CSPN | COLLEGE SAVINGS PLANS NETWORK

August 21, 2015

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

Dear Treasury and Internal Revenue Service Rulemaking Staff:

Thank you for meeting with College Savings Plans Network representatives on August 12 regarding the proposed ABLE regulations. We appreciated the opportunity to discuss the three threshold issues that we described in our letter to you of July 29, 2015. As we outlined in our meeting, to make ABLE programs available on a timely basis to individuals with disabilities, the states implementing ABLE Programs require advance guidance with respect to the threshold issues. Absent an advance notice or similar advance guidance addressing these issues, we believe that most states will be forced to defer structuring a program until the proposed regulations are finalized, and the opening of programs will lag even further. Given the timeframe for finalizing regulations, even on an expedited basis, the absence of advance guidance may delay many states from opening programs until 2017, even if the final regulations make the requested changes. As you requested, we are following-up with the additional suggestions and information you indicated would be helpful, in advance of our anticipated formal comment letter.

1. Filing of Eligibility Certifications

With regard to the first issue discussed in our July 29, 2015, letter, eligibility certification, we suggest that the states could collect appropriate data provided by the beneficiary or authorized signatory that is certified under penalty of perjury rather than requiring beneficiaries to produce and states to store and safeguard medical and other sensitive documentation. The certified data could be as extensive as you think is necessary. However, we caution that the more detailed and extensive the requested data is the more it will become an obstacle for opening accounts.

We suggest that the collected certified data should include:

1. Whether ABLE eligibility is established by
    a. Entitlement to benefits under Title II of the Social Security Act (SSDI); or
    b. Entitlement to benefits under Title XVI of the Social Security Act (SSI); or
    c. A disability certification of eligibility (which could be made on the account application) that states:
        i. that the individual is blind; or

ii. the individual has a medically determinable physical or mental impairment that:
    1. has resulted in marked and severe functional limitations; and
    2. is expected to result in death, or has lasted or is expected to last for a continuous period of not less than 12 months;
iii. the individual possesses a written diagnosis signed by a physician

2. A statement (which could be made on the account application) that the blindness or disability occurred before the individual's 26th birthday
3. An indication (check box) of the category(ies) listed on IRS Form 5498-QA in which the diagnosis falls.

If you desire to have more detailed information certified, the states could also require certification (which could be made on the account application) of the following:

1. For eligibility established by entitlement to Social Security Act benefits, a certification by the beneficiary or authorized signatory of the date of the most recent entitlement letter;
2. For eligibility established by a disability certification, a certification by the beneficiary or authorized signatory of the name of the physician and the date of the written diagnosis.

There was some discussion at our meeting about including the physician license number in the certifications, but we are concerned that such license number might not be readily available to the beneficiary or authorized signatory and could delay or impede the account being opened.

We welcome your suggestions on what other data you might want to have collected during the enrollment process that would be readily known by the beneficiary or the authorized signatory.

2. Distinguishing Among Types of Distributions

We understand that the proposed regulations' requirement that an ABLE program "establish safeguards to distinguish" between qualified and non-qualified distributions and to identify the amount of qualified distributions used for housing is more for purposes of the Social Security Administration's (SSA) administration of the SSI program rather than for Treasury/IRS. As you suggested, what information SSA needs from programs, as opposed to from SSI or SSDI recipients, is a matter for SSA to determine, not for the tax regulations. As we discussed at our meeting, Section 529A(d)(4) merely requires monthly statements of "relevant distributions," a requirement which we believe is satisfied by providing to SSA the amount of distributions, other than distributions that are irrelevant to SSI-eligibility determinations, such as rollover distributions, distributions upon the beneficiary's death and, potentially, distributions for beneficiaries who are not SSI recipients.

As we indicated at our meeting, the exact application of distributions from an ABLE account may not be known by the program or the beneficiary at the time of the distribution. 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. Similarly, if the beneficiary withdraws an amount from an ABLE account prior to expenditure, as Section 529A permits, the beneficiary may not know at the time of withdrawal into which category the ultimate expenditure will belong.

Furthermore, if a program were to require, as a condition of withdrawal, a certification by the recipient as to whether the expenditure is or will be a non-qualified, qualified non-housing or housing expenditure, it will need to be in a position to respond to inquiries as to the appropriate category for a particular expenditure. State programs and their program managers cannot be expected to shoulder the expense or potential liability associated with responding to questions as to whether particular expenditures constitute "basic living expenses" and the myriad other nuanced questions likely to arise in interpreting whether certain expenditures are qualified, qualified housing or non-qualified. That expertise lies with SSA, not the programs, and, as long as programs notify SSA on a monthly basis that a specified amount has been distributed from the ABLE account, SSA has sufficient information to require any further information as to such distribution from the ABLE account beneficiary.

We have reached out to SSA to expedite a dialogue with them. Our suggestion to them will be that they should collect the information they want in their periodic collection of other data from recipients, and that the states cannot provide, and should not be expected to provide, categorical breakdowns of ABLE account distributions.

You indicated in our meeting that you were open to revisiting the "safeguards" sentence in the proposed regulations, which we appreciate. For the above reasons, we strongly urge the removal of that sentence. We will keep you apprised of our discussions with SSA, and will seek to obtain SSA's concurrence with our suggested approach. However, we believe the potential impediments or delays to the launching of ABLE programs posed by the "safeguards" sentence would be addressed by including in the requested advance notice a statement that the final regulations will remove the "safeguards" sentence and that the monthly reporting requirements to SSA will be governed by Section 529A(d)(4) and such further guidance as may be provided by SSA pursuant to Section 529A(d)(4).

We note that SSA already requires SSI recipients to report to SSA, within 10 days after any month in which changes affecting eligibility for or the amount of SSI benefits occur, the details of such change. http://www.ssa.gov/ssi/text-report-ussi.htm. It may be appropriate for SSA to include in such self-reporting requirements details as to an SSI recipient's expenditures of ABLE account distributions. SSA also may determine, upon receipt from an ABLE program of data indicating that a distribution to an SSI recipient has occurred, to make routine or occasional inquiries to the SSI recipient regarding the manner of application of the distribution. There is no reason, however, for tax regulations to address this topic or to require programs to act as middlemen in the transmission of such information from SSI recipients to SSA, particularly as such an unnecessary and burdensome requirement may be detrimental to the Congressional objective of making ABLE programs a reality.

3. Requirement to obtain TINs for all contributors

Many, 529 college savings programs currently have systems in place to reject excess contributions before they are credited to individual accounts. Some may initially deposit an excess contribution into the account but quickly remove it as of the same day it was credited resulting in neither a gain nor loss. In other words, it would be unusual for an excess contribution to be placed in an individual's account at all and even more unusual for it to remain in the account for any measurable period of time. We anticipate that ABLE programs will be similarly designed. In light of this, we believe it is unnecessary for a program to request the TIN

for each contributor at the time a contribution is made. As explained in our July 29 letter, doing so would be difficult, costly, and is likely to discourage occasional contributors. Therefore, we suggest that the requirement to request the TIN of every contributor be eliminated and be replaced with the obligation to request a contributor's TIN only in the unlikely circumstance that an excess contribution has been deposited in an individual's account and has accrued earnings or losses; in which case, the TIN would be obtained before the contribution, with any gains or losses, is returned. If necessary, the excess contribution could be removed from the individual account and held in a "suspension" account until the TIN is obtained.

Again, we greatly appreciate your receptiveness to our concerns and suggestions and we look forward to continuing dialogue as we work towards our joint goal of making robust ABLE programs available to individuals with disabilities and their families in furtherance of Congressional intent.

We appreciate the opportunity to propose these changes and look forward to working with you on these important initiatives. Please contact us through Chris Hunter at Chris@statetreasurers.org or 859-721-2181 for any follow-up or additional information or discussion.

Sincerely,

Betty Lochner
Director, Guaranteed Education Tuition Program
Chair, College Savings Plans Network

Cc: Catherine Hughes