



NATIONAL ASSOCIATION OF
STATE TREASURERS

May 29, 2019

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Re: Proposed Regulation Comments for Section 529A ((CC:PA:LPD:PR (REG-102837-15))

To the Internal Revenue Service:

The National Association of State Treasurer's (NAST) ABLE Committee appreciates this opportunity to comment on the proposed regulations under Section 529A of the Internal Revenue Code that provide guidance regarding the Achieving a Better Life Experience (ABLE) Act of 2014 (the "Proposed Regulations"). We realize that the initial comment period ended on September 21, 2015; however, we understand that comments are still being accepted. With several years of collective administration of ABLE programs, states have now gained operational experience that has in turn provided insight into how the Proposed Regulations can be improved.

The Problem

Despite 41 states and the District of Columbia offering ABLE programs, the rate of ABLE account openings has been slow industry wide. While there are many causes for this, we believe part of the problem is that not all potential ABLE account owners have a parent, guardian, or power of attorney who can or who is willing to serve as an "authorized legal representative" and assist them in opening and maintaining an account. Therefore, we would like to make two recommendations on expanding the definition of who can administer the account.

Recommendation #1: Add Social Security Representative Payees (the “Representative Payee”) to the list of those who can establish and administer an ABLE account.

Currently, §1.529A – 1(b)(4) of the Proposed Regulations permits an eligible individual to open an ABLE account directly. If the eligible individual does not have capacity or has capacity but chooses not to exercise signatory authority, an eligible individual’s power of attorney, or, if none, their parent or legal guardian may open and manage the account for them. However, we are finding that some parents are unable or unwilling to help their children open and maintain an ABLE account, that the cost of appointing a guardian is prohibitive to many, and that people who are willing to undertake the legal and personal responsibilities of a power of attorney for an individual with a disability can sometimes be scarce. As a result, our industry frequently encounters a significant number of individuals who are eligible for an ABLE account but do not have a power of attorney, parent, or guardian to assist them with opening and maintaining the account. What a significant number of these ABLE-eligible individuals *do* have, however, is a Representative Payee.

A Representative Payee is a person, an organization¹, or an institution² who is appointed by SSA to receive benefits on behalf of an individual who cannot manage or direct the management of his or her benefits (the “Beneficiary”). The Representative Payee must use the monies received from Social Security or SSI for the benefit of the individual who is receiving the benefits. In doing so, the Representative Payee must consider the Beneficiary’s needs and is required to spend benefits to meet the Beneficiary’s day-to-day requirements for food, clothing, shelter, and medical care. They must also save any money not so used, keep an accounting of the funds, return to SSA any payments to which the Beneficiary is not entitled, and return to SSA any payments received after the person, organization, or institution is no longer the Representative Payee for the Beneficiary. Importantly, under current SSA regulations the Representative Payee has no legal authority over a Beneficiary’s earned income, pensions, or any income from sources other than Social Security or SSI.

According to the National Disability Institute, approximately 8 million individuals with disabilities are eligible to open ABLE accounts (see second chart below). Although no data is available showing what percentage of them also have a SSA Representative Payee, we extrapolated from the SSA table immediately below to build what we believe is a reliable estimate: The total number of Disabled Workers and Disabled Adult Children is the group most likely to include ABLE-eligible individuals, and totals about 9.9 million; 1.7 million of them have Representative Payees, or about 17%. Therefore, we estimate that almost 1.3 million ABLE-eligible individuals (or 17% of the estimate 9.9 million ABLE-eligible individuals) have SSA Representative Payees and we want to ensure that they have an opportunity to open an ABLE account.

¹ An Organizational Entity is a business, company or the like, and includes a social service agency, state or local government agency, or a financial organization that manages benefits on behalf of an incapable beneficiary. Source: www.ssa.gov/payee/NewGuide/toc.htm

² An Institutional Entity is a specific type of organizational payee who provides care and treatment for the beneficiaries who reside in the institution or in off-site facilities affiliated with the institution (i.e.; nursing homes, hospitals, group homes or a halfway house). Source: www.ssa.gov/payee/NewGuide/toc.htm

Number and Percentage of Old-Age, Survivors, and Disability Insurance Beneficiaries, with Representative Payees by Category, December 2016

Type of Beneficiary	All Beneficiaries	Beneficiaries w/ Representative Payees	
		Number	Percentage
Adults	Retired	41,233,126	537,923 1.3
	Spouses	2,505,754	21,696 0.9
	Nondisabled Widow(ers)	3,878,927	104,744 2.7
	Disabled Workers	8,808,736	904,143 10.3
	Disabled Widow(ers)	259,207	13,855 5.3
	Total Adults	56,685,750	1,582,361
Children	Under Age 18	3,006,839	3,004,567 99.9
	Disabled Adult Children	1,085,262	796,160 73.4
	Students, Ages 18-19	129,456	4,867 3.8
	Total Children	4,221,557	3,805,594
Total Adults & Children	60,907,307	5,387,955	8.8

Source: Social Security Administration, “Annual Statistical Supplement to Social Security Bulletin,” Social Security Administration, Washington, DC, 2017, Table 5.L.1.

ABLE-Eligible Population Estimates

Population Category		Age of Onset		
		0-25	26-45	Total (0-45)
Children		3,300,000	0	3,300,000
Working Age <i>Recipient of:</i>	SSI only	1,780,000	1,100,000	2,880,000
	SSDI only	1,650,000	3,200,000	4,850,000
	Both SSI and SSDI	660,000	450,000	1,110,000
	Neither Benefits	650,000	1,400,000	2,050,000
Total		8,040,000	6,150,000	14,190,000

Source: NDI as of February 7, 2018

We are aware that this population is vulnerable to exploitation, particularly in the areas of fraud and abuse. Our goal has always been to limit the opportunity for fraud or abuse. Should Representative Payees be permitted to open ABLE accounts, a recent bill passed by Congress and signed into law by the President, H.R. 4547, would assist in ensuring that accounts managed by Representative Payees are handled properly. H.R. 4547 or the “Strengthening Protections for Social Security Beneficiaries Act of 2018”), bolsters the monitoring and oversight mechanisms available to SSA and state protection and advocacy groups in administering the Representative Payee program by increasing funding for the Representative Payee program and strengthening procedures for addressing misuse or misappropriation of funds. These additional protections will strengthen SSA’s ability to prevent and remedy incidents of fraud and abuse.

We acknowledge that, currently, SSA appoints Representative Payees to manage Social Security and SSI funds only. Per the current definition, a Representative Payee has no legal authority to manage non-Social Security income. Prior to the ABLE Act, this restriction was understandable however, with ABLE accounts, individuals can now save more than \$2,000 of non-SSA funds for Qualified Disability Expenses. Given that individual, organizational, and institutional Representative Payees are appointed by

SSA to manage an individual's SSI funds, it seems logical to also allow them the ability to manage ABLE accounts even if those accounts contain both Social Security and SSI funds as well as funds from other sources. Therefore, we request that individual, organizational, and institutional Representative Payees be permitted to open and manage ABLE accounts on behalf of eligible individuals.

Recommendation #2: Permit a broader range of family members to help relatives with disabilities open and maintain ABLE accounts.

Under the current Proposed Regulations, a parent is the only relative permitted to have signatory authority over an ABLE account. We suggest permitting more relatives the opportunity to assist their ABLE-eligible family members to set up and maintain an ABLE account by providing signatory authority to grandparents and siblings (including stepsiblings and adopted siblings). In so doing, we hope to expand the reach of ABLE accounts to ABLE-eligible individuals who do not have a parent capable of exercising signatory authority over an ABLE account.

While some might assume that almost all children who are ABLE-eligible have a parent to open and manage an ABLE account for them, this is not always the case. Per the U.S. Census Bureau's 2017 American Community Survey, it is estimated that 5,956,765 grandparents live in a home with a grandchild, and of this amount 2,734,356 grandparents are responsible for their own grandchildren. Indeed, a survey conducted by Grandfamilies.org further illustrates the important role of grandparents and other relatives responsible for the care of a child, noting that as of May 2017, 7,416,698 (10.1%) of children under the age of 18 were living in homes of their grandparents (7.4%) or other non-parent relatives (2.4%). While no statistics are available detailing how many of these children live with a disability, it can at least be assumed that these numbers would include children with qualifying disabilities.

While permitting grandparents to have signatory authority will certainly help younger eligible individuals open and maintain ABLE accounts, it is less likely that they will be able to assist eligible adults. In addition, as parents age they too will become less capable in assisting their children with their ABLE accounts. With this in mind, we would also suggest permitting siblings to open and exercise signatory authority over ABLE accounts for their eligible brothers and sisters.

Permitting grandparents and siblings to open and maintain an ABLE account for their ABLE-eligible relatives would allow wider and more equitable access to the financial security provided by this unique program. We have attached suggested edits that could be made to the Proposed Regulations to effect both this change and the addition of Representative Payees.

Other Issues of Concern Related to Representative Payees:

Currently, many Representative Payees are hesitant to deposit SSI funds into an ABLE account, particularly if the account is not being administered by the Representative Payee themselves. At least some Representative Payees believe, perhaps erroneously, that they will be held accountable by SSA for the use of these funds even though they no longer have access to the SSI funds once they have been deposited into the ABLE account. More ABLE account guidance from SSA on how Representative Payees can use ABLE accounts would be extremely helpful and clarify the responsibilities that the Representative Payee has in administering the account. An effective way to do this would be to update the SSA's *Guide for Representative Payees* (the "Guide") as follows:

- Include ABLE accounts as an acceptable method of savings for eligible individuals. Currently, the Guide states that money remaining after the Beneficiary's needs have been met and expenses

paid can be saved. As there is currently no specific reference to the use of ABLE accounts, updating the provision to include ABLE accounts would alleviate the hesitation of individual, organizational, and institutional Representative Payees to contribute excess benefits to ABLE accounts;

- Confirm that benefits can be directly deposited into an ABLE account since many ABLE account owners want this flexibility. The POMS already explicitly permit at least some benefits to be directly deposited. For example, POMS section C.1.a states that “[e]xamples of payments that might be direct deposited into an ABLE account...include...Benefit payments (Title II, Veterans Administration, pensions, etc...)”. This aligns with Section III of IRS Notice 15-81, which provides clarification on distributions for qualified disability expenses.
- List the documentation required when saving SSI funds in an ABLE account; and
- Provide instructions for those Representative Payees who do *not* personally manage an ABLE account but who do deposit SSI funds into an ABLE account managed by someone else.

In closing, we respectfully request that you evaluate our recommendations regarding the role of Representative Payees and certain family members in the administration of ABLE accounts. Each state-administered ABLE program faces individual challenges related to who can legally establish an ABLE account. Each state has a different court system, unique care provider structures, state-focused laws related to guardian and conservator responsibilities, as well as individualized approaches as to who is entitled to a guardian or other support services to maintain independence and quality of life. By expanding the scope of who can establish an ABLE account, some of the barriers states currently face would be removed, allowing ABLE to fully reach the population it is intended to serve.

If you have any questions, please contact Shaun Snyder, NAST’s executive director, at 202-744-6663 or shaun@statetreasurers.org. We appreciate your consideration of this matter.

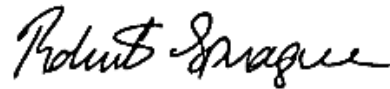
Sincerely,



Hon. David Damschen
Utah State Treasurer & NAST President



Hon. Michael Frerichs
Illinois State Treasurer &
Chair, NAST ABLE Committee



Hon. Robert Sprague
Ohio State Treasurer &
Vice-Chair, NAST ABLE Committee

Enclosure

Proposed Rep Payee ABLE Regulatory Change

§1.529A-2 Qualified ABLE Program

...

(c) Establishment of an ABLE account—

(1) *In general.* Except as otherwise provided in this paragraph (c), a qualified ABLE program must provide that an ABLE account may be established only for an eligible individual under a qualified ABLE program of the State in which the eligible individual is a resident. The qualified ABLE program also may allow the establishment of an ABLE account for an eligible individual who is a resident of a Contracting State as defined in § 1.529A-1(b)(2). If an eligible individual is unable to establish an ABLE account on his or her own behalf, the ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a parent, grandparent, or sibling who is over the age of 18 years, or legal guardian of the eligible individual, or representative payee appointed by the Social Security Administration for the eligible individual.