribution—should be reported.

## IV. PROPOSED REGULATION § 1.529A-4, GIFT, ESTATE, AND GENERATION-SKIPPING TRANSFER TAXES

### A. Designated Beneficiary as Contributor—Proposed Regulation § 1.529A-4(a)(3)

The proposed regulations require that a contribution made by a designated beneficiary, and "any earnings attributable to that contribution," be treated as a gift to a successor beneficiary. As this requirement creates significant recordkeeping burdens, we recommend that the IRS delete it.

Notwithstanding the requirement in proposed Regulation 1.529A-4(a)(3), the proposed regulations do not expressly require tracking specific tax lots for each contribution nor separate earnings calculations with respect to each such lot. This approach acknowledges that ABLE Act accounts are likely to receive large numbers of contributions—likely from multiple contributors—and to make a large numbers of distributions over the life of the account. Requiring a program to assign "earnings attributable to that contribution" as proposed by this regulation will, in essence, require the program to track specific tax lots for each contribution. And yet, as implicitly recognized by the IRS, a recordkeeper will not be able to make the required assignments unless a separate set of records is kept for every beneficiary contribution. As noted below, maintaining records for each contributor is unduly burdensome. We therefore recommend that the IRS delete this requirement.

## V. PROPOSED REGULATION § 1.529-6, REPORTING OF DISTRIBUTIONS FROM AND TERMINATION OF AN ABLE ACCOUNT

### A. Request for TIN of Contributor(s)—Proposed Regulation 1.529A-6(d)

Proposed regulations section 1.529A-6(d) would require a filer to "request the TIN for each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that persons' correct TIN." It would also require the filer to "clearly notify each contributor to the account that the law requires that person to furnish a TIN so that it may be included on an information return to be filed by the filer." We do not understand either the reason for this requirement or how the benefits of collecting TINs outweighs the burdens of collecting, maintaining, and reporting this information.

Our concerns with this provision derive from the fact that financial institutions' processing systems currently cannot capture the TIN of each person making a contribution to an existing financial account. Also, we are uncertain how a financial institution could capture such information in light of the fact that contributors can submit contributions by checks in the mail, automated clearing house

(ACH) transfers directly from a contributor's bank account, and federal fund wire transfers. Although financial institutions capture and maintain account owners' TINs, there is currently no way for their systems to store a TIN – assuming they could obtain one – of each and every person making a contribution to an account. Such a requirement is likely to result in financial institutions having to undertake expensive and significant enhancements to their current recordkeeping systems or run their programs manually rather than using their automated systems. It would be unduly time consuming and expensive to operate these accounts manually. In the interest of those persons the Act is intended to help, we strongly encourage the IRS to avoid imposing any requirements, such as this, that are likely to increase the costs and expenses associated with operating ABLE Act accounts.

We believe that the IRS's interest in facilitating the return of excess contributions can be achieved through less burdensome and problematic means. In particular, we recommend that the IRS treat all contributions made to an ABLE Act account as being owned by the designated beneficiary.[18] This approach, which is wholly consistent with the Act and with IRS Notice 2015-18, would obviate the need for a program to obtain a contributor's TIN because the plan would have the designated beneficiary's TIN and contact information and could, therefore, readily return any excess contributions to the beneficiary. However, as discussed above, if this approach would adversely impact the designated beneficiary's Federal or state benefits (*e.g.,* Social Security benefits), the regulations could off the beneficiary the option of agreeing to provide the program the contact information and TIN for only those persons who make an excess contribution so the program can return such contribution to such person. Should the beneficiary either not agree or not provide the information upon request of the program, the default would be to treat the excess benefits as the property of the beneficiary.

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The Institute appreciates your consideration of our comments on the proposed ABLE Act regulations. If you have any questions concerning these comments, please do not hesitate to contact the undersigned by phone (202-326-5825) or email (tamara@ici.org).

Regards,

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Tamara K. Salmon
Associate General Counsel

Cc: Catherine V. Hughes, Estate & Gift Tax Attorney-Advisor
Office of Tax Policy, U.S. Department of the Treasury

[18] *See, also,* our discussion under Item III.E., above, relating to the return of excess contributions.

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September 4, 2015

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

Re: ABLE Act Rulemaking

Dear Treasury and Internal Revenue Service Rulemaking Staff:

The Investment Company Institute[1] is writing to encourage the Department of the Treasury and the Internal Revenue Service ("IRS") to publish interpretive guidance to facilitate implementation of the states' ABLE Act programs under Internal Revenue Act Section 529A.[2] While we intend to file a comment letter on the regulations the IRS proposed to implement the ABLE Act,[3] in the meantime, we are writing to impress upon the IRS the need to publish interpretive guidance clarifying three of the more substantive issues the proposed regulations raise. In the absence of such guidance, states may be unable to implement fully their ABLE Act programs, notwithstanding the fact that the states have already enacted the legislation necessary to create and implement such programs and states are in the

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[2] We understand that the College Savings Plan Network ("CSPN") has also requested that the IRS issue interpretive guidance during the pendency of this rulemaking. *See* Letter to the Internal Revenue Service from Betty Lochner, Director, Guaranteed Education Tuition Program, Chair, CSPN, dated July 29, 2015 (the "CSPN July 2015 Letter"); and Letter to the Internal Revenue Service from Betty Lochner, Director, Guaranteed Education Tuition Program, Chair, CSPN, dated August 21, 2015 (the "CSPN August 2015 Letter").

[3] *See Guidance Under Section 529A: Qualified ABLE Programs,* Department of the Treasury REG-102837-15, 80 Fed. Reg. 35602 (June 22, 2015).

process of designing their programs. As you consider issuing interpretive guidance, we urge that you focus on three areas that are addressed in the proposed regulations:

(1) Satisfying the eligibility determination;
(2) Determining the use of proceeds from an account distribution; and
(3) Obtaining a tax identification number (TIN) for all contributors to an ABLE Act account.

While our perspective on each of these issues is briefly summarized below, our interest in each of these and other ABLE Act implementation issues is aligned with the interests of the states implementing these programs, as the members of the Institute are the financial institutions and asset managers that are expected to assist the states in operating their programs. As such, states are likely to delegate any duties imposed on them under the proposed regulations on those financial institutions that assist them in establishing and running their programs.[4]

Due to their similarity with the states' 529 college savings programs, the persons expected to administer and run the states' ABLE Act programs are, in large part, not those persons or agencies that have experience in dealing with disabled individuals or with the variety of regulations at the state and Federal level that govern aid or assistance provided to disabled individuals. Instead, subject to the states' oversight, the persons with this responsibility are expected to be Federally-registered financial institutions that are in the business of establishing financial accounts, managing money, processing transactions, and complying with state and Federal laws governing the operations of financial institutions – including IRS regulations relating to tax reporting. As such, it is crucially important that, in adopting regulations to administer Section 529A of the IRC, and in issuing any interpretive guidance, the IRS take into account the role financial institutions will play in administering these programs and the limitations this may present to satisfying the regulations' requirements.

To ensure the success of ABLE Act programs, and consistent with the Act's purpose to "assist families and disabled individuals in meeting their financial needs,"[5] we recommend that the IRS do everything possible to enable the states and their financial institution partners to establish and operate these accounts as efficiently and inexpensively as possible. We believe each of the recommendations below is a step towards reducing the expenses associated with, and increasing the efficiency of, operating these programs.

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[4] Our members have a long history of working with the states on helping administer and operate the states' education savings accounts, which were created and administered in compliance with Section 529 of the Internal Revenue Code ("IRC").

[5] *See* HR REP. NO. 113-614 on the ABLE ACT OF 2014 (2014) (the "House Report") at p. 11.

**DETERMINING AND DOCUMENTING AN ACCOUNT OWNER'S ELIGIBILITY STATUS**

Subdivision 529A(e)(1) of the ABLE Act defines an "eligible individual" as a person: (1) who is either entitled to benefits based on blindness or disability under Title II or XVI of the Social Securities Act, provided such condition occurred prior to the individual attaining the age of 26; or (2) for whom "a disability certification with respect to such individual is filed with the Secretary [of the Treasury" for such taxable year." Pursuant to subdivision 529A(e)(2) of the Act, the term "disability certification" means, in general, "a certification to the satisfaction of the Secretary by the individual or the parent or guardian of that individual" that (1) certifies that the individual qualifies as an eligible individual under the Act and (2) includes a copy of the individual's diagnosis, which is signed by a qualified physician. In enacting this provision, the Report of the Committee on Ways and Means expresses concerned with protecting the confidential nature of the very sensitive medical information relating to an eligible individual:

> . . . Treasury is responsible for maintaining the list of eligible individuals, including those who have a Social Security disability determination, *so that the States and the IRS need to contact only one entity to confirm an individual's eligibility status.* The SSA is responsible for providing confirmation of disability determination in the manner specified by Treasury. *This process does not violate the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") because no diagnosis information should be exchanged, only binary information on the result of a disability determination or certification for a given tax year.*[6]

In other words, as envisioned by Congress, the ABLE Act vests in the Secretary of the Treasury the duty to maintain the certifications of disability that verify a person is, in fact, eligible to open an ABLE account. It bears emphasizing that, under this design, states have a single source to consult to determine whether a person opening an ABLE account is an eligible person. As a result, states and the Secretary would not exchange the account owners' personal medical information,[7] thereby protecting such person's privacy interests and avoiding HIPAA concerns.

The regulations the IRS proposed seem inconsistent with Congress's intent. In particular, the proposed regulations appear to put the onus on the states and the state programs to determine eligibility status.[8] Unlike Congress's intent, this construct: (1) imposes upon

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[6] *See* House Report at pp. 13-14. [Emphasis added.]

[7] Instead, only information regarding whether the account owner is an "eligible individual" would be exchanged between the Secretary and the states – not the basis for such determination.

[8] *See* Proposed Regulation 1.529A-2 (d) and (e). Presumably this very personal information would also have to be shared with Treasury, thereby further eroding the eligible individual's privacy interests.

persons that have no expertise in making disability determinations a duty to do so; and (2) requires a disabled individual to expose their very personal and private medical information to state workers, financial institutions, and financial institution professionals.[9] This seems wholly inappropriate, unnecessary, and harmful to an account owner's privacy interests.

Accordingly, like CSPN, we have very serious concerns with the Treasury, through the proposed regulations, imposing upon states and their financial institution partners the duty to obtain personal medical information from an account holder in order to establish an ABLE account. We strongly recommend that, if Treasury elects not to act as the repository for this information, it instead should permit the person opening an ABLE Act account to self-certify their status as an "eligible individual." This approach, which is supported by CSPN,[10] would: help ensure that only eligible individuals open ABLE Act accounts; relieve states and their financial institution partners from the burden of making decisions that they are not competent to make regarding disabilities; protect eligible individuals' privacy interests; and place the burden for any misrepresentations or material omissions on the person seeking the tax advantages associated with an ABLE Act account. If the IRS concurs and permits self-certifications, we recommend that it limit the information in such self-certification to only the information necessary to meet the requirements of the ABLE Act.[11] To avoid this issue delaying the implementation of the state programs, we strongly encourage the IRS to publish interpretive guidance allowing states to satisfy eligibility determination requirement through a self-certification process.

**DETERMINING THE USE OF PROCEEDS FROM A DISTRIBUTION**

Proposed Regulation 529A-2(h), which defines the term "qualified disability expense," provides in part 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 as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration." The ABLE Act does not appear to mandate this requirement.[12] While Section 103 of the Act governs the treatment of

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[9] As stated in CSPN's July Letter, "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." CSPN July Letter at p. 2. The same is true of the states' financial institution partners.

[10] The CSPN August 2015 Letter proposes the contents of such self-certifications. *See* CSPN August 2015 letter at pp. 1-2.

[11] We additionally recommend that Treasury relieve states of the burden of annually re-certifying an account owner's continued status as an eligible individual by permitting the individual to self-certify that, in the event his or her eligible status changes, the account owner agrees to notify the state or financial institution holding the account.

[12] Indeed, it seems the only provision in the Act that is somewhat related is Subdivision 529A(g)(4), which requires the Secretary to prescribe rules to carry out the purposes of the Act. In particular, Subdivision 529A(g)(4) requires that the

ABLE Act distributions "for purposes of certain other means-tested Federal programs," there does not appear to be anything in the Act requiring state programs or financial institutions administering such programs to identify the purpose or use of any distribution from an ABLE Act account. Nor does the Act appear to require an ABLE Act program to report to the Secretary the purpose of use of any distribution from an account. Indeed, Subdivision 529A(d), which imposes reporting requirements on "each officer or employee having control of the qualified ABLE program," only requires the reporting "to the Secretary and to the designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require." Accordingly, while the Act provides the Secretary authority to adopt regulations, including regulations that require the reporting of distribution information and the purpose for such distribution, the Act does not appear to require this result. We strongly recommend that, if the IRS requires the reporting of the purpose for any distribution from an ABLE account, it require the taxpayer (*i.e.* the account owner), not the program, to file such reports.

This is important because financial institutions lack the systems necessary to capture, maintain, and report information regarding *why* money is being withdrawn from an account at a financial institution. Requiring financial institutions to redesign their current processing systems to accommodate ABLE Act accounts is likely to be unduly costly.[13]

It bears remembering that, when Congress originally enacted IRC Section 529, it required 529 plans to verify that distributions from 529 college savings accounts were used for the beneficiary's qualified higher education expenses. This requirement proved unduly burdensome for states and most problematic for financial institutions operating the states' 529 plans because it largely resulted in processing distributions manually and not through automated processes, which increased the programs' costs. We were quite pleased when, in December 2001, Congress revised IRC Section 529 to eliminate this requirement and the IRS issued Notice 2001-81 verifying that, as of December 31, 2001, a Section 529 program "will no longer be required to verify how distributions are used . . .."[14] In repealing this requirement, the onus was placed on the taxpayer – not the 529 plan – to document how distributions from these accounts were being used.

The same result should occur under the ABLE Act. In lieu of requiring the ABLE Act program or its financial institution partner to obtain, maintain, and report how distributions are used, this

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rules promulgated by the Secretary, both "generally define qualified disability expenses" and "be developed in consultation with the Commission of Social Security, relating to disability certifications and determinations of disability . . .."

[13] The systems in use today do not have this functionality because, to our knowledge, there is no other requirement under state or Federal law that requires financial institutions to obtain information of this sort.

[14] *See* IRS Notice 2001-81 (December 2001) at p. 2.

obligation should be on the account owner. In addition to recognizing the limitations of financial institutions' processing and recordkeeping systems, this approach has the advantage of ensuring that ABLE Act account owners can access their funds without administrative delays[15] and better enable them to account for how the funds were actually spent – not how they intended to spend them.[16]

Accordingly, like CSPN, we strongly encourage the IRS to eliminate from the proposal the requirement for states to collect information regarding the purpose of distributions and to publish Interpretive Guidance alerting states that, in designing and implementing their programs, they are not required to collect such information from account owners.

**COLLECTING TINS OF ACCOUNT CONTRIBUTORS**

As proposed, Regulation 1.529A-6(d) would require a filer to "request the TIN for each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that persons' correct TIN." It would also require the filer to "clearly notify each contributor to the account that the law requires that person to furnish a TIN so that it may be included on an information return to be filed by the filer." Apparently this provision is to facilitate the return of excess contributions to the account. Like CSPN, we believe the burdens associated with this provision outweigh any benefits intended by it, and we recommend that the IRS delete it from the regulations. As CSPN notes, "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."

From a more practical perspective, however, financial institutions' processing systems currently cannot capture the TIN of each person making a contribution to an existing financial account. We are uncertain how a financial institution could capture such information in light of the fact that contributors can submit contributions by checks in the mail, automated clearing house (ACH) transfers from directly from a contributor's bank account, and federal fund wire transfers. While financial institutions capture and maintain account owners' TINs, there is currently no way for their systems to store a TIN – assuming they could obtain one – of each and every person making a contribution to an account. As such, this requirement is likely to result in financial institutions having to undertake expensive and significant enhancements to their current recordkeeping systems or run

[15] As noted by CSPN, "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." CSPN August Letter at p. 2.

[16] For example, at the time an account owner withdraws money from an ABLE Act account, the owner may intend to use the proceeds for one expense but, due to intervening circumstances, may need to use the money for another entirely different purpose. In such instances, the reason given for withdrawing the funds may no longer be accurate notwithstanding the account owner's intention at the time the funds were withdrawn.

their programs manually rather than using their automated systems. It would be unduly time consuming and expensive to operate these accounts manually. As noted above, in the interest of those persons the Act is intended to help, we strongly encourage the IRS to avoid imposing any requirements that are likely to increase the costs and expenses associated with operating ABLE Act accounts.

Accordingly, we concur with CSPN's recommendation that the IRS eliminate this requirement. We also concur with CSPN that, to avoid hindering implementation of the states' ABLE Act programs, the IRS publish interpretive guidance affirming that states are not expected to collect each contributor's TIN. If the IRS remains concerned with excessive contributions to ABLE Act accounts, we recommend that it address its concerns through the account's designated beneficiary. Unlike 529 college savings plans, all monies deposited into an ABLE Act account become the designated beneficiary's property. As a result, any excess contributions that must be returned may be the beneficiary's property. Because the plan would have the designated beneficiary's TIN and contact information, it could return such excess contributions to such person. This approach alleviates the need for the plan to collect TINs on all contributors, while addressing the IRS's concerns with excess contributions.

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The Institute appreciates your consideration of our comments regarding the need for the issuance on interpretive guidance during the pendency of the regulations to implement the ABLE Act. If you have any questions concerning these comments, please do not hesitate to contact the undersigned by phone (202-326-5825) or email (tamara@ici.org).

Regards,

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