CONSORTIUM FOR CITIZENS WITH DISABILITIES

January 8, 2019

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Internal Revenue Service
Department of the Treasury
Washington, DC

RE: Contribution Limits Applicable to ABLE Accounts RIN 1545-BP10

Dear Internal Revenue Service:

Thank you for the opportunity to comment on the proposed regulations implementing changes to ABLE accounts made by the Tax Cuts and Jobs Act of 2017 (PL 115-97) (the "2017 Act"). The Consortium for Citizens with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. We are concerned that the proposed rule is not sufficiently clear and does not take sufficient action to protect ABLE beneficiaries and we would urge the Internal Revenue Service (IRS) to adopt our recommendations detailed below.

We note that clear regulations and additional beneficiary protections are particularly important due to current misinformation that exists about ABLE accounts. During the time Congress was considering the 2017 Act, immediately after its passage, and to current date, there has been widespread misinformation in the community about the treatment of compensation added to an ABLE account beyond the original annual contribution limit. There is an impression that earned income of the account owner that is directly deposited into their ABLE account will not be counted against the ABLE beneficiary's eligibility for benefits (such as Supplemental Security Income or Medicaid). This is simply not the case, as both the Social Security Administration (SSA) through the Program Operations Manual Systems (POMS) and the Centers for Medicare and Medicaid Services (CMS) through guidance have confirmed that the earned income of ABLE beneficiaries would still be considered in calculating substantial gainful activity. The persistence of this confusion makes the case for clarity in all ABLE-related regulations even more compelling.

The 2017 Act amended section 529A(b)(2)(B) to allow an employed designated beneficiary described in new section 529A(b)(7) to contribute, prior to January 1, 2026, an additional amount in excess of the limit in section 529A(b)(2)(B)(i) (the annual gift tax exclusion amount) which may not exceed the lesser

820 First Street, NE Suite 740 • Washington, DC 20002 • PH 202-567-3516 • FAX 202-408-9520 •
Info@c-c-d.org • www.c-c-d.org

of (i) the designated beneficiary's compensation as defined by section 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. Congress intended this change to encourage work and allow individuals and their families to save more money in an ABLE account if the beneficiary works and earns income. In short, the 2017 Act increased the annual contribution cap for ABLE-eligible working people with disabilities from the annual gift tax amount to the gift tax amount plus the lesser of an amount equal to the Federal Poverty Level or the total amount of wages earned.

Before the 2017 Act was passed, CCD expressed significant concerns to Congress about the additional administrative burden that this change would place on people with disabilities and the complexities and confusion it would cause. Currently, state ABLE program administrators ensure that ABLE accounts do not exceed the gift tax limit, but CCD was particularly concerned that without that protection for the increased limit, ABLE account owners would accidentally over-save and place their vital supports and services provided by various means tested programs at risk. This risk places ABLE account holders in a vulnerable position in complete contrast to the very intent of the ABLE Act. Since the 2017 Act was enacted without regard to our concerns, we now turn to the IRS to help reduce the risk faced by ABLE beneficiaries.

A) The IRS should clarify that the new increased contribution limit does not require that contributions be made exclusively by the designated beneficiary.

We request that the IRS clarify Section 529A(b)(2)(B). As we read the statute at 529A(b)(2)(B), the new increased limit on annual ABLE account contributions is based on the "aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the sum of" while 529A(b)(2)(B)(ii) is specific to the "the case of any contribution by a designated beneficiary." If contributions under the increased limit authorized by (B)(ii) must be made by the designated beneficiary, does this exclude employers from directly depositing funds into an ABLE account? Equally importantly, the point of an ABLE account is to ensure that people with disabilities can save without jeopardizing access to means tested benefits.

While some people with disabilities can work at a level to sustain themselves without these benefits, many rely on Medicaid home and community-based services to work at all and/or are only able to work limited hours. Often, the compensation earned from this limited work is used to pay basic living expenses, with little to no savings remaining to be deposited in an ABLE account. If the designated beneficiary is the only individual who can contribute towards the increased contribution limit, then the increased contribution limit seems limited to those people who can sustain themselves without means tested benefits, contradicting the entire premise of ABLE accounts and Congressional intent. For instance, a young person who has worked and earned $2,500 a year which was spent paying his rent, could receive a gift of the full gift tax amount in his ABLE account from his grandparents, but if they wanted to honor his employment with an additional gift, they would have to give it directly to him for him to place in his ABLE account, potentially putting his benefits at risk.

The contradiction between the statute and Congressional intent also creates a complex account dynamic in which beneficiaries must distinguish between two types of contributions—those made by the ABLE beneficiary and those made by others—and raises the question: do contributions made by the ABLE beneficiary count towards the increased limit, even if the original limit has not been reached? To build on the example used earlier: if the ABLE beneficiary contributes $200 a month to his account, does that mean that in August, his grandparents can only give him the amount of the gift tax minus the $1,400 he has already saved? Or can they contribute the full gift tax amount to the ABLE Account? Given these complications, we believe the statute is ambiguous and we would ask the IRS to clarify that contributions towards the increased limit do not have to be made directly by the beneficiary since this would conflict with the purpose of the ABLE account and Congressional intent. We also believe that these contributions should be allowed to be counted above the gift tax limit, even if made before the gift tax limit is reached. Otherwise an accounting nightmare would result that would be beyond the skills of many beneficiaries to handle.

B) The IRS should clarify that the new increased contribution limit does not require that additional contributions be made in the ABLE beneficiaries' compensation from employment

We would also ask the IRS to clarify that contributions towards the additional limit authorized under 529A(b)(2)(B)(ii) do not have to be contributions from an individual's own compensation. While the increased limit is only available to individuals with disabilities who are employees, the statute does not indicate in any place that the contributions to the ABLE account must be from the individual's own compensation. The Congressional intent of this change was to incentivize people with disabilities to work so that they and their families could contribute more to their ABLE accounts, not necessarily to ensure that individuals were contributing from their own compensation. The statutory text, because of this, makes no reference to the increased limit being limited to contributions from the individual's compensation. There are a few references in the proposed rule to "compensation income" that we believe are referring to the increased limit,[1] not a requirement that contributions toward the limit be from an ABLE beneficiary's own compensation, but these references create confusion. As discussed above, we think it is particularly important for the IRS and state ABLE programs to be extremely clear about the rules of this increased limit. We will note that creating this unintended and non-statutory distinction would result in complex accounting for both individuals and state ABLE programs and since it is neither the intent of Congress or in the statute, it should not be adopted even if that was what the IRS intended.

C) The IRS should ensure sufficient protections for ABLE beneficiaries following updates from the 2017 Act.

We note that Section 529A(b)(6) requires that state ABLE programs "must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit."[2] The current regulations require state ABLE programs to not accept any contribution "to the

[1] 84 Fed. Reg. 54531 (see discussion at subheading 3). We believe these references simply stem from the analogy to excess contributions in the individual retirement accounts or annuities context being utilized, but the references do create confusion.
[2] 80 Fed. Reg. 35609.

extent such contribution, when added to all other contributions (whether from the designated beneficiary or one or more other persons) to that ABLE account made during the designated beneficiary's taxable year causes the total of such contributions to exceed the amount in effect under section 2503(b) for the calendar year."[3] This protection, in addition to others, is why we did not believe in 2015 when we commented on the initial regulations that it was necessary for state ABLE programs to collect Tax Identification Numbers (TINs) for all contributors to ABLE accounts.[4]

While we understand that Congress intentionally placed the burden of risk on ABLE beneficiaries for the increased limit authorized by the 2017 Act, we are concerned, as discussed above, that this risk places ABLE beneficiaries in a vulnerable situation. We believe that the IRS should take additional steps to ensure that beneficiaries are protected in line with the spirit and intent of the ABLE Act. We would recommend three additional steps:

1) State ABLE programs should provide notice to ABLE beneficiaries about the increased contribution limit and the rules regarding these additional contributions.

We urge the IRS to require state ABLE programs to provide notice to all ABLE beneficiaries about the increased contribution limit under the 2017 Act, including details of eligibility for the increased limit, information about the two increased contribution limits that they are eligible for, and detailing the specific poverty level applicable to ABLE beneficiaries in their state and any state in which an ABLE beneficiary of that program resides. This notice would clarify misinformation that we know exists, as discussed above. And while we agree with the decision reflected in the proposed regulation to utilize the poverty guideline applicable in the state of the designated beneficiary's residence, the burden of determining the poverty level of their state of residence is left entirely to the ABLE beneficiary. While beneficiaries should be aware of how much money they make and thus how much their alternative increased contribution limit is, they do not have a universal source for what the federal poverty level would be. Requiring state ABLE programs to provide this written notice would ensure ABLE beneficiaries have accurate information about the rules of the program and about the poverty level being utilized in their state. We urge that this notice be provided at the time the ABLE beneficiary opens the ABLE account and yearly thereafter.

2) State ABLE programs should provide notice to ABLE beneficiaries when the beneficiary reaches the original contribution limit and when they are approaching the increased limit from the 2017 Act.

We urge the IRS to require the state ABLE programs to send notice to ABLE beneficiaries when they have reached the annual contribution limit (currently $15,000) and inform them again about the opportunity to keep making contributions to the ABLE account pursuant to the 2017 Act, while clearly stating the applicable state poverty lines and the details of the alternative increased contribution limit so that a beneficiary who is employed may choose at that point whether to take advantage of the enhanced contribution limit set by the 2017 Act. Furthermore, we would like the IRS to require the

[3] 80 Fed. Reg. 35614.
[4] Comments of the Consortium for Citizens with Disabilities on RIN 1545-BM68 (Sept. 21, 2015), http://c-c-d.org/fichiers/CCD-ABLE-regs-comments.pdf.

ABLE programs to send another notice to ABLE beneficiaries who have opted to save pursuant to the 2017 Act when their contributions approach the maximum annual poverty level limit (80%?) and then again when they hit this limit. Even this approach will leave those beneficiaries vulnerable whose own annual earnings are less than the state poverty level, opening them up to potential loss of critical benefits, supports, and services, but we acknowledge the administrative difficulty that state ABLE programs would face in attempting to provide notice in those cases.

3) State ABLE programs should allow ABLE beneficiaries to opt out of the increased limit.

Finally, we believe that if an ABLE beneficiary wishes to opt out of the increased limit and avoid taking on the additional risk, they should able to do so. Since state ABLE programs will need to differentiate between original contribution limit accounts and increased contribution accounts, they should be able to provide this choice without substantial additional administrative burden. This would allow ABLE beneficiaries to avoid a risk that they may not want to take on. This opt out could be provided as part of the notice of the increased contribution limit once an ABLE beneficiary has hit the original contribution limit. While we are cognizant of the administrative burden this might place on the state ABLE programs, we believe that the risk of the tax penalty and the potential loss of vital supports and services provided by means tested programs is so potentially devastating for ABLE beneficiaries that this is crucial protection that the IRS should implement.

Thank you for the opportunity to comment on this important regulation.

Sincerely,

Allies for Independence
American Network of Community Options & Resources (ANCOR)
Center for Public Representation
Easterseals
The Jewish Federations of North America
Justice in Aging
Lutheran Services in America—Disability Network
National Academy of Elder Law Attorneys
National Disability Institute
National Disability Rights Network
National Down Syndrome Congress
The Arc of the United States