Guidance on the Contribution Limits Applicable to ABLE Accounts

Notice 2018-62

SECTION 1. PURPOSE

This notice announces that the Department of the Treasury (the Treasury Department) and the Internal Revenue Service (the IRS) intend to issue proposed regulations providing clarification regarding the contribution limits provided in § 529A(b)(2) of the Internal Revenue Code (Code).

SECTION 2. BACKGROUND

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the "ABLE Act") was enacted on December 19, 2014, as part of The Tax Increase Prevention Amendments (P.L. 113-295). The ABLE Act added § 529A to the Code. Section 529A allows a State (or its agency or instrumentality) to establish and maintain a tax-advantaged savings program under which contributions may be made to an ABLE account for the purpose of paying for the qualified disability expenses of the designated beneficiary of the account. Section 529A was amended by "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," P.L. 115-97 (2017 Act), signed into law on December 22, 2017.

Prior to amendment by the 2017 Act, § 529A(b)(2) stated that a program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted unless it is in cash and if the contribution (other than a rollover contribution described in § 529A(c)(1)(C)) would not result in aggregate contributions from all contributors in excess of the amount of the § 2503(b) gift tax exclusion for the calendar year in which the designated beneficiary's taxable year begins. Under § 529A(b)(2), rules similar to the rules of § 408(d)(4) apply to permit the return of excess contributions (with any attributable net income) on or before the due date (including extensions) of the designated beneficiary's income tax return. In addition, under § 529A(b)(6), a qualified ABLE program must provide adequate safeguards to ensure that total contributions do not exceed the State's limit for aggregate contributions under its qualified tuition program as described in § 529(b)(6). A qualified tuition program under § 529 is a program established by a State or its agency or instrumentality that permits a person to prepay or contribute to a tax-favored savings account for a designated beneficiary's qualified higher education expenses (QHEEs) or a program established by an eligible educational institution that permits a person to prepay a designated beneficiary's QHEEs.

The Treasury Department and the IRS issued proposed regulations concerning qualified ABLE programs. These proposed regulations were released on June 19, 2015 and published in the Federal Register on June 22, 2015 (80 Fed. Reg. 35602). The proposed regulations provide rules by which states or state agencies or instrumentalities may establish and maintain a qualified ABLE program. Prop. Treas. Reg. § 1.529A-2(g)(4) would require a qualified ABLE program to return any excess contribution or excess aggregate contribution, including all net income attributable to that excess contribution or excess aggregate contribution, to the person or persons who made that contribution. The qualified ABLE program must use the rules set forth in § 1.408-11 for this purpose, treating an ABLE account the same way that an IRA is treated, and must return excess contributions or excess aggregate contributions in accordance with § 408(d)(4). To facilitate the proper tax treatment of returned excess contributions, Prop. Treas. Reg. § 1.529A-6(d) would require ABLE programs to collect the taxpayer identification number (TIN) of all contributors to an ABLE account.

The Treasury Department and the IRS issued Notice 2015-81, 2015-49 IRB 784 (Dec. 7, 2015), which, in response to comments on the proposed regulations, describes how the Treasury Department and the IRS intend to revise certain provisions of the proposed regulations under § 529A when those regulations are finalized. One of the provisions is the requirement under Prop. Treas. Reg. § 1.529A-6(d) to collect the TIN of each contributor to the ABLE account (if the program does not already have a record of the person's correct TIN). Notice 2015-81 states that it is anticipated that the final regulations will not require ABLE programs to request the TIN of ABLE contributors if the program has a system in place to identify and reject contributions that exceed the annual or cumulative limits. However, if an excess contribution is deposited into a designated beneficiary's ABLE account, the program must request the TIN of the contributor that made the excess contribution. Final regulations under § 529A are included on the 2017-2018 Priority Guidance Plan.

The contribution limits and other provisions of section 529A were modified by the 2017 Act. Specifically, the 2017 Act amended § 529A(b)(2)(B) to allow a designated beneficiary described in § 529A(b)(7) to contribute, prior to January 1, 2026, an additional amount in excess of the limit in § 529A(b)(2)(B)(i) (the annual gift tax exclusion amount in § 2503(b), formerly set forth in § 529A(b)(2)(B)). This additional amount is set forth in § 529A(b)(2)(B)(ii) and is equal to the lesser of (I) the designated beneficiary's compensation as defined by § 219(f)(1) for the taxable year, or (II) an amount equal to the poverty line for a one-person household for the calendar year preceding the calendar year in which the taxable year begins. The 2017 Act also amended the § 529A(b)(2) flush language by adding that the designated beneficiary, or a person acting on behalf of the designated beneficiary, is required to maintain adequate records to ensure, and is responsible for ensuring, that the requirements of § 529A(b)(2)(B)(ii) are met.

The 2017 Act added § 529A(b)(7)(A) to identify a designated beneficiary eligible to make such an additional contribution as one who is an employee (including a self-employed individual) with respect to whom there has been no contribution made for the taxable year to the following: a defined contribution plan meeting the requirements of §§ 401(a) or 403(a); an annuity contract described in § 403(b); or an eligible deferred contribution plan under § 457(b). The 2017 Act also added § 529A(b)(7)(B) to the Code, which states that the term poverty line has the meaning given in section 673 of the Community Services Block Grant Act (42 U.S.C. 9902).

Finally, the 2017 Act amended § 529(c)(3)(C)(i)(III) (related to qualified tuition programs) to permit, before January 1, 2026, a limited rollover from a qualified tuition program to an ABLE account. Notice 2018-58, 2018-33 I.R.B. 305, addresses, among other things, the new rule under § 529(c)(3)(C)(i)(III).

SECTION 3. ADDITIONAL CONTRIBUTIONS BY AN EMPLOYED DESIGNATED BENEFICIARY

As amended by the 2017 Act, § 529A(b)(2) generally provides that a program is not treated as a qualified ABLE program unless it provides that contributions will not be accepted in excess of the sum of the contribution limits set forth in § 529A(b)(2)(B)(i) and (ii). Section 529A(b)(2)(B)(ii) allows an employed or self-employed designated beneficiary described in § 529A(b)(7) to contribute the lesser of his or her compensation for the taxable year or an amount equal to the poverty line for a one-person household for the calendar year preceding the calendar year in which the taxable year begins. Consistent with § 529A(b)(2), as amended by the 2017 Act, the Treasury Department and the IRS intend to issue proposed regulations that confirm that the employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements in § 529A(b)(2)(B)(ii) are met and for maintaining adequate records for that purpose. In addition, to minimize burdens for the designated beneficiary and the qualified ABLE program, the proposed regulations are expected to provide that ABLE programs may allow a designated beneficiary to certify under penalties of perjury that he or she is a designated beneficiary described in § 529A(b)(7) and that his or her contributions do not exceed the limit set forth in § 529A(b)(2)(B)(ii).

SECTION 4. APPLICABLE POVERTY LINE

Section 529A(b)(2)(B)(ii) bases the employed designated beneficiary's contribution limit, in part, on an amount equal to the poverty line for a one-person household for the preceding calendar year. Section 529A(b)(7)(B) provides that the term poverty line has the same meaning given such term by section 673 of the Community Services Block Grant Act (42 U.S.C. 9902). The Treasury Department and the IRS intend to issue proposed regulations to clarify that this reference to the poverty line means the poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2). In addition, the poverty guidelines differ by geography; there are separate guidelines for (1) the 48 contiguous states and the District of Columbia, (2) Alaska, and (3) Hawaii. Because the poverty guideline that most closely relates to the designated beneficiary's cost of living appears to be the most relevant for the purpose of determining the contribution limit, the Treasury Department and the IRS anticipate that the proposed regulations will provide that a designated beneficiary's contribution limit should be determined using the poverty guideline applicable in the state of the designated beneficiary's residence, rather than the guideline applicable in the state in which the designated beneficiary's ABLE account is established, or elsewhere.

SECTION 5. EXCESS CONTRIBUTIONS FROM THE DESIGNATED BENEFICIARY

Section 529A(b)(2) provides that a program will not be treated as a qualified ABLE program if it accepts contributions that are not in cash or that exceed the contribution limits in § 529A(b)(2)(B). Because § 529A(b)(2) also provides that rules similar to § 408(d)(4) will apply to excess contributions to ABLE accounts, Prop. Treas. Reg. § 1.529A-2(g)(4) includes a requirement that a qualified ABLE program must return any excess contribution, including all net income attributable to that excess contribution, to the person or persons who made that contribution.

With the addition by the 2017 Act to allow certain contributions of the designated beneficiary's compensation income, the Treasury Department and the IRS intend to issue proposed regulations to also apply the proposed required return of excess contributions to any excess contributions of the designated beneficiary's compensation income. Specifically, the proposed regulations are expected to provide that the qualified ABLE program should use the rules set forth in § 1.408-11 to return any excess contribution, including any contributions in excess of the limit in § 529A(b)(2)(B)(ii). However, because § 529A(b)(2), as amended by the Act, imposes on the designated beneficiary (rather than on the qualified ABLE program) the responsibility for ensuring compliance with the limitation on the amount of the designated beneficiary's contributions of compensation income under §529A(b)(2)(B)(ii), the proposed regulations are expected to provide that: (i) it will be the sole responsibility of the designated beneficiary (or the person acting on the designated beneficiary's behalf) to identify and request the return of any excess contribution of such compensation income; and (ii) for purposes of determining the limit on contributions made under §529A(b)(2)(B)(ii), the qualified ABLE program may rely on self-certifications, made under penalties of perjury, of the designated beneficiary or the person acting on his or her behalf.

SECTION 6. TRANSITION RELIEF

The Treasury Department and the IRS are aware that, once final regulations are issued, qualified ABLE programs may need to adjust their systems and account documents to be in compliance with regulatory requirements. The Treasury Department and the IRS also are aware that, in some cases, a necessary change may require state legislative action. Therefore, the regulations are expected to provide transition relief with respect to any necessary changes to ensure that the state programs and accounts meet the requirements in the regulations, including providing sufficient time after issuance of the final regulations in order for changes to be implemented.

SECTION 7. RELIANCE

Before the issuance of the proposed regulations described in this notice, taxpayers, beneficiaries, and administrators of ABLE programs may rely on the rules described in sections 3, 4, and 5 of this notice.

SECTION 8. REQUEST FOR PUBLIC COMMENTS

The Treasury Department and the IRS request comments on the issues addressed in this notice, including any necessary transition relief.

Written comments may be submitted by November 1, 2018 to Internal Revenue Service, CC:PA:LPD:PR (Notice 2018-62), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to Notice.Comments@irscounsel.treas.gov (please include "Notice 2018-62" in the subject line). Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2018-62), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. Comments will be available for public inspection and copying.

SECTION 9. DRAFTING INFORMATION

The principal author of this notice is Julia E. Parnell of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Parnell at (202) 317-5800 (not a toll-free number).