INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2020–50
December 7, 2020

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

EMPLOYEE PLANS

NOTICE 2020-83, page 1597.

This notice contains the 2020 Required Amendments List for qualified individually designed plans and § 403(b) individually designed plans.

EXEMPT ORGANIZATIONS

T.D. 9923, page 1554.

This document contains final regulations under section 529A of the Internal Revenue Code that provide guidance regarding programs under the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014. Section 529A provides rules under which States may establish and maintain a new type of tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. This document also contains final regulations under the Tax Cuts and Jobs Act of 2017 (TCJA), which modified the contribution limits and other provisions of section 529A. In addition, these regulations provide corresponding amendments to regulations under sections 511 and 513, with respect to unrelated business taxable income, sections 2501, 2503, 2511, 2642 and 2652, with respect to gift and generation-skipping transfer taxes, and section 6011, with respect to reporting requirements.

INCOME TAX

REV. PROC. 2020-51, page 1599.

This revenue procedure provides a safe harbor for taxpayers in one of two situations to allow them to deduct certain expenses on their 2020 or later year return.

REV. RUL. 2020-26, page 1550.

Federal rates; adjusted federal rates; adjusted federal long-term rate, and the long-term tax exempt rate. For purposes of sections 382, 1274, 1288, 7872 and other sections of the Code, tables set forth the rates for December 2020.

REV. RUL. 2020-27, page 1552.

This revenue ruling holds that a taxpayer cannot claim deductions for certain payments on its 2020 return when the taxpayer received Paycheck Protection Program (PPP) loan proceeds and has requested PPP loan forgiveness, but has not received notice from the lender whether the PPP loan has been forgiven at the end of 2020.

Finding Lists begin on page ii.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part I

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 467, 468, 482, 483, 1288, 7520, 7872.)

Rev. Rul. 2020-26

This revenue ruling provides various prescribed rates for federal income tax purposes for December 2020 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2020-26 TABLE 1
Applicable Federal Rates (AFR) for December 2020
Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
		Short-term		
AFR	0.15%	0.15%	0.15%	0.15%
110% AFR	0.17%	0.17%	0.17%	0.17%
120% AFR	0.18%	0.18%	0.18%	0.18%
130% AFR	0.20%	0.20%	0.20%	0.20%
		Mid-term		
AFR	0.48%	0.48%	0.48%	0.48%
110% AFR	0.53%	0.53%	0.53%	0.53%
120% AFR	0.58%	0.58%	0.58%	0.58%
130% AFR	0.62%	0.62%	0.62%	0.62%
150% AFR	0.72%	0.72%	0.72%	0.72%
175% AFR	0.84%	0.84%	0.84%	0.84%
		Long-term		
AFR	1.31%	1.31%	1.31%	1.31%
110% AFR	1.45%	1.44%	1.44%	1.44%
120% AFR	1.58%	1.57%	1.57%	1.56%
130% AFR	1.71%	1.70%	1.70%	1.69%

REV. RUL. 2020-26 TABLE 2
Adjusted AFR for December 2020
Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	0.11%	0.11%	0.11%	0.11%
Mid-term adjusted AFR	0.36%	0.36%	0.36%	0.36%
Long-term adjusted AFR	0.99%	0.99%	0.99%	0.99%

REV. RUL. 2020-26 TABLE 3 Rates Under Section 382 for December 2020	
Adjusted federal long-term rate for the current month	.99%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	.99%

REV. RUL. 2020-26 TABLE 4 Appropriate Percentages Under Section 42(b)(1) for December 2020	
Note: Under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%.	
Appropriate percentage for the 70% present value low-income housing credit	7.20%
Appropriate percentage for the 30% present value low-income housing credit	3.09%

REV. RUL. 2020-26 TABLE 5 Rate Under Section 7520 for December 2020	
Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	.6%

Section 42.—Low-Income Housing Credit

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 280G.—Golden Parachute Payments

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 467.—Certain Payments for the Use of Property or Services

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The applicable federal short-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 482.—Allocation of Income and Deductions Among Taxpayers

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 483.—Interest on Certain Deferred Payments

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 7520.—Valuation Tables

The applicable federal mid-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2020. See Rev. Rul. 2020-26, page 1550.

Deductibility of PPP Expenses

Rev. Rul. 2020-27

ISSUE

May a taxpayer that received a loan guaranteed under the Paycheck Protection Program (PPP) authorized under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) (covered loan), and paid or incurred certain otherwise deductible expenses listed in section 1106(b) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020) deduct those expenses in the taxable year in which the expenses were paid or incurred if, at the end of such taxable year, the taxpayer reasonably expects to receive forgiveness of the covered loan based on the otherwise deductible expenses?

FACTS

In each of the following situations, the taxpayer computes taxable income on the basis of the calendar year for federal income tax purposes and received a covered loan from a private lender in 2020.

Situation 1. During the period beginning on February 15, 2020, and ending on December 31, 2020 (covered period), Taxpayer A (A) paid expenses that are described in section 161 of the Internal Revenue Code (Code) and section 1106(a) of the CARES Act (eligible expenses). These expenses include payroll costs that qualify under section 1106(a)(8) of the CARES Act, interest on a mortgage that qualifies as interest on a covered mortgage obligation under section 1106(a)(2) of the CARES Act, utility payments that qualify as covered utility payments under section 1106(a)(5) of the CARES Act, and rent that qualifies as payment on a covered rent obligation under section 1106(a)(4) of the CARES Act. In November 2020, pursuant to the terms of section 1106 of the CARES Act, A applied to the lender for forgiveness of the covered loan on the basis of the eligible expenses it paid during the covered period. At that time, and based on A's payment of the eligible expenses, A satisfied all requirements under section 1106 of the CARES Act for forgiveness of the covered loan. The lender does not inform A whether the loan will be forgiven before the end of 2020.

Situation 2. During the covered period, Taxpayer B (B) paid the same types of eligible expenses that A paid in Situation 1. B, unlike A, did not apply for forgiveness of the covered loan before the end of 2020, although, taking into account B's payment of the eligible expenses during the covered period, B satisfied all other requirements under section 1106 of the CARES Act for forgiveness of the covered loan. B expects to apply to the lender for forgiveness of the covered loan in 2021.

LAW

Section 1102 and 1106 of the CARES Act, established the PPP as a new loan program administered by the U.S. Small Business Administration (SBA) as part of its section 7(a) Loan Program (15 U.S.C. 636(a)) that was designed to assist small businesses nationwide adversely impacted by the COVID–19 emergency to pay payroll costs and other covered expenses. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811 (April 15, 2020). Under the PPP, the SBA is permitted to guarantee the full principal amount of a covered loan. Under section 1102(a)(2) of the CARES Act, a covered loan is a loan made under the PPP during the covered period. A covered loan may be forgiven under section 1106 of the CARES Act, based on certain eligible expenses being paid or incurred during the covered period.

The covered period for making loans was initially the period beginning on February 15, 2020 and ending on June 30, 2020. *See* section 1102(a)(2) of the CARES Act. The Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641 (June 5, 2020), extended the end date of the covered period for making loans from June 30, 2020 to December 31, 2020.

An individual or entity that is eligible to receive a covered loan (eligible recipient) can receive forgiveness of the full principal amount of the covered loan up to an amount equal to the following eligible expenses that are paid or incurred during the covered period: (1) payroll costs, (2) interest on a covered mortgage obligation, (3) any covered rent obligation payment, and (4) any covered utility payment. *See* section 1106(b) of the CARES Act.

Under section 1106(i) of the CARES Act, for purposes of the Code "any amount which (but for [section 1106(i)]) would be includible in gross income of the eligible recipient by reason of forgiveness described in [section 1106](b) shall be excluded from gross income." Section 1106(i) of the CARES Act excludes the forgiven amounts from gross income regardless of whether the income would be (1) income from the discharge of indebtedness under section 61(a)(11) of the Code, or (2) otherwise includible in gross income under section 61 of the Code.

On May 2, 2020, the Department of the Treasury and the Internal Revenue Service (IRS) released Notice 2020-32, 2020-21 IRB 837 (May 18, 2020), which clarifies that no deduction is allowed for an eligible expense that is otherwise deductible if the payment of the eligible expense results in forgiveness of a covered loan. Notice 2020-32 relied on section 265(a)(1) of the Code and §1.265-1 of the Income Tax Regulations, which provide that no deduction is allowed for any amount otherwise allowable as a deduction to the extent the amount is allocable to one or more classes of income other than interest wholly exempt from the taxes imposed by subtitle A of the Code. *See generally* section 265(a)(1); §1.265-1. This rule applies "whether or not any amount of income of that class or classes is received or accrued." *Id*. The term "class of exempt income" means any class of income that is either wholly excluded from gross income under any provision of subtitle A of the Code or wholly exempt from the taxes imposed by subtitle A of the Code under the provisions of any other law. *See* §1.265-1(b)(1).

Notice 2020-32 also relied on authorities holding that deductions for otherwise deductible expenses are disallowed if the taxpayer receives reimbursement for such expenses. Authorities addressing reimbursement further hold that an otherwise allowable deduction is disallowed if there is a reasonable expectation of reimbursement. *See Burnett v. Commissioner*, 356 F. 2d 755 (5th Cir. 1966) *cert. denied* 385 U.S. 832 (1966); *Canelo v. Commissioner*, 53 TC 217, 225-226 (1969), *aff'd* 447 F.2d 484 (9th Cir.1971); *Charles Baloian Co. v. Commissioner*, 68 T.C. 620 (1977);

Rev. Rul. 80-348, 1980-2 C.B. 60; Rev. Rul. 79-263, 1979-2 C.B. 82.

In *Burnett*, a lawyer advanced expenses to clients that the clients were obligated to repay only to the extent the lawyer was successful in obtaining recovery on the client's claim. The taxpayer argued that the advances were deductible trade or business expenses under section 162 of the Code because there was no unconditional obligation on the part of the clients to repay the advances. The court noted that the taxpayer provided assistance only to clients with claims that were likely to be successful and that the advances were "made to clients with the expectation, substantially realized, that they would be recovered." 356 F.2d at 758. On that basis, the court affirmed the Tax Court's holding that the advances were not deductible. Similarly, in *Canelo v. Commissioner*, 53 TC 217, 225-226 (1969), *aff'd* 447 F.2d 484 (9th Cir.1971), a personal injury law firm advanced litigation costs on behalf of its clients, and the clients had no obligation to repay the costs unless their case was successful. The law firm deducted the litigation costs in the year paid and included the reimbursed costs in income in the year of reimbursement. The law firm screened clients to reduce the risk that the advanced costs would not be repaid and took cases when there was a "good hope" of recovery. The court determined that the law firm's advances operated as loans to its clients for which the law firm had an expectation of reimbursement. Therefore, deductions for the advances under section 162 were not allowed. *See also Herrick v. Commissioner*, 63 T.C. 562 (1975) (similar effect); *Silverton v. Commissioner*, T.C. Memo. 1977-198 (1977) (similar effect).

Under the related "tax benefit rule," if a taxpayer takes a proper deduction and, in a later tax year, an event occurs that is fundamentally inconsistent with the premise on which the previous deduction was based (for example, an unforeseen refund of deducted expenses), the taxpayer must take the deducted amount into income. *See* section 111 of the Code (providing that gross income does not include income attributable to the recovery during a taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by chapter 1 of the Code). The Supreme Court applied the tax benefit rule in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983). In that case, the Court observed that "[t]he basic purpose of the tax benefit rule is to achieve rough transactional parity in tax … and to protect the Government and the taxpayer from the adverse effects of reporting a transaction on the basis of assumptions that an event in a subsequent year proves to have been erroneous. Such an event, unforeseen at the time of an earlier deduction, may in many cases require the application of the tax benefit rule." *Id*. at 383.

ANALYSIS

In both Situation 1 and Situation 2, A and B each have a reasonable expectation of reimbursement. At the end of 2020, the reimbursement of A's and B's eligible expenses, in the form of covered loan forgiveness, is reasonably expected to occur – rather than being unforeseeable – such that a deduction is inappropriate. *Compare Canelo*, 53 TC at 225-226 with *Hillsboro*, 460 U.S. at 383. Section 1106(b), (d), and (g) of the CARES Act, and the supporting loan forgiveness application procedures published by the SBA, provide covered loan recipients like A and B with clear and readily accessible guidance to apply for and receive covered loan forgiveness. *See* www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program. Under these procedures, each taxpayer calculates the amount of its covered loan forgiveness on the basis of the eligible expenses paid or accrued in the covered period and submits a completed form and supporting documentation to their covered loan lender. *See* PPP Loan Forgiveness Application Form 3508. Within 60 days of receipt of an application for forgiveness, their covered loan lenders must issue a decision regarding A and B's applications. *See* section 1106(g) of the CARES Act. Accordingly, A's and B's eligible expenses are not deducible because there is a reasonable expectation of reimbursement.

Section 265(a)(1) of the Code also disallows any amount of A's and B's eligible expenses otherwise allowable as a deduction under the Code, including section 161, to the extent the payment of such eligible expenses is allocable to tax-exempt income in the form of the reasonably expected covered loan forgiveness. The fact that the tax-exempt income may not have been accrued or received by the end of the taxable year does not change this result because the disallowance applies whether or not any amount of tax-exempt income in the form of covered loan forgiveness and to which the eligible expenses are allocable is received or accrued. *See* section 265(a)(1); §1.265-1(b)(1).

Situation 1.

Based on the foregoing, when A completed its application for covered loan forgiveness, A knew the amount of its eligible expenses that qualified for reimbursement, in the form of covered loan forgiveness, and had a reasonable expectation of reimbursement. The reimbursement, in the form of covered loan forgiveness, was foreseeable. Therefore, pursuant to the foregoing authorities, A may not deduct A's eligible expenses.

In the alternative, section 265(a)(1) disallows a deduction of A's otherwise deductible eligible expenses because the expenses are allocable to tax-exempt income in the form of reasonably expected covered loan forgiveness.

Situation 2.

Although B did not complete an application for covered loan forgiveness in 2020, at the end of 2020, B satisfied all other requirements under section 1106 of the CARES Act for forgiveness of the covered loan and at the end of 2020 expected to apply to the lender for covered loan forgiveness of the covered loan in 2021. Thus, at the end of 2020 B both knew the amount of its eligible expenses that qualified for reimbursement, in the form of covered loan forgiveness, and had a reasonable expectation of reimbursement. The reimbursement in the form of covered loan forgiveness was foreseeable. Therefore, pursuant to the foregoing authorities, B may not deduct B's eligible expenses.

In the alternative, section 265(a)(1) disallows a deduction of B's otherwise deductible eligible expenses because the expenses are allocable to tax-exempt income in the form of reasonably expected covered loan forgiveness.

HOLDING

A taxpayer that received a covered loan guaranteed under the PPP and paid or incurred certain otherwise deductible expenses listed in section 1106(b) of the CARES Act may not deduct those expenses in the taxable year in which the expenses were paid or incurred if, at the end of such taxable year, the taxpayer reasonably expects to receive forgiveness of the covered loan on the basis of the expenses it paid or accrued during the covered period, even if the taxpayer has not submitted an application for forgiveness of the covered loan by the end of such taxable year.

EFFECT ON OTHER DOCUMENTS

This revenue ruling amplifies Notice 2020-32, 2020-21 IRB 837 (May 18, 2020).

DRAFTING INFORMATION

The principal authors of this revenue ruling are Sarah Daya and Charles Gorham of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue ruling, contact Ms. Daya at (202) 317-4891 (not a toll-free number).

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26 CFR §1.529A added; 1.511-2 amended; 1.513-1 amended; 25.2501-1 amended; 25.2503-3 amended; 25.2503–6 amended; 25.2511-2 amended; 26.2642-1 amended

T.D. 9923

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 1, 25, 26, 301, and 602

Guidance under Section 529A: Qualified ABLE Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance regarding programs under the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act). The ABLE Act provides rules under which States or State agencies or instrumentalities may establish and maintain a Federal tax-favored savings program for eligible individuals with a disability who are the owners and designated beneficiaries of accounts to which contributions may be made to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. In addition, these final regulations provide corresponding amendments to the unrelated business income tax regulations, the gift and generation-skipping transfer tax regulations, and the electronic filing requirements regulations. These regulations affect eligible individuals that are designated beneficiaries of accounts established and maintained under the ABLE Act.

DATES: *Effective date*: These final regulations are effective November 19, 2020.

Applicability dates: For dates of applicability, see §§ 1.511-2(e)(2), 1.513-(g), 1.529A-1(c), 1.529A-2(q), 1.529A-3(h), 1.529A-4(e), 1.529A-5(g), 1.529A-6(f), 1.529A-7(b), 1.529A-8(a), and 301.6011-2(g).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations under section 529A, Taina Edlund, (202) 317-4541, or Julia Parnell, (202) 317-4086; concerning the estate and gift tax regulations, Lorraine Gardner, (202) 317-4645, or Daniel Gespass, (202) 317-4632; concerning the reporting provisions under section 529A, Isaac Brooks, (202) 317-6844 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations amending 26 CFR parts 1, 25, 26 and 301, to provide guidance under section 529A of the Internal Revenue Code (Code). Section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a Federal tax-favored savings program through which contributions may be made to the account of an eligible individual with a disability to meet qualified disability expenses.

1. *The ABLE Act*

Section 529A was added to the Code on December 19, 2014, by the ABLE Act, which was enacted as part of the Tax Increase Prevention Act of 2014, Public Law 113-295 (128 Stat. 4010). The statutory requirements of section 529A apply to taxable years beginning after December 31, 2014.

Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the lifetime of an individual with a disability. Section 101 of the ABLE Act confirms that one of the ABLE Act's purposes is to "provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits" otherwise available to those individuals, whether through private sources, employment, public programs, or otherwise. Before the enactment of the ABLE Act, various types of Federal tax-advantaged savings arrangements existed, but none adequately served the goal of promoting saving for those supplemental financial needs.

Section 529A allows the creation of a qualified ABLE program by a State (or agency or instrumentality thereof) under which a separate ABLE account may be established for an eligible individual with a disability who is the designated beneficiary and owner of that account. Generally, contributions to an ABLE account are subject to both an annual limit and a cumulative limit, and, when made by a person other than the designated beneficiary, are treated as gifts to the designated beneficiary. These gifts may be sheltered from Federal gift tax by the annual per-donee gift tax exclusion. Distributions from an ABLE account for the qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. However, the earnings portion of distributions from an ABLE

account in excess of the qualified disability expenses generally is includible in the gross income of the designated beneficiary. An ABLE account may be used for the long-term benefit or short-term needs of the designated beneficiary.

Section 103 of the ABLE Act, while not a tax provision, is critical to achieving the goal of the ABLE Act of providing financial resources for the benefit of individuals with disabilities. Because so many of the programs that provide essential financial, occupational, and other resources and services to individuals with disabilities are available only to persons whose resources and income do not exceed relatively low dollar limits, section 103 generally disregards a designated beneficiary's ABLE account (specifically, the account balance, contributions to the account, and distributions from the account) for purposes of determining the designated beneficiary's eligibility for, and the amount of any assistance or benefits provided under, certain means-tested Federal programs. However, in the case of the Supplemental Security Income (SSI) program under title XVI of the Social Security Act, distributions for certain housing expenses are not disregarded, and the balance (including earnings) in an ABLE account is considered a resource of the designated beneficiary to the extent it exceeds $100,000. Section 103 also addresses the impact of an excess balance in an ABLE account on the designated beneficiary's eligibility for benefits under the SSI program and Medicaid.

Finally, section 104 of the ABLE Act addresses the treatment of ABLE accounts in bankruptcy proceedings.

2. *Guidance*

A. *Notice 2015-18*

Shortly after the ABLE Act was enacted, the Department of the Treasury (Treasury Department) and the IRS were advised that several state legislatures were in the process of enacting enabling legislation, and ABLE programs might be in operation in some states before guidance under section 529A could be issued by the Treasury Department and the IRS. In order to prevent the lack of regulatory guidance from discouraging states to enact enabling legislation and create ABLE programs, the Treasury Department and the IRS issued Notice 2015-18, 2015-12 I.R.B. 765 (March 23, 2015). The Notice provided that future section 529A guidance would confirm that the owner of an ABLE account is the designated beneficiary of the account, and that a person with signature authority over the account (if other than the account's designated beneficiary) may neither have nor acquire any beneficial interest in the ABLE account and must administer the account for the designated beneficiary of the account. The Notice further provided that, in the event that State legislation creating an ABLE program enacted in accordance with section 529A prior to the issuance of guidance does not fully comport with the guidance when issued, the Treasury Department and the IRS intended to provide transition relief to give the States sufficient time to implement the changes necessary to avoid the disqualification of the program and of the ABLE accounts already established under the program.

B. *2015 proposed regulations*

On June 22, 2015, the Treasury Department and the IRS published a notice of proposed rulemaking (NPRM) in the **Federal Register** (REG-102837-15; 80 FR 35602) proposing regulations under section 529A regarding programs under the ABLE Act (2015 proposed regulations). The 2015 proposed regulations set forth the requirements a program established and maintained by a State, or agency or instrumentality thereof, must satisfy to be considered a qualified ABLE program under section 529A. They covered the requirements for establishing an ABLE account (including those that an individual must satisfy to be an eligible individual qualified to be the designated beneficiary of an ABLE account) and the requirements concerning contributions to an ABLE account (including the limitations on the amount and investment of such contributions). In addition, the 2015 proposed regulations addressed the gift and generation-skipping transfer (GST) tax consequences of contributions to an ABLE account, as well as the Federal income, gift, and estate tax consequences of distributions from, and changes in the designated beneficiary of, an ABLE account. The 2015 proposed regulations also provided guidance on requirements with respect to rollovers and program-to-program transfers from one ABLE account to another and on the recordkeeping and reporting requirements of a qualified ABLE program. Finally, the 2015 proposed regulations provided corresponding amendments to regulations under sections 511 and 513 (with respect to unrelated business taxable income), sections 2501, 2503, 2511, 2642, and 2652 (with respect to gift and GST taxes), and section 6011 (with respect to electronic filing requirements).

C. *Notice 2015-81*

More than 200 written comments were received in response to the 2015 proposed regulations and a public hearing was held on October 14, 2015. Numerous commenters asked the Treasury Department and the IRS to issue interim guidance to address three requirements under the proposed regulations that they said would create significant barriers to the development of qualified ABLE programs by the States: (i) the requirement to establish safeguards to categorize distributions from an ABLE account; (ii) the requirement to request the taxpayer identification number (TIN) of every contributor to an ABLE account; and (iii) the requirement to process disability certifications with signed physicians' diagnoses.

In response to the request for interim guidance, the Treasury Department and the IRS published Notice 2015-81, 2015-49 I.R.B. 784 (Dec. 7, 2015), advising that the final regulations would address these requirements in the following manner: First, the final regulations would eliminate the requirement that a qualified ABLE program distinguish between types of expenses. Second, the final regulations would eliminate the requirement that a qualified ABLE program must request the TIN of each contributor at the time a contribution is made if the program has a system in place to identify and reject excess contributions and excess aggregate contributions before they are deposited into an ABLE account. Third, the final regulations would permit a certification of eligibility to satisfy the requirement for

filing a disability certification. A certification of eligibility is a certification, under penalties of perjury, that the individual (or the individual's agent under a power of attorney or a parent or legal guardian of the individual) has a signed physician's diagnosis, and that the signed diagnosis will be retained and provided to the ABLE program or the IRS on request.

3. *The PATH Act Amendment*

On December 18, 2015, Section 303 of the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act), was enacted as part of the Consolidated Appropriations Act, 2016, Public Law 114-113 (129 Stat. 2242). The PATH Act amended section 529A(b)(1), effective for taxable years beginning after December 31, 2014, by removing the requirement that a State's qualified ABLE program allow the establishment of an ABLE account only for a designated beneficiary who is a resident of that State or of a contracting State.

4. *The TCJA*

The contribution limits and other provisions of section 529A were modified by the Tax Cuts and Jobs Act, Public Law 115-97, 131 Stat. 2054, (2017) (TCJA), signed into law on December 22, 2017. The TCJA 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 in section 2503(b), formerly set forth in section 529A(b)(2)(B)). This additional permissible contribution is subject to its own limit as described in section 529A(b)(2)(B)(ii). Specifically, this additional contributed amount may not exceed the lesser 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. The TCJA also amended the section 529A(b)(2) flush language to require the designated beneficiary, or a person acting on behalf of the designated beneficiary, to maintain adequate records to ensure, and to be responsible for ensuring, that the requirements of section 529A(b)(2)(B)(ii) are met.

New section 529A(b)(7)(A) identifies a designated beneficiary eligible to make this 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: a defined contribution plan meeting the requirements of sections 401(a) or 403(a); an annuity contract described in section 403(b); or an eligible deferred contribution plan under section 457(b). Section 529A(b)(7)(B) defines the term "poverty line" as having the meaning provided in section 673 of the Community Services Block Grant Act (42 U.S.C. 9902).

The TCJA also amended section 529 (regarding qualified tuition programs) to allow, before January 1, 2026, a limited amount to be rolled over to an ABLE account from the designated beneficiary's own section 529 qualified tuition program (QTP) account or from the QTP account of certain family members. The TCJA added section 529(c)(3)(C)(i)(III), which provides that a distribution from a QTP made after December 22, 2017, and before January 1, 2026, is not subject to income tax if, within 60 days of the distribution, it is transferred to an ABLE account of the designated beneficiary or a member of the family of the designated beneficiary. Under section 529(c)(3)(C)(i), the amount of any rollover to an ABLE account is limited to the amount that, when added to all other contributions made to the ABLE account for the taxable year, does not exceed the contribution limit for the ABLE account under section 529A(b)(2)(B)(i), that is, the annual gift tax exclusion amount under section 2503(b). This limited rollover is described in more detail in Notice 2018-58, 2018-33 I.R.B. 305 (Aug. 13, 2018).

A. *Notice 2018-62*

To address the TCJA modifications to section 529A, the Treasury Department and the IRS published Notice 2018-62, 2018-34 I.R.B. 316 (Aug. 20, 2018), which announced the intent of the Treasury Department and the IRS to issue proposed regulations to implement these changes and describes the anticipated rules to implement the statutory changes. No comments were received in response to the Notice.

B. *2019 proposed regulations*

On October 10, 2019, the Treasury Department and the IRS published an NPRM in the **Federal Register** (REG-128246-18; 84 FR 54529) to address the TCJA modifications to section 529A (2019 proposed regulations).

The 2019 proposed regulations confirmed that the employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements in section 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 2019 proposed regulations provided that ABLE programs may allow a designated beneficiary or the person acting on his or her behalf to certify, under penalties of perjury, that he or she is a designated beneficiary described in section 529A(b)(7) and that his or her contributions of compensation do not exceed the limit set forth in section 529A(b)(2)(B)(ii).

The 2019 proposed regulations also clarified that the poverty line in section 529A(b)(7)(B) is to be determined by using 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). Those guidelines vary based on locality. Specifically, there are separate guidelines for (1) the contiguous 48 states and the District of Columbia, (2) Alaska, and (3) Hawaii. Because the Treasury Department and the IRS concluded that the poverty guideline that most closely reflects the employed designated beneficiary's cost of living is the most relevant for determining the contribution limit, the 2019 proposed regulations provided that a designated beneficiary's contribution limit is to be determined using the poverty guideline applicable in the state of the designated beneficiary's residence.

Because section 529A(b)(2) provides that rules similar to those set forth in section 408(d)(4) regarding the return of excess contributions to an individual retire-

ment account or annuity apply to ABLE accounts, the 2019 proposed regulations provided that a qualified ABLE program must return any contributions of the designated beneficiary's compensation in excess of the limit in section 529A(b)(2)(B)(ii) to the designated beneficiary.

The 2019 proposed regulations also provided that 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. Such returns of excess compensation contributions must be received by the employed designated beneficiary on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess compensation contributions were made. A failure to return excess contributions within this time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess compensation contributions.

Finally, in order to minimize administrative burdens for the designated beneficiary and the qualified ABLE program, for purposes of ensuring that the limit on contributions made under section 529A(b)(2)(B)(ii) is not exceeded, the 2019 proposed regulations provided that a qualified ABLE program may rely on self-certifications, made under penalties of perjury, of the designated beneficiary or the person acting on the designated beneficiary's behalf.

Six comments were received in response to the 2019 proposed regulations. No public hearing was requested or held.

Summary of Comments and Explanation of Provisions

Approximately 200 comments were received in response to the 2015 proposed regulations. These comments, along with the six comments received in response to the 2019 proposed regulations, are discussed in this section. The Treasury Department and the IRS, after consideration of all of these comments and the changes made to section 529A of the Code by the PATH Act and the TCJA, adopt the 2015 and 2019 proposed regulations as amended by this Treasury decision. The comments are available for public inspection at *www.regulations.gov* or on request.

These final regulations provide guidance on the requirements a program established and maintained by a State, or agency or instrumentality thereof, must satisfy to be considered a qualified ABLE program under section 529A. They also address the requirements for establishing an ABLE account, for qualifying as an eligible individual and thus a qualified designated beneficiary of an ABLE account and for contributions to an ABLE account, including the limitations on the amount and investment of such contributions. These final regulations also provide rules regarding changes in the designated beneficiary of an ABLE account, and rollovers and program-to-program transfers from one ABLE account to another. In addition, these final regulations provide guidance on the gift and GST tax consequences of contributions to an ABLE account, as well as on the Federal income, gift, and estate tax consequences of distributions from, and changes in the designated beneficiary of, an ABLE account. Finally, these final regulations provide guidance on the recordkeeping and reporting requirements of a qualified ABLE program.

1. *Qualified ABLE Programs*

A. *Established and maintained by a State*

Consistent with section 529A(b)(1), which defines an ABLE program as a program established and maintained by a State, or agency or instrumentality thereof, the final regulations, like the 2015 proposed regulations, provide that a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State. A program is maintained by a State, or its agency or instrumentality, if all the terms and conditions of the program are set by the State, or its agency or instrumentality, and the State, or its agency or instrumentality, is actively involved on an ongoing basis in the administration of the program, including supervising decisions relating to the investment of assets contributed to the program. The final regulations set forth factors that are relevant in determining whether a State, or its agency or instrumentality, is actively involved in the administration of the program. Among those factors is the nature and extent of the State's role in selecting and overseeing private contractors contracted to provide administrative or other services.

B. *Community Development Financial Institutions*

The Treasury Department and the IRS understand that many of the States will have the entity that currently administers its section 529 qualified tuition program (on which section 529A was loosely modeled) also administer that State's qualified ABLE program. However, because of greater administrative obligations, each qualified ABLE program is likely to have higher costs and lower revenue to offset those costs than the same State's qualified tuition program. The 2015 proposed regulations suggested that, by contracting with one or more Community Development Financial Institutions (CDFIs)[1] to perform some or all of the duties involved in administering the qualified ABLE program, a State might be able to reduce its costs, and the cost to each owner of an ABLE account, because the CDFI might be able to obtain corporate or other grants to cover those costs. For example, a CDFI could provide services to facilitate distributions, collect and report social data, solicit grants to defray the cost of administering the program, and apply for a financial assistance award from the CDFI Fund, an entity established within the Treasury Department to promote community development in economically distressed communities.

Several commenters expressed concerns that the reference to CDFIs in the 2015 proposed regulations may lead qualified ABLE program administrators to believe that CDFIs are the preferred, or perhaps even the sole, entities with which they may contract for administrative and

[1] CDFIs (as defined in 12 U.S.C. 4702(5) and 12 CFR 1805.104) are certified by the CDFI Fund established under 12 U.S.C. 4703. The CDFI Program (authorized by 12 U.S.C. 4704-4707) is administered by the Treasury Department. See the CDFI Fund's website (www.cdfifund.gov) for more detailed information and a listing of CDFIs nationwide.

other services. These commenters asked that the final regulations clarify that organizations other than CDFIs, such as community banks, also may perform such services. One commenter expressed concern that CFDIs will not be located where people with disabilities and their families would have easy access to make deposits or withdrawals. The same commenter also expressed concern that CFDIs would be overwhelmed by screening and verifying people associated with ABLE accounts.

The Treasury Department and the IRS note that the final regulations, like the 2015 proposed regulations, do not prohibit States from contracting with private contractors for various services. However, to increase clarity, the final regulations specifically provide that, while a qualified ABLE program may contract with a CDFI for services, a qualified ABLE program also may contract with other private contractors.

Some commenters requested that the rules applicable to qualified ABLE programs be as consistent as possible with the rules applicable to qualified tuition programs under section 529 in order to reduce administrative burdens and costs. Numerous others requested that the process and reporting should be made as simple and streamlined as possible for the individuals with a disability and their families. Others requested as much uniformity as possible among the qualified ABLE programs, to facilitate the movement of ABLE accounts from one program to another.

The Treasury Department and the IRS are aware of the desirability of reducing administrative burdens and costs. The final regulations therefore are consistent with the rules applicable to qualified tuition programs, where appropriate. However, the final regulations allow certain flexibility in the way each ABLE program may implement the applicable requirements.

C. *Consortia*

Several commenters asked whether qualified ABLE programs could join together to form a consortium for the purpose of offering broader investment choices, streamlined program administration, and lower fees for account holders. The Treasury Department and the IRS view the States' ability to streamline administration and lower costs as helpful in facilitating the establishment and maintenance of qualified ABLE programs. Therefore, the final regulations provide that a qualified ABLE program may be maintained by two or more States or agencies or instrumentalities of a State. If a State or agency or instrumentality of a State participates in a consortium, the consortium's program is considered to be the program of each member (State or agency or instrumentality of a State) of the consortium.

D. *Residency requirement*

As originally enacted, section 529A(b)(1)(C) required a qualified ABLE program to allow for the establishment of an ABLE account only for a designated beneficiary who is a resident of that State or of a contracting State. Consistent with the statute, the 2015 proposed regulations required that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary's residence has contracted for the provision of ABLE accounts.

The 2015 proposed regulations provided that, if a State does not establish and maintain a qualified ABLE program, it could contract with another State to provide an ABLE program for its residents. The 2015 proposed regulations defined "contracting State" as a State without a qualified ABLE program of its own, which, in order to make ABLE accounts available to its residents who are eligible individuals, contracts with another State that has a program.

Many commenters asked that the final regulations clarify whether a State without an ABLE program could contract with more than one State having an ABLE program. Another commenter asked whether the Federal government would allow a State without its own qualified ABLE program to decline to contract with another State, and thus deprive its residents of access to ABLE accounts.

A few commenters were in support of the residency requirement, but several commenters expressed hope that Congress would amend the ABLE Act to eliminate the residency requirement. Commenters pointed out that the residency requirement prevents an otherwise eligible US citizen living abroad from having an ABLE account, and that the accounts of non-resident US citizens in a disability savings account program created under foreign law would not receive the same tax-sheltered benefits under US law as are accorded to ABLE accounts. Others argued that allowing an eligible individual a choice of programs would ensure quality, competitive fees, uniformity, and other benefits for the eligible individual.

Several commenters suggested that the final regulations permit a qualified ABLE program to rely on a certification under penalties of perjury by the designated beneficiary regarding his or her state of residence to establish that the residency requirement has been satisfied.

After the Treasury Department and the IRS received these comments, the PATH Act repealed the residency requirement. Therefore, the final regulations eliminate all references to a residency requirement and to a "contracting State." A qualified ABLE program may allow an ABLE account to be established for an eligible individual regardless of his or her residence and, subject to the rules of the particular qualified ABLE program, an eligible individual may be the designated beneficiary of an ABLE account under the qualified ABLE program of any State. However, the Treasury Department and the IRS note that the final regulations do not prohibit a State from limiting its program to State residents nor do they require a State to establish or participate in an ABLE program.

2. *ABLE Accounts*

A. *Establishment and signatory of an ABLE account*

Section 529A(e)(3) defines the term "designated beneficiary" as the eligible individual who established an ABLE account and is the owner of such account. Consistent with section 529A(e)(3), the 2015 proposed regulations provided that the designated beneficiary of an ABLE account is the individual who is the owner of the ABLE account and who either established the account at a time when he or

she was an eligible individual or who has succeeded the original designated beneficiary. Because not every eligible individual may have the capacity or otherwise be able to establish an ABLE account on his or her own behalf, the 2015 proposed regulations provided that the ABLE account may be established on behalf of the eligible individual by his or her agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual. Similarly, the 2015 proposed regulations also provided that if the designated beneficiary is unable to, or chooses not to, exercise signature authority over his or her account, then signature authority may be exercised by an agent under power of attorney or, if none, a parent or legal guardian of the designated beneficiary. The final regulations retain these provisions with modifications.

One commenter suggested that the final regulations clarify that "parent" refers to the parent of an adult designated beneficiary, as well as the parent of a minor. The final regulations do not adopt this suggestion because it is not necessary. A person's status as a parent is not changed by the child's attainment of the age of majority. Rather, a person's status as a parent is determined by reference to a familial relationship that is not age dependent.

Numerous commenters asked that the list of persons who may exercise signature authority over the ABLE account on behalf of the designated beneficiary (signatories) be expanded to provide greater flexibility and to avoid the need for the court appointment of a conservator or other legal representative, particularly in cases in which the designated beneficiary has no parent available to serve as signatory. One commenter suggested that there is no reason to restrict the list to those acting under a power of attorney or to legal guardians to the exclusion of custodians and other types of fiduciaries permitted under applicable state law. One commenter pointed out that an individual eligible for an ABLE account may not have a parent, guardian, or agent under a power of attorney who can and who is willing to manage an account. Other commenters suggested that the list of authorized signatories be expanded to include grandparents, siblings, non-family members, the trustees of a trust for which the designated beneficiary is the trust beneficiary, the designated beneficiary's representative payee as recognized by the Social Security Administration (SSA), and custodians or others designated by the designated beneficiary. One commenter explained that concerns about fraud or abuse by SSA representative payees would be alleviated by the Strengthening Protections for Social Security Beneficiaries Act of 2018, Public Law 115-165 (132 Stat. 1257), which increases the funding for the Representative Payee program and strengthens procedures for addressing misuse or misappropriation of funds by SSA representative payees. Another commenter suggested that someone other than the eligible individual be permitted to establish the account if the eligible individual has the legal capacity to do so but chooses to have another person establish the account. One commenter suggested that the law of each individual State should be permitted to govern who can be a signatory.

Some commenters suggested that the designated beneficiary and/or the other person with signature authority be permitted to name a successor, that the designated beneficiary be allowed to delegate to others not only signature authority over his or her account but also the ability to establish the ABLE account, that the designated beneficiary be able to choose more than one person to exercise signature authority over his or her ABLE account, and that the designated beneficiary be allowed to designate a co-signer to serve concurrently with the designated beneficiary. Commenters also requested that the final regulations confirm that a parent with signature authority over a minor child's ABLE account remains eligible to serve after the designated beneficiary reaches the age of majority.

Some commenters requested that the ordering rule for determining the order in which a person has the authority to be a signatory be removed. These commenters were concerned that the ordering rule would impose obligations on the qualified ABLE programs to verify the absence of any other person with higher priority who was both willing and able to so serve. These commenters suggested that a program be permitted to rely on the certification, under penalties of perjury, of an individual seeking to exercise signature authority over an ABLE account regarding that individual's authority to act on behalf of the designated beneficiary.

On the other hand, one commenter supported the provision in the 2015 proposed regulations regarding permissible signatories. Another commenter questioned whether allowing the designated beneficiary to designate another individual (who may otherwise lack independent authority to act on behalf of the designated beneficiary) to exercise signature authority would be consistent with the designated beneficiary's ownership of the ABLE account. The commenter also noted that allowing greater flexibility in the choice of authorized signatory could increase program costs.

The Treasury Department and the IRS recognize that there may be situations in which an eligible individual with legal capacity may want another person to establish, or to serve as the person with signature authority over, the ABLE account for that eligible individual. Therefore, the final regulations clarify that an eligible individual with legal capacity may delegate these responsibilities to any other person. Furthermore, the Treasury Department and the IRS recognize that expanding the categories of individuals who may serve as signatories of an ABLE account of a designated beneficiary who lacks legal capacity affords less cumbersome alternatives to a court-appointed guardian in the event the designated beneficiary has no agent under a power of attorney or parent to exercise signature authority. However, the Treasury Department and the IRS also recognize that expanding too widely the universe of individuals who are allowed to establish an ABLE account and serve as the signatory of that ABLE account could increase the risk of the impermissible establishment of multiple accounts for a single individual or of having the designated beneficiary's only ABLE account being established and managed by a person who might not be the most appropriate person to serve in that capacity.

In an effort to find an appropriate balance between these possibly competing concerns, the final regulations provide an expanded hierarchy of persons who may establish an ABLE account for an individual or exercise signature authority over that individual's ABLE account.

That hierarchy consists of the individual selected by the eligible individual or the eligible individual's agent under a power of attorney, conservator or legal guardian or conservator, the spouse, a parent, a sibling, a grandparent, or a representative payee (whether an individual or organization) appointed by the SSA, in that order. It is noted that the representative payee is subject to all applicable SSA rules.

Because each eligible individual is allowed to have only one ABLE account, the Treasury Department and the IRS concluded that the ordering rule is necessary to provide a clearer process for determining who may establish the designated beneficiary's only permissible ABLE account. For this reason, the limitation and ordering rule prescribing the persons who may establish the account and/or serve as a signatory is retained in the final regulations. To further facilitate the establishment of ABLE accounts without imposing undue burden on the program or the eligible individuals, the final regulations permit a qualified ABLE program to accept a certification by an individual, under penalties of perjury, that he or she is authorized to establish the ABLE account for the benefit of the eligible individual and that there is no other willing and able person with a higher priority to do so.

The final regulations also allow a designated beneficiary with legal capacity to remove and replace from time to time the individual with signature authority over that designated beneficiary's ABLE account, and to name a successor signatory. The final regulations also allow a person with signature authority to name a successor signatory, consistent with the same ordering rule, if the designated beneficiary lacks the legal capacity to do so.

A few commenters suggested that more than one person be allowed to serve as authorized co-signatories. The Treasury Department and the IRS understand that this could provide administrative flexibility, so the final regulations allow a qualified ABLE program to permit co-signatories as long as each co-signatory would satisfy the ordering rule if the other had refused to so serve.

As in the 2015 proposed regulations, the final regulations provide that, because individuals with signature authority over an ABLE account would be acting on behalf of the designated beneficiary, references to actions of the designated beneficiary, such as establishing or managing the ABLE account, are deemed to include the actions of any individual with signature authority over the ABLE account. Further, the final regulations continue to provide that, except for the designated beneficiary of the ABLE account, any person with signature authority over the account may neither have, nor acquire, a beneficial interest in the account during the lifetime of the designated beneficiary, and must administer the account for the benefit of the designated beneficiary.

One commenter asked that the person with signature authority over an ABLE account be allowed to elect to establish an ABLE account as a custodial account under a Uniform Transfers to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA). The Treasury Department and the IRS decline to adopt this suggestion. The ABLE Act mandates very different rules governing ABLE accounts than those governing UTMA and UGMA accounts under State laws. As a result, the Treasury Department and the IRS concluded it would not be possible to administer an ABLE account as mandated by the ABLE Act if the account instead was structured and administered as a UTMA or UGMA account.

One commenter suggested that the final regulations confirm that the provisions regarding authorized signatories do not limit the ability of either the designated beneficiary or the person with signature authority to name other agents to, for instance, obtain information, make electronic contributions and investment option changes, authorize withdrawals, or have full joint control. With regard to shared full joint control, the final regulations do not adopt the suggestion. The Treasury Department and the IRS have concluded that this responsibility is properly the obligation of the person(s) with signature authority over the account and should not be delegable. However, the final regulations do not prohibit the person(s) with signature authority from having co-signatories or from allowing sub-accounts, each with a different signatory, for specific purposes.

B. *Limit on number of ABLE accounts of a designated beneficiary*

Section 529A(b)(1)(B) provides that each eligible person may have only one ABLE account. In addition, section 529A(c)(4) generally provides that, except with respect to rollovers, once an ABLE account has been established for a designated beneficiary, no account subsequently established for the same designated beneficiary may qualify as an ABLE account. Accordingly, the 2015 proposed regulations provided that, except in the case of rollovers or program-to-program transfers, a designated beneficiary would be limited to one ABLE account at a time, regardless of where located. The final regulations confirm that an eligible individual is not prohibited from establishing an ABLE account merely because he or she previously was the designated beneficiary of an ABLE account that has been closed.

Consistent with the statutory provisions, the 2015 proposed regulations provided that, except with respect to rollovers and program-to-program transfers, if an ABLE account is established for a designated beneficiary who already has an ABLE account in existence, the additional account would not be treated as an ABLE account. The 2015 proposed regulations also provided that, if an additional account is established and all contributions made to the additional account are returned in accordance with the rules applicable to excess contributions, the additional account would be treated as never having been established. The final regulations retain these provisions with one substantive modification.

Section 103 of the ABLE Act generally exempts ABLE accounts from being counted as a resource in determining the designated beneficiary's eligibility for, or the amount of, certain public benefits. Thus, an ABLE account has both tax and nontax benefits. Several commenters raised concerns regarding the treatment of additional accounts for purposes of the designated beneficiary's eligibility for public benefits. Although a tax regulation cannot govern provisions administered by other government agencies, the final regulations appropriately provide guidance on circumstances under which accounts are treated as ABLE accounts.

As a result of the PATH Act's amendment to section 529A eliminating the requirement that the account be opened in the State of the designated beneficiary's residence, the Treasury Department and the IRS concluded that there is now an increased risk that an additional account could be opened under a different qualified ABLE program by a person with authority to establish an account without the knowledge of either the eligible individual or another person with authority to establish an account, thus increasing the risk that the eligible individual thereby could lose his or her eligibility for his or her public benefits. The Treasury Department and the IRS also concluded that it is within the scope of their regulatory authority to attempt to prevent this potential harm to the class of individuals that section 529A was enacted to benefit. Accordingly, the final regulations provide that, if an additional account is established for the eligible individual, the additional account also is an ABLE account if either all contributions made to the additional account are returned to the contributor(s) under the same rules applicable to the return of excess contributions, or the additional account is transferred into the designated beneficiary's preexisting ABLE account with any excess contributions and excess aggregate contributions being returned to the contributor(s). If neither of these conditions is satisfied on or before the due date (including extensions) of the eligible individual's Federal income tax return for the year in which the additional account was established, the additional account will cease to be an ABLE account immediately after that return due date.

Like the 2015 proposed regulations, the final regulations provide that, at the time when an individual seeks to establish an ABLE account, the qualified ABLE program must obtain verification from the individual, signed under penalties of perjury, that the individual neither knows nor has reason to know that the eligible individual for whom the ABLE account is being established has an existing ABLE account, other than an account the assets of which will be rolled over or transferred to the new account in a program-to-program transfer. As noted previously, an eligible individual is not prohibited from establishing an ABLE account merely because he or she was the designated beneficiary of an ABLE account that has been closed.

Some commenters asked whether any penalty would be imposed on a qualified ABLE program that allows an individual to establish an ABLE account on the basis of such certification if the same eligible individual in fact does have a preexisting ABLE account. The Treasury Department and the IRS note that, in such an instance, no penalty would be imposed on the qualified ABLE program as long as the program has complied with all of the requirements of the regulations, including in obtaining the necessary certifications. As noted earlier in this section, if all of the contributions to the additional account are returned timely, the additional account will be treated as an ABLE account.

C. *Definition of one account*

Several commenters asked that the final regulations allow for the establishment of one or more sub-accounts under a master account of a single designated beneficiary, and that the master account (including all of its sub-accounts) would constitute a single ABLE account. Each sub-account would have a different individual with signature authority and discretion to direct the investments in that sub-account, provided that all of the sub-accounts are treated as one account for Federal tax and Federal means-tested benefit purposes. These commenters expressed concern that, if qualified ABLE programs are not given the discretion to allow sub-accounts, fewer individuals would be willing to contribute to a designated beneficiary's account because they would not have control over the manner in which the contributions were invested or used for the designated beneficiary. Another commenter expressed concern that allowing sub-accounts could increase program costs.

The Treasury Department and the IRS view the ability of a program to allow different individuals to establish and have signature authority over separate sub-accounts under one master account as being contrary to the only-one-account rule under section 529A. Therefore, the final regulations do not permit the kind of arrangement described in the preceding paragraph.

However, the final regulations do permit, but do not require, an ABLE program to allow the establishment of sub-accounts within the sole ABLE account of the designated beneficiary. Such a sub-account could be authorized by either the designated beneficiary or the person with signature authority over the ABLE account. The signatory over the ABLE account has sole authority over the investment of the ABLE account, but the final regulations permit a program to allow the creation and maintenance of separate funds within that account, each to be used for one or more types of expenditures and from which distributions may be authorized by a person other than the signatory. For example, a designated beneficiary may authorize a parent to open and administer the ABLE account, but also may authorize the maintenance of a particular sub-account to be used for the purchase of the designated beneficiary's groceries and entertainment expenses on an ongoing basis, and from which the designated beneficiary (or a named sibling, for example) may make distributions for that purpose. Thus, different persons may be authorized to make distributions from different sub-accounts. All sub-accounts are aggregated as part of the one ABLE account for all other purposes, including, without limitation, the contributions limits, limit on the number of permissible investment direction changes, tax provisions, and reporting requirements.

D. *Eligible individual*

At the time an ABLE account is established, the designated beneficiary of the account must provide evidence that he or she is an "eligible individual." Consistent with section 529A(e)(1), the 2015 proposed regulations provided that an individual is an eligible individual for a taxable year if he or she is either (i) entitled during that year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such blindness or disability occurred before the date on which the individual attained age 26, or (ii) the subject of a disability certification filed with the Secretary of the Treasury or his delegate (Secretary) for that year.

The final regulations, like the 2015 proposed regulations, provide that the determination that an individual is an eligible individual is made each taxable year and applies for the entire year. The final regulations, like the 2015 proposed regulations, provide that a qualified ABLE program must specify the documentation that an individual must furnish, both at the time an account is established and thereafter, to ensure that the designated beneficiary of the ABLE account is, and continues to be, an eligible individual.

A few commenters requested clarification as to whether an ABLE account may be established for an individual with a mental illness. The Treasury Department and the IRS note that the statute does not differentiate between a mental or physical condition, and the final regulations retain the language from § 1.529A-2(e)(1)(i)(A) of the 2015 proposed regulations that provides that a mental impairment can meet the requirements for a disability certification.

One commenter asked whether a qualified ABLE program could narrow the types of physical or mental impairments that would satisfy the requirements to be an eligible individual to specific disabilities, such as developmental disabilities. The Treasury Department and the IRS concluded that the statute does not permit a qualified ABLE program to discriminate on the basis of the nature of the disability, and that Congress intended that all individuals meeting the definition of an eligible individual under section 529A have access to an ABLE account, regardless of the nature of the individual's disability. Therefore, a qualified ABLE program may not narrow the definition of an eligible individual by limiting the types of disabilities that can be considered.

The Treasury Department and the IRS considered whether to retain the term "entitled" for purposes of the definition of an eligible individual under section 529A(e)(1)(A). To clarify the definition of "eligible individual" under section 529A(e)(1)(A) and its use of the word "entitled", the final regulations retain the term "entitled" as provided in the statute, interpret it to include eligibility for SSI benefits, and define the term "eligible individual" to include an individual who either is receiving SSI benefits based on blindness or a disability that occurred before age 26 or is a person whose entitlement to such benefits has been suspended due solely to excess income or resources.

A few commenters suggested that establishing an individual's eligibility should be the obligation of the Treasury Department or the SSA and should not be a burden shifted to the qualified ABLE programs. In addition, one commenter requested that a defined term, "qualified proxy," be added to the regulations to clarify the procedures for establishing eligibility based on the individual's entitlement to SSI or SSDI benefits. Such a certification would be signed under penalties of perjury by the designated beneficiary or a "qualified proxy" who would certify as to the beneficiary's entitlement to these benefits during the applicable tax year and as to the onset of blindness or disability prior to age 26. The commenter also suggested that the certification either be accompanied by a copy of a letter from the SSA confirming eligibility for such benefits or reference the existence of such a letter and specifying the date of that letter. The commenter suggested allowing a qualified ABLE program to rely on an SSA certification for purposes of determining whether an individual is an eligible individual based on blindness or disability under title II or XVI of the Social Security Act. Other commenters recommended that the applicant be asked to certify the date of the most recent SSA benefit entitlement letter or to show some easily available proof, which the commenters suggested could be verified through electronic data matches between the IRS and the SSA.

The Treasury Department and the IRS agree that a certification-based process regarding eligibility by reason of entitlement to benefits based on blindness or disability under title II or XVI of the Social Security Act is the simplest way to facilitate the establishment of ABLE accounts without unduly burdening individuals, the program, the IRS, or the SSA. Additionally, the Treasury Department and the IRS concluded that it would be in everyone's best interests to permit an eligible individual to establish an ABLE account without experiencing the delay that would result from having to wait for the acceptance or approval of a certification by a government agency. Therefore, consistent with Notice 2015-81, the final regulations provide that a qualified ABLE program may establish entitlement with a certification, under penalties of perjury, by the individual establishing the ABLE account that the designated beneficiary of that account is eligible for benefits under title II or XVI of the Social Security Act and that the blindness or disability that qualifies the designated beneficiary for those benefits occurred before the date on which he or she attained age 26.

The other method of satisfying the definition of an eligible individual is by obtaining a disability certification and filing it with the Secretary. Consistent with section 529A(e)(2)(A), the 2015 proposed regulations provided that a disability certification is a certification deemed sufficient by the Secretary, signed under penalties of perjury, that an individual has a severe physical or mental impairment that can be expected to result in death or that has lasted (or can be expected to last) for a continuous period of not less than 12 months, or that the individual is blind, and that the blindness or impairment occurred before age 26, which certification is accompanied by a copy of a physician's diagnosis relating to the blindness or impairment. One commenter asked that the final regulations clarify that a disability certification that meets the requirements of the final regulations will be "deemed sufficient by the Secretary." The Treasury Department and the IRS agree, and the final regulations affirm that a certification that meets the requirements of a disability certification as set forth in the final regulations is sufficient to establish the requisite level of physical or mental impairment described in § 1.529A-2(e)(2).

The final regulations, like the 2015 proposed regulations, also provide that a disability certification is deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification is deemed to have been received under the rules of the qualified ABLE program, about which receipt the qualified ABLE program must file information with the IRS.

As was stated in Notice 2015-81, numerous commenters, including States and potential qualified ABLE program administrators, expressed concerns about their

responsibilities and potential liabilities for receiving and safeguarding medical information contained in a signed diagnosis, particularly because they do not anticipate having the expertise or ability to evaluate that medical information. The commenters emphasized that qualified ABLE programs would incur unmanageable costs and burdens in trying to comply with applicable laws imposing system and other requirements on those in possession of medical records, as well as in implementing systems to receive and store paper documentation. The commenters also expressed the concern that, if these costs and burdens are not minimized, some States might not proceed with the implementation of qualified ABLE programs for their residents. The commenters recommended that a qualified ABLE program be permitted to establish an ABLE account on the basis of a certification by the person establishing the ABLE account, signed under penalties of perjury, that the individual who is to be the designated beneficiary of the account has a qualifying condition and otherwise satisfies the definition of an eligible individual, and that a diagnosis signed by a physician regarding the relevant impairment or impairments has been obtained. To facilitate the establishment of qualified ABLE programs by the States, commenters requested interim guidance addressing the issue.

After consideration of these comments, the Treasury Department and the IRS issued Notice 2015-81, stating that a certification under penalties of perjury that the individual (or the individual's agent under a power of attorney or legal guardian of the individual) has a signed physician's diagnosis, and that the signed diagnosis will be retained and provided to the qualified ABLE program or the IRS upon request, would be adequate under the final regulations to satisfy the requirements pertaining to the filing of a disability certification to establish eligibility for an ABLE account.

One commenter stated that the degree of flexibility given to each state with respect to the specific documentation that will need to be filed to establish proof of eligibility will place an undue burden on the process and will create confusion within the disability community. This commenter and others asked that the IRS provide standard forms to document eligibility. Another commenter recommended that the final regulations establish a maximum amount of required information and documentation to make it easier for those attempting to establish an ABLE account to ensure they have everything required. Other commenters asked that qualified ABLE program administrators be required to collect only information concerning the basis of eligibility and a statement that the blindness or disability occurred before age 26. These commenters recommended the use of an application with "check-off" boxes allowing the applicant to indicate whether his or her eligibility for an ABLE account is based on SSI eligibility, SSDI eligibility, or the filing of a disability certification. The commenters would require the eligible individual to maintain records and documentation supporting the category of eligibility indicated on the application form, and to sign the application form under penalties of perjury.

The Treasury Department and the IRS understand and appreciate the benefits of a consistent and predictable disability documentation process, while recognizing that a qualified ABLE program should be accorded the flexibility to meet its own particular needs. Therefore, consistent with Notice 2015-81, the Treasury Department and the IRS added a safe harbor to the final regulations. The safe harbor provides that a qualified ABLE program may establish that an individual is an eligible individual if the individual (or the person with authority to establish that individual's account) certifies under penalties of perjury: (i) the basis for the individual's status as an eligible individual under § 1.529A-1(b)(8) (entitlement for benefits based on blindness or disability under title II or XVI of the Social Security Act, or a disability certification); (ii) that the individual is blind or has a medically determinable physical or mental impairment as described in the final regulations; (iii) that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); (iv) if the basis of the individual's eligibility is a disability certification, that the individual has obtained and will retain a copy of the written diagnosis relating to the disability, accompanied by the name and address of the diagnosing physician and the date of the written diagnosis; (v) that the individual has provided the applicable diagnostic code from those listed on Form 5498-QA that applies with respect to the designated beneficiary's disability; (vi) that the person establishing the account is the individual who will be the designated beneficiary of the account or is the person authorized under § 1.529A-2(c)(1)(i) to establish the account; and (vi) if required by the qualified ABLE program, that the individual has provided the information from a physician as to the categorization of the disability that may be used to determine, under the particular State's program, the appropriate frequency of required recertifications.

A few commenters, observing that persons with developmental disabilities are often diagnosed by licensed psychologists, clinical therapists, or certified vocational rehabilitation counselors, requested that the final regulations authorize such professionals to sign the individual's diagnosis. While the Treasury Department and the IRS understand the commenters' concerns, the final regulations do not incorporate these suggestions. Section 529A(e)(2)(A)(ii) requires the individual's diagnosis to be signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act, which means a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, and, for some purposes, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor.

In the case of a program-to-program transfer, several commenters requested that the final regulations allow the recipient qualified ABLE program to assume at the time of the transfer (in reliance on the obligations of the transferor program) that the designated beneficiary of the recipient ABLE account is an eligible individual. The final regulations do not incorporate this suggestion because the Treasury Department and the IRS concluded that the obligation of a qualified ABLE program to establish an account only for an eligible individual is not delegable. Thus, the same requirements for establishing an ABLE account apply, regardless of whether the account is funded initially with a program-to-program transfer or otherwise, including permitting a qualified ABLE program to allow the designated benefi-

ciary to certify that he or she is an eligible individual.

E. *Disability standard*

As directed in the ABLE Act, the Treasury Department and the IRS consulted with the Commissioner of Social Security in developing the medical standards relating to disability certifications and determinations of disability. The final regulations, like the 2015 proposed regulations, provide that a person signing (under penalties of perjury) a disability certification with respect to an individual is certifying that such individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind. The disability certification also is a certification that such blindness or disability occurred before the date on which the individual attained age 26.

Consistent with section 529A(e)(2)(A), the 2015 proposed regulations defined the phrase "marked and severe functional limitations" as the standard of disability in the Social Security Act for children claiming benefits under the SSI program based on disability, but without regard to the age of the individual. Citing 20 CFR 416.906, the 2015 proposed regulations clarified that this definition refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments in appendix 1 of subpart P of 20 CFR part 404. An impairment is medically equivalent to a listing if it is at least equal in severity and duration to the severity and duration of any listing. An impairment that does not meet or medically equal any listing may result in limitations that functionally equal the listings if it results in marked limitations in two domains of functioning or an extreme limitation in one domain of functioning, as explained in 20 CFR 416.926a. Several commenters commended the proposed regulation's use of this disability standard, saying that it achieves the intended statutory result.

One commenter questioned whether physicians would accurately interpret and apply the standard, and asked whether training for physicians would be provided. The Treasury Department and the IRS note that, while the physician is to provide the diagnosis, it is the designated beneficiary or other person establishing the ABLE account who is responsible for certifying satisfaction of the standard of medical disability, so no special training of physicians by the SSA, the Treasury Department, or the IRS is contemplated.

A few commenters noted that the definition of "marked and severe functional limitations" under 20 CFR 416.906 includes the statement that "if you file a new application for benefits and you are engaging in substantial gainful activity, we will not consider you disabled." These commenters questioned whether that statement suggests that a person is disqualified from having an ABLE account if he or she is gainfully employed. The Treasury Department and the IRS agree that the citation to the SSI regulation, without any further clarification, may lead to confusion. Therefore, the final regulations adopt the proposed regulation's definition of "marked and severe functional limitations," but also provide that the standard of disability under section 529A is applied without regard to either the individual's age or whether the individual is engaged in substantial gainful activity.

Some commenters requested that the final regulations provide that a person who does not meet the definition of an eligible individual before attaining age 26, but who subsequently will develop blindness or a disability of sufficient severity to satisfy that definition as a result of either a genetic disorder present at birth or a condition that is diagnosed before attaining age 26 may qualify as an eligible individual. One commenter asserted that such an individual should be allowed to prepare for a known future disability by establishing an ABLE account. The Treasury Department and the IRS also have considered whether such an individual should be able to qualify as an eligible individual once the disorder or condition causes blindness or a disability of sufficient severity. While sympathetic to this request, the Treasury Department and the IRS concluded that the statutory requirement that the blindness or disability have "occurred" before age 26 is not consistent with the broader interpretations requested or considered. There is no indication in the statute or legislative history of the ABLE Act that Congress intended to permit what could be a significant expansion of the definition of an eligible individual by including a person who may never develop the disability or whose condition is cured or significantly alleviated by subsequent medical discoveries. Accordingly, the final regulations do not incorporate this suggested change.

The 2015 proposed regulations provided that a condition listed in the "List of Compassionate Allowances Conditions" maintained by the SSA (currently at www.socialsecurity.gov/compassionateallowances/conditions.htm) would be deemed to meet the requirements of a condition sufficient for a disability certification without a physician's diagnosis if the condition was present before the date on which the individual attained age 26. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS requested comments on other conditions that might also be deemed sufficient for a disability certification without the need of a physician's diagnosis.

Some commenters proposed that a few additional specific conditions should be treated similarly as qualifying disabilities. One commenter suggested that three additional types of spinal muscular atrophy, a permanent disability that can occur after age 26, should so qualify, in addition to the two types already on the List of Compassionate Allowances Conditions. Another commenter suggested that polymicrogyria qualifies under certain conditions, while yet another commenter pointed out that autism is typically a lifelong condition. One commenter suggested that the regulations incorporate what was described as the "non-exhaustive list of impairments presumed to be disabilities under the updated EEOC Title I regulations of the Americans with Disabilities Act (76 FR 16978)." While sympathetic to the suggestions of these commenters, the Treasury Department and the IRS are not qualified to make the kind of decisions that are made by the SSA when compiling the List of Compassionate Allowances Conditions. For that reason, the final regulations adopt the provision in the 2015 proposed regulations without change. The Treasury Department and the IRS note

that the SSA periodically updates the List of Compassionate Allowances Conditions, so these commenters may want to consider approaching the SSA with their requests. The Office of Disability Policy maintains a website and e-mail box for soliciting and evaluating compassionate allowance condition submissions from the public at https://www.ssa.gov/compassionateallowances/submit_potential_cal.html.

F. *Recertification*

The 2015 proposed regulations provided that a qualified ABLE program could choose different methods of ensuring a designated beneficiary's status as an eligible individual. That might include, for example, imposing different periodic recertification requirements for different types of impairments, taking into consideration whether an impairment is incurable and the likelihood that a cure may be found. The 2015 proposed regulations explained that, while a qualified ABLE program generally must require an annual recertification that the designated beneficiary continues to satisfy the definition of an eligible individual, it may deem an annual recertification to have been provided in appropriate circumstances. For example, a qualified ABLE program could deem a one-time certification by an individual that he or she has a permanent disability as meeting the annual recertification requirement in subsequent years. In other cases, a program could require the same evidence that is required of an initial disability certification, or could incorporate some other method of ensuring that the designated beneficiary continuously qualifies as an eligible individual.

While most commenters supported the flexibility accorded qualified ABLE programs to impose different periodic recertification requirements for different types of impairments, several commenters recommended that there be as much uniformity among qualified ABLE programs as possible. Some of these commenters asked that the final regulations identify those illnesses or disabilities for which there is no known cure and then excuse them from any recertification requirement. Many of these commenters requested that the form used to establish the ABLE account contain a box for the diagnosing physician to check if the disability is unlikely to change within five years, and require recertification only every five years thereafter. Other commenters suggested that there be a uniform certification form with which a physician could certify that an individual's impairment is unlikely to improve, in which case the certification would be effective for a certain number of years (for example, 5 years or longer), after which time a new certification form could be filed for an additional number of years. Some commenters suggested that the certification of a "permanent," "incurable," or "severe and sustained" disability should be effective for a longer period of time than the certification of a "moderate" or "curable" disability, or that the disability be classified as "severe", "moderate", or "mild" with a different recertification frequency for each, and that those classifications would be certified when the account is established. Some commenters suggested that there be a presumption of continued eligibility until the designated beneficiary notifies the qualified ABLE program of his or her ineligibility. Other commenters suggested that recertification be waived as long as the designated beneficiary's SSDI or SSI benefits qualify him or her for an ABLE account, while still other commenters requested that the annual recertification requirement be waived for anyone with an incurable illness or disability. One commenter suggested that the IRS partner with the SSA to maintain lists of recertification criteria. Other commenters pointed out that recertification may be too burdensome.

The final regulations retain the rule set forth in the 2015 proposed regulations that a determination of eligibility must be made annually unless the qualified ABLE program adopts a different method of ensuring a designated beneficiary's continuing status as an eligible individual. This gives each qualified ABLE program broad discretion to devise its own recertification methods. This provision is broad enough to permit many of the approaches suggested by commenters, other than the suggestions regarding the elimination of the recertification requirement entirely. The final regulations specify that a permissible method may include a certification by the designated beneficiary under penalties of perjury.

The final regulations, like the 2015 proposed regulations, also provide that even if a qualified ABLE program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABLE account to report promptly any changes in the designated beneficiary's condition that would disqualify the designated beneficiary as an eligible individual, the qualified ABLE program may provide that a certification is valid until the end of the taxable year in which the change in the designated beneficiary's condition occurred. One commenter asked for clarification that a qualified ABLE program that adopts this approach will not be deemed to be noncompliant with the annual recertification requirement for any year in which the designated beneficiary is no longer an eligible individual but fails to report a change in status to the program. The final regulations confirm that a qualified ABLE program that is compliant with the rules regarding recertification will not cease to be a qualified ABLE program if the designated beneficiary fails to report a change in status.

G. *Change in eligible individual status*

The Treasury Department and the IRS recognize that there will be instances when an individual's impairment abates to the point that the individual no longer qualifies as an eligible individual, either temporarily or permanently. The 2015 proposed regulations provided that an existing ABLE account will remain the ABLE account of the designated beneficiary even during years in which the designated beneficiary does not qualify as an eligible individual. However, the 2015 proposed regulations also provided that, beginning with the year immediately following the year in which that qualification ceases, no additional contributions may be made into that ABLE account. The final regulations preserve these rules. However, the 2015 proposed regulations provided that, beginning with that same year, no amounts incurred would constitute a qualified disability expense, regardless of the nature of that expense. As explained in the following paragraphs, the final regulations continue to provide that, in this

event, no expense will constitute a qualified disability expense, but further provide that this rule applies at all times when the designated beneficiary does not qualify as an eligible individual, including during the portion of the year remaining after that eligibility has been lost.

One commenter asked whether the ABLE account could be used to pay for medical treatments that may be necessary to sustain the designated beneficiary's improved condition. Another commenter asked whether distributions from the ABLE account to pay for medically necessary procedures of a designated beneficiary who is not an eligible individual are subject to tax. One commenter suggested that an ABLE account should be closed if the designated beneficiary of the account no longer has the qualifying blindness or disability, and that the designated beneficiary then should be subjected to long term capital gains tax on the income portion of any remaining funds in that ABLE account, possibly payable over more than a single year.

A condition in remission subsequently can become active, so it is possible that the designated beneficiary could again satisfy the definition of an eligible individual in the future. In addition, even though a designated beneficiary may fail to qualify as an eligible individual for purposes of section 529A, that person still may be relying on public benefits that could be lost if the ABLE account were to lose its special exclusion under section 103 of the ABLE Act. For these reasons, the Treasury Department and the IRS concluded that it is appropriate to preserve the ABLE account for the benefit of the designated beneficiary, even after the designated beneficiary fails to qualify as an eligible individual, in case he or she once again becomes an eligible individual. Therefore, like the 2015 proposed regulations, the final regulations provide that, for any year during which a designated beneficiary no longer satisfies the definition of an eligible individual, his or her ABLE account remains an ABLE account, to which all of the non-tax provisions of the ABLE Act continue to apply, and to which all of the tax provisions continue to apply except as otherwise provided with regard to contributions and the tax treatment of distributions. The ABLE account does not have to terminate, and there is no deemed distribution of the account balance for tax purposes. Beginning on the first day of the designated beneficiary's first taxable year following the year in which the designated beneficiary no longer satisfies the definition of an eligible individual, no contributions to the ABLE account may be accepted by the qualified ABLE program. In addition, expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither an individual with a disability nor blind within the meaning of § 1.529A-1(b)(8)(i) or § 1.529A-2(e)(1)(i), even if the individual remains an eligible individual through the end of the year in which the individual ceases to be disabled or blind. Therefore, although distributions still may be made from an ABLE account to pay the expenses of the designated beneficiary incurred during periods when the designated beneficiary is no longer blind or disabled, none of those expenses are qualified disability expenses and thus the earnings included in those distributions are includible in the gross income of the designated beneficiary. If the designated beneficiary subsequently requalifies as an eligible individual, contributions to the designated beneficiary's ABLE account again will be allowed, subject to the annual contribution limit under section 529A(b)(2)(B) and the aggregate contribution limit under section 529A(b)(6), and expenses again may constitute qualified disability expenses.

3. *Contributions to an ABLE Account*

A. *Source and nature*

Like the 2015 proposed regulations, the final regulations provide that any person may make contributions to an ABLE account, subject to annual and aggregate contribution limits. One commenter suggested that the final regulations explicitly define the word "person" with reference to the definition of "person" under section 7701. Another commenter requested clarification that contributors to an ABLE account may include charitable organizations described in section 501(c)(3) of the Code, as well as special needs trusts as described in 42 U.S.C. 1396p(d)(4) that can be excluded from a person's assets for purposes of eligibility for certain Medicaid benefits. The Treasury Department and the IRS note that the definition of "person" in section 7701 applies throughout the Code unless explicitly provided otherwise or where manifestly incompatible with the statutory intent and is thus applicable in this context. The Treasury Department and the IRS also note that a "person" under section 7701 includes both trusts and tax-exempt organizations. Accordingly, an express statement in the regulatory text is not necessary to achieve the commenter's purpose. Therefore, the final regulations do not adopt these comments.

Like the 2015 proposed regulations, the final regulations provide that all contributions to an ABLE account must be made in cash, and that a qualified ABLE program may accept contributions in the form of cash, check, money order, credit card payment, electronic transfer, or other similar method of payment. Many commenters urged that the final regulations continue to allow a qualified ABLE program to accept contributions by credit card, and the final regulations do so. One commenter asked that the final regulations clarify that a qualified ABLE program may accept payroll deductions. The final regulations accordingly clarify that cash contributions may be made as after-tax payroll deductions.

One commenter asked that the final regulations clarify that a qualified ABLE program may accept contributions directly from a corporation, and that employers may contribute to the ABLE accounts of their employees through matching contribution programs. The Treasury Department and the IRS note that the final regulations provide that a qualified ABLE program may accept contributions in the form of after-tax payroll deductions and do not prohibit other forms of contributions from a corporation or employer. However, it is important to remember that contributions made by an employer to the ABLE account of its employee or of a family member of the employee are subject to the rules governing the taxation of compensation. The final regulations also clarify that the rules concerning the tax treatment of contributions to an ABLE account apply only for purposes of section 529A. No inference is intended with respect to the tax treatment of amounts contributed to ABLE accounts for other

purposes of the Code, such as the tax treatment of compensation.

Several commenters requested that certain contributions be allowed without regard to other applicable tax provisions. For example, one commenter suggested that a parent be allowed to withdraw assets from his or her IRA and contribute the assets to his or her child's ABLE account free of income tax on the IRA withdrawal. Although there is no limit on the permissible sources of contributions to an ABLE account, the regulatory authority of the Treasury Department and the IRS does not extend to negating the tax consequences that otherwise are applicable to amounts used to make contributions.

B. *Annual and aggregate contribution limits*

Consistent with section 529A(b)(2)(B), the 2015 proposed regulations provided that the total amount of contributions to an ABLE account during the designated beneficiary's taxable year (excluding rollovers and program-to-program transfers) could not exceed the section 2503(b) gift tax annual exclusion amount ($14,000 in 2015, 2016, and 2017 and $15,000 in 2018, 2019, and 2020) (annual contribution limit). Although section 529A was effective for taxable year 2015, no qualified ABLE programs were operational in 2015. Several commenters asked that the final regulations allow a "make-up" contribution for 2015 to be made in 2016, so that, for 2016 only, the total amount that may be contributed to an ABLE account is $28,000. Setting the 2016 contribution limit at $28,000, these commenters said, would effectuate Congressional intent to enable eligible individuals to benefit from ABLE accounts beginning in 2015.

The final regulations do not incorporate this suggestion as the statute is explicit with regard to the annual contribution limit and does not permit a carryover. Section 529A(b)(2) states that, except in the case of a rollover, a qualified ABLE program may not accept a contribution to an ABLE account that would result in aggregate contributions from all contributors to the account for the taxable year exceeding the Federal gift tax exclusion amount in effect under section 2503(b) for that year.

One commenter asked that the final regulations expressly state that a change in the designated beneficiary of an ABLE account to a member of the family of the designated beneficiary effectuated without a rollover or program-to-program transfer is not a contribution subject to the annual contribution limit. The final regulations adopt this suggestion. The Treasury Department and the IRS view such a change of the designated beneficiary as the equivalent of a rollover or program-to-program transfer. Therefore, the annual contribution limit does not apply as long as the successor designated beneficiary is both an eligible individual and a sibling, stepsibling, or half-sibling of the designated beneficiary (collectively referred to as siblings).

Section 529A(b)(2) provides that, for purposes of applying the annual contribution limit imposed by that section, rules similar to the rules of section 408(d)(4), determined without regard to subparagraph (B) thereof, apply. Section 408(d)(4) generally provides that a distribution from an IRA is not taxable if it is the return of a contribution made during the taxable year, provided that the return of the contribution is received by the IRA owner on or before the due date (including extensions) of his or her income tax return for that year, and if the amount returned includes the earnings on the amount of the contribution. However, the earnings portion of the distribution is includible in the recipient's gross income for the year in which the contribution was made.

One commenter suggested that the reference to section 408(d)(4) should be construed to calculate both the annual contribution limit and the aggregate contribution limit by not counting toward either limit the amount of each contribution withdrawn during that same year for qualified disability expenses. Under this view, total permissible contributions during any year would equal the sum of the annual contribution limit (currently $15,000) and the total withdrawals during that year for qualified disability expenses, thus giving the designated beneficiary the ability to save amounts in the ABLE account in excess of what is needed for current expenses.

The final regulations do not incorporate this suggestion. The Treasury Department and the IRS concluded that the mere reference in section 529A(b)(2) to section 408(d)(4) cannot be read to increase the permissible annual contributions by the amounts distributed out of the ABLE account in the same year. The reference to section 408(d)(4) provides a mechanism for correcting the receipt of a contribution in excess of the annual contribution limit. Under section 4973(h)(2), an excess annual contribution timely returned in accordance with the reference to section 408(d)(4) in section 529A(b)(2) is treated as an amount not contributed, and therefore avoids the imposition of a six percent excise tax under section 4973 on excess annual contributions that are not timely returned.

One commenter suggested that the final regulations should allow an individual's benefits under the SSI program to be directly deposited or otherwise transferred to the ABLE account of which the individual is the designated beneficiary, without being counted against the annual contribution limit. Another commenter suggested that, in applying the annual contribution limit, the final regulations should disregard the amount of certain other items deposited into an ABLE account, such as the payment of retroactive SSDI benefits, the proceeds from a personal injury lawsuit, or a family inheritance. Noting that large sums of money received as a result of a lawsuit settlement or inheritance are often placed in special needs trusts, the commenter also recommended that the final regulations permit transfers from a special needs trust to an ABLE account. Another commenter asked that the final regulations not treat any earned income of the designated beneficiary that is deposited into his or her ABLE account as a contribution subject to the annual contribution limit because such a transfer is not treated as a completed gift for Federal tax purposes.

The final regulations do not incorporate these suggestions. The statute does not differentiate between contributions based on their nature or source. The Treasury Department and the IRS concluded that the statute is properly interpreted to include all amounts contributed to an ABLE account for the benefit of the designated beneficiary (other than a rollover, program-to-program transfer, or pursuant to a change of designated beneficiary) as

a contribution subject to the annual limit, regardless of the source of the funds contributed. The Treasury Department and the IRS note that section 529A does not prevent a transfer from a special needs trust to an ABLE account subject to the annual and aggregate contribution limits of sections 529A(b)(2)(B) and 529A(b)(6).

The 2015 proposed regulations provided that a qualified ABLE program is required to provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the State on contributions to its qualified tuition program under section 529(b)(6) (aggregate contribution limit). The 2015 proposed regulations included a safe harbor providing that a qualified ABLE program satisfies the aggregate contribution limit requirement if it refuses to accept any additional contribution to an ABLE account once the balance in the account reaches that limit. Once the account balance falls below the aggregate contribution limit, additional contributions again may be accepted up to the aggregate contribution limit. The Treasury Department and the IRS concluded that this safe harbor and the permissible recommencement of contributions is appropriate based on the nature and purposes of a qualified ABLE program.

Most commenters were supportive of the proposed safe harbor, which is the same safe harbor in the proposed regulations addressing the cumulative limit on qualified tuition accounts under section 529. Some commenters also noted that the safe harbor would be consistent with the way most States administer their 529 programs, which would lower administrative costs. One commenter observed that the safe harbor avoids the disparities inherent in focusing solely on contributions, which penalizes savers experiencing financial market downturns while favoring those experiencing financial gains. Some commenters requested clarification that the safe harbor could be applied each time the account balance reaches the applicable limit, and is not limited to just one application. The final regulations, like the 2015 proposed regulations, provide that, once the account balance falls below the aggregate contribution limit, additional contributions again may be accepted, again subject to the aggregate contribution limit.

One commenter, however, expressed concerns that the proposed safe harbor, by substituting the account balance for the aggregate contribution limit, renders an ABLE account less attractive as a savings vehicle for the designated beneficiary. The commenter noted that earnings on contributions to the account may cause the account balance to reach the aggregate contribution limit long before aggregate contributions to the account rise to that limit. Therefore, the commenter recommended replacing the safe harbor in the 2015 proposed regulations with a six-month grace period during which a qualified ABLE program could identify and disgorge excess aggregate contributions.

The Treasury Department and the IRS are also concerned, however, with the opposite situation in which total contributions have reached the aggregate contribution limit but distributions and/or decreases in market value have reduced the account balance to below the aggregate contribution limit. In that case, without the safe harbor, all further contributions would be prohibited. Accordingly, the Treasury Department and the IRS continue to view the proposed safe harbor as potentially more favorable to the designated beneficiary than an approach focused on cumulative contributions. In addition, some commenters predicted that the safe harbor would reduce the administrative costs of qualified ABLE programs. Therefore, the final regulations retain the safe harbor provision but clarify that the safe harbor may be applied an unlimited number of times and that, once contributions recommence, they are subject to both the annual and aggregate contribution limits. The final regulations also change a cross-reference that caused some confusion among commenters.

The aggregate contribution limit is likely to be different for each qualified ABLE program because that limit is determined by the limit established by each particular State for contributions to its qualified tuition program under section 529(b)(6). One commenter asked that the final regulations permit rollovers and program-to-program transfers of amounts in excess of the transferee ABLE program's aggregate contribution limit if such amount does not exceed the aggregate contribution limit of the transferor ABLE program, or, if it does, that it exceeds that limit solely because of investment growth. The commenter suggested that the transferee ABLE program would reject additional contributions until the account balance falls below the aggregate contribution limit set by the transferee ABLE program. The final regulations adopt this suggestion and exclude rollovers, program-to-program transfers, and changes to a new designated beneficiary who is an eligible individual and a sibling of the former designated beneficiary for purposes of the aggregate contribution limit, provided that subsequent contributions are prohibited either under the general rule or the safe harbor. The Treasury Department and the IRS view this exclusion as consistent with the account balance safe harbor.

C. *Additional contribution limit and applicable poverty line*

Consistent with the TCJA amendment to section 529A(b)(2)(B), the 2019 proposed regulations provided that an employed or self-employed designated beneficiary described in section 529A(b)(7) may contribute to his or her ABLE account the lesser of the designated beneficiary's 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 designated beneficiary's taxable year begins.

Section 529A(b)(7)(B) provides that the term poverty line referred to in section 529A(b)(2)(B)(ii) has the same meaning given to that term by section 673 of the Community Services Block Grant Act (42 U.S.C. 9902). Consistent with the 2019 proposed regulations, the final regulations provide that the poverty line in section 529A(b)(7)(B) is to be determined by using 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). Those guidelines vary based on locality. Specifically, there are three separate guidelines: (1) the contiguous 48 states and the District of Columbia, (2) Alaska, and (3) Hawaii. The 2019 proposed regulations provided that a designated beneficiary's contribution limit is to be determined using the poverty guideline

applicable in the state of the designated beneficiary's residence.

One commenter suggested that the final regulations should provide that the poverty line on which the designated beneficiary's contribution limit is based should be uniform throughout the United States to avoid both confusion and an incentive for a move to a state with a higher poverty line. The Treasury Department and the IRS have concluded that the poverty guideline that most closely reflects the employed designated beneficiary's cost of living is the most relevant for determining the contribution limit, and that a move to a state with a higher poverty line generally also would subject the designated beneficiary to a higher cost of living, thus effectively negating any incentive to move. Therefore, consistent with the 2019 proposed regulations, the final regulations provide that a designated beneficiary's contribution limit is determined using the poverty guideline applicable in the state of the designated beneficiary's residence, and that an employed or self-employed designated beneficiary described in section 529A(b)(7) may contribute to his or her ABLE account the lesser of the designated beneficiary's 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 designated beneficiary's taxable year begins.

One commenter suggested that designated beneficiaries generally will not easily be able to determine the annual applicable poverty line and requested that the IRS require ABLE programs to provide notice to designated beneficiaries each year of the poverty line for each of the geographic areas applicable for that year. Two commenters also expressed concern about the statutory provision that makes the designated beneficiary responsible for ensuring that these contributions of compensation income do not exceed the applicable limit, and pointed out that an uncorrected excess contribution would be likely to jeopardize the designated beneficiary's qualification for public benefits on which the designated beneficiary relies. They suggested that supplemental information is needed to assist the designated beneficiaries and their advisors, and recommended that ABLE programs be required not only to provide annual updates on the applicable poverty limits, but also general information about the compensation contribution limit, as well as notice to each designated beneficiary when compensation contributions are approaching and/or have exceeded the applicable level, and when other contributions have reached the annual and cumulative limits. Finally, a commenter suggested that ABLE programs should allow ABLE beneficiaries to opt out of the compensation contribution limit to assist those designated beneficiaries who do not want to incur any risk of exceeding the applicable limit.

The final regulations do not incorporate these suggestions. The Treasury Department and the IRS note that the statute does not require qualified ABLE programs to provide any of the notices suggested by the commenter and, in fact, requires the designated beneficiary to be solely responsible for monitoring the increased limit. Furthermore, the Treasury Department and the IRS are concerned that requiring qualified ABLE programs to provide these notices would be unduly burdensome and would increase costs to the programs. Although the final regulations do not impose such notification requirements on qualified ABLE programs, the Treasury Department and the IRS acknowledge that it may be helpful and a real service to designated beneficiaries if the ABLE programs would make this information available to designated beneficiaries, whether by information posted online or otherwise, and suggest that ABLE programs are free to provide such a service if they wish. Finally, the Treasury Department and the IRS note that, because making the additional contribution of the designated beneficiary's compensation income is voluntary, there is no need to opt out of the ability to make such a contribution.

Another commenter requested that the final regulations provide that an amount not in excess of the new compensation contribution limit may be contributed by a person other than the designated beneficiary. The commenter pointed out that many employed designated beneficiaries have to use their earned income to pay their living expenses, thus leaving little for saving in the ABLE account, and that, without such a provision, another person's gift to match the designated beneficiary's earned income would have to be made through the designated beneficiary's account, which could adversely impact qualification for public benefits. The Treasury Department and the IRS understand the potential problem but believe that such a provision would be contrary to the explicit language of the statute, requiring that such contributions be made by the designated beneficiary. Further, the legislative history of the TCJA, like the statute, explicitly states that additional amount must be contributed by the designated beneficiary. See H.R. Rep. No. 115-466, at 329 (2017) (Conf. Rep.). Therefore, the final regulations do not incorporate this suggestion.

The commenter also requested confirmation that a direct deposit of the designated beneficiary's compensation income to his or her ABLE account is a contribution "by" the designated beneficiary, as well as confirmation that contributions subject to the new compensation contribution limit do not have to be made from the designated beneficiary's compensation income. The Treasury Department and the IRS agree. Money is fungible. In addition, the statute does not require that the contributions come from the designated beneficiary's earned income; rather, the designated beneficiary's earned income is one measure used to determine the additional contribution limit applicable to an employed designated beneficiary's own contributions. The final regulations clarify these two points.

One commenter asked whether a designated beneficiary's compensation contributions count towards the compensation contribution limit even if the annual contribution limit has not been reached. If the new limit on compensation contributions has been reached, the designated beneficiary may continue to make additional contributions until the annual or cumulative contribution limits have been reached. The Treasury Department and the IRS believe each qualified ABLE program has the flexibility to determine how to identify contributions from the designated beneficiary that are compensation contributions subject to the new contribution limit.

Finally, one commenter requested clarification that, although contributions to and distributions from an ABLE account generally are not taken into account in determining the designated beneficiary's

qualification for certain public benefits, the earned income of a designated beneficiary that is deposited into his or her ABLE account nevertheless is earned income and, as such, may be counted in calculating "substantial gainful activity" of the designated beneficiary which, regardless of its deposit into an ABLE account, may have an impact for purposes of determining the designated beneficiary's qualification for those benefits. This is not a tax issue and thus is beyond the scope of these regulations.

D. *Application of gift tax and GST to contributions to an ABLE account*

Contributions to an ABLE account are completed gifts to the designated beneficiary of that ABLE account. Gift tax consequences may arise from a contribution to an ABLE account even though the aggregate amount of contributions to that ABLE account from all contributors must not exceed the annual exclusion amount under section 2503(b) applicable to any single contributor. For example, if a contributor makes gifts to an individual in addition to that contributor's contributions to the same individual's ABLE account, the contributor's total gifts to such individual in that year could give rise to a gift tax liability.

Contributions can be made by any person. The term *person* is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, associations, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person includes an individual as well as each of the entities described in section 7701(a)(1). Although under section 2501(a)(1), the gift tax applies only to gifts by individuals, it applies to gifts made directly or indirectly. As a result, a gift made by a trust, estate, association, company, corporation, or partnership is treated for gift tax purposes as having been made by the owner(s) of that entity. For example, a gift from a corporation to a designated beneficiary is treated as a gift from the shareholders of the corporation to the designated beneficiary. See § 25.2511-1(h)(1). Accordingly, the final regulations adopt unchanged the provisions of the 2015 proposed regulations and provide that, for purposes of section 529A, a contribution by a corporation is treated as a gift by its shareholders and a contribution by a partnership is treated as a gift by its partners. This rule also applies to trusts, estates, associations, and companies. See section 2511 and § 25.2511-1(c) and (h).

The legislative history of section 529A suggests that a "person" described in section 529A(b)(1)(A) who can make contributions to an ABLE account includes the designated beneficiary of an ABLE account. See 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014). A person may transfer his or her own funds into an ABLE account of which that person is the designated beneficiary. Because an individual cannot make a gift to himself or herself, the final regulations, like the 2015 proposed regulations, provide that no contribution by a designated beneficiary to his or her own ABLE account is treated as a completed gift. See § 25.2511-2(b) and (c).

However, because the statute contemplates that the funds being deposited into an ABLE account are taxable gifts, and the contributions from the designated beneficiary into his or her own ABLE account were never treated as completed gifts to the designated beneficiary, the 2015 proposed regulations provided that, notwithstanding section 529A(c)(2)(C), which makes gift and GST taxes inapplicable to the change of beneficiary of an ABLE account if the transferee is both an eligible individual and a sibling of the former designated beneficiary, if the designated beneficiary transfers the funds in the account to any other person, including a sibling, the designated beneficiary making the transfer is the donor for gift tax purposes and the transferor for GST tax purposes to the extent of the funding provided by that designated beneficiary and the accumulated earnings thereon. Although the provisions of section 529A(c)(2)(C) would appear to apply to exclude the balance of the account from gift and GST taxes if the transfer was to a sibling, one commenter asked why, in that case, the entire value of the account would not be a taxable gift. That commenter also objected to requiring ABLE programs to track contributions from the designated beneficiary for this purpose as being too burdensome.[2]

In light of these comments, the Treasury Department and the IRS have reconsidered the approach of the 2015 proposed regulations, taking into account the comments describing the burden of separately tracking contributions from the designated beneficiary. The final regulations balance the treatment of contributions as a completed gift and the exclusion of gifts to a sibling of the designated beneficiary by taking the least burdensome approach, as requested by these commenters. Specifically, even though the portion of the account attributable to contributions from the designated beneficiary is the only part of the ABLE account that was not previously treated as a gift, the designated beneficiary is the owner of the entire account and the gift and GST tax properly applies to the entire account when there is a change of designated beneficiary, but those taxes are inapplicable if the new designated beneficiary is a sibling of the former designated beneficiary. Making this change makes it unnecessary for a qualified ABLE program to separately track contributions made by the designated beneficiary. The final regulations reflect this change.

E. *Return of excess contributions and excess aggregate contributions*

The 2015 proposed regulations define an "excess contribution" 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) (the gift tax annual exclusion amount) for the calendar year in which the taxable year of the designated beneficiary begins (annual contribution limit). The 2015 proposed regulations defined an "excess aggregate contribution" as the amount contributed

[2] Another commenter stated that requiring a qualified ABLE program to assign "earnings attributable to that contribution" would require the qualified ABLE program to track specific tax lots for each contribution, which would be unduly burdensome. Therefore, the commenter recommended that the phrase "any earnings attributable to that contribution" be deleted. It is not correct that earnings would have to be tracked to meet such a requirement, as the rules for calculating earnings attributable to a contribution would not need to require tracking earnings on a particular investment but could be based on the proportionate increase in value of the account over the relevant period. See § 1.408-11. However, given that the Treasury Department and the IRS agree that the entire account would be a taxable gift, it is not necessary to calculate earnings attributable to a contribution.

during the taxable year of the designated beneficiary that causes the total amount contributed since the establishment of the ABLE account to exceed the limit in effect under section 529(b)(6) or, in the context of the safe harbor, a contribution that causes the account balance to exceed the limit in effect under section 529(b)(6) (aggregate contribution limit).

Consistent with section 529A(c)(3)(C), the 2015 proposed regulations provided that, if an excess contribution or an excess aggregate contribution is deposited into or allocated to the ABLE account of a designated beneficiary, a qualified ABLE program would be required to return that excess contribution or excess aggregate contribution, along with all net income attributable to the excess amount, to the person or persons who made the contribution. The 2015 proposed regulations provided rules for determining the net income attributable to a contribution made to an ABLE account, and also provided that excess contributions and excess aggregate contributions must be returned to their contributors on a last-in-first-out (LIFO) basis. The 2015 proposed regulations also required that a returned contribution be received by the contributor on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. Failure to return an excess contribution within that time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of the excess contribution. See section 4973(a)(6) and (h)(2). However, the 2015 proposed regulations impose an affirmative obligation on the qualified ABLE program to ensure that these excess contributions are returned on a timely basis so that the excise tax never will be imposed on the designated beneficiary.

The 2015 proposed regulations also provided that, if an excess contribution or excess aggregate contribution and the net income attributable to such contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program is to notify the designated beneficiary of such return at the time of the return.

One commenter objected to the requirement that an excess contribution or excess aggregate contribution be returned to the person or persons who made the contribution, which, according to the commenter, places a burden on the qualified ABLE program to track the source, amount, and date of each contribution. The commenter suggested that it would be less burdensome if excess contributions and excess aggregate contributions were returned instead to the designated beneficiary who, in turn, would then be responsible for returning the contribution to the appropriate contributor. The Treasury Department and the IRS decline to adopt this suggestion. Requiring the designated beneficiary to return contributions would be unduly burdensome to the designated beneficiary, the person for whom many commenters requested as much simplification as possible. More importantly, contributions returned to the designated beneficiary are likely to be counted as a resource of the designated beneficiary for purposes of determining his or her eligibility for benefits under certain means-tested government programs, thus potentially causing the designated beneficiary to lose eligibility for those critical benefits.

Another commenter asked that the final regulations eliminate the requirement to return any earnings on an excess contribution or excess aggregate contribution to the contributor, citing the cost and other burdens of creating an automated process to track individual contributions and calculate the earnings thereon. The Treasury Department and the IRS decline to adopt this suggestion because section 529A(c)(3)(C)(ii) requires the return of the net income attributable to an excess contribution. The statute also requires that the net income attributable to an excess contribution be determined in the same manner as in the case of withdrawn excess contributions to IRAs. In addition, because this determination is based on the change in value of the account, it does not require the tracking of earnings attributable to each contribution. For more information on how to determine the net income attributable to an excess contribution, see Publication 590-A, "Contribution to Individual Retirement Arrangements (IRAs)", Worksheet 1-4, "Determining the Amount of Net Income Due To an IRA Contribution and Total Amount To Be Withdrawn From the IRA." See also § 1.408-11.

A few commenters also recommended that the final regulations explicitly state that a qualified ABLE program need not notify the designated beneficiary when it rejects and returns an excess contribution or excess aggregate contribution from another contributor to the designated beneficiary's ABLE account as long as such contribution was not deposited into or allocated to the ABLE account. Because such a contribution could not have generated any earnings in the ABLE account, the Treasury Department and the IRS concluded that there is no need for such a contribution to generate any reporting requirement. The final regulations clarify that notification is not required if amounts are rejected by the qualified ABLE program before they are deposited into or allocated to the designated beneficiary's ABLE account.

Another commenter criticized the requirement that excess contributions be returned on a LIFO basis, stating that a LIFO approach could result in the return of contributions made by the designated beneficiary before contributions made by another person, thereby making an ABLE account less attractive as a financial planning tool for the designated beneficiary. The commenter recommended that the final regulations require that the qualified ABLE program return contributions made by persons other than the designated beneficiary before returning any contribution made by the designated beneficiary. The Treasury Department and the IRS decline to adopt this recommendation in the final regulations. The Treasury Department and the IRS note that a qualified ABLE program may allow the designated beneficiary or person with signature authority over an ABLE account to place restrictions on the contributors and/or the amounts contributed to the account if the designated beneficiary is concerned about the impact of the unwanted contributions on financial planning. In addition, adopting the suggestion would impose additional burdens on the qualified ABLE programs, that then would be required to separately track contributions from the designated beneficiary (which several commenters opposed). Moreover, many states have designed their programs and administrative systems

to stop accepting contributions once the total contributions or value of the account reaches the applicable limit. Such a system is not consistent with a rule other than a LIFO rule.

F. *Return of excess compensation contribution*

The 2019 proposed regulations defined an excess compensation contribution as the amount by which the amount contributed during the taxable year of an employed designated beneficiary to the designated beneficiary's ABLE account exceeds the limit in effect under section 529A(b)(2)(B)(ii) for the calendar year in which that taxable year of the employed designated beneficiary begins.

Consistent with section 529A(b)(2) and the 2019 proposed regulations, if an excess compensation contribution is deposited into or allocated to the ABLE account of a designated beneficiary, the qualified ABLE program must return the excess contribution, along with all net income attributable to the excess contribution, as determined under the rules set forth in § 1.408-11 (treating references to an IRA as references to an ABLE account, and references to returned contributions under section 408(d)(4) as references to excess compensation contributions), to the employed designated beneficiary. Also consistent with section 529A(b)(2) and the 2019 proposed regulations, the final regulations provide that 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. Such returns of excess compensation contributions must be received by the employed designated beneficiary on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess compensation contributions were made. A failure to return excess compensation contributions within this time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess compensation contributions.

Additionally, in order to minimize administrative burdens for the designated beneficiary and the qualified ABLE program, for purposes of ensuring that the limit on contributions made under section 529A(b)(2)(B)(ii) is not exceeded, the final regulations, like the 2019 proposed regulations, provide that the qualified ABLE program may rely on self-certifications, made under penalties of perjury, of the designated beneficiary or the person acting on the designated beneficiary's behalf.

G. *Request for the TIN of a contributor*

Because a qualified ABLE program is required to return to the contributor any excess contribution or excess aggregate contribution that is deposited into or allocated to an ABLE account (along with any net income attributable to the contribution), the 2015 proposed regulations required a qualified ABLE program to request the TIN of each contributor to the ABLE account at the time a contribution was made if the qualified ABLE program did not already have a record of that person's correct TIN.

Numerous commenters expressed concerns about the substantial burdens that they anticipate this provision would place upon qualified ABLE programs. Commenters noted that contributions are likely to come from many sources and be made in various ways (for example, payroll deduction, check, debit, automated clearing house (ACH) transfers, and others), making it difficult as a practical matter to obtain the TIN of the contributor. Commenters also conjectured that some contributors, especially those making small gifts, might be reluctant to make a contribution if they were required to provide their TIN.

As an alternative to the provision in the 2015 proposed regulations, one commenter suggested that the final regulations require the qualified ABLE program to pay an excess contribution to the designated beneficiary rather than the contributor, thereby obviating the need to procure the contributor's TIN. As noted previously, the Treasury Department and the IRS do not agree with this suggestion, because the designated beneficiary's receipt of such an excess amount could put the designated beneficiary at risk of being disqualified for his or her Federal benefits that are income or resource based, a result that would be inconsistent with the purposes of section 529A.

Other commenters suggested that a qualified ABLE program be required to collect a contributor's TIN only if the program does not have a system in place to prevent an excess contribution or excess aggregate contribution from being deposited into an ABLE account. The commenters expect that most qualified ABLE programs will adopt the automated systems currently used by section 529 qualified tuition programs either to reject such excess contributions before they are deposited into a particular ABLE account, or to escrow and immediately refund the excess contributions, again before being deposited into or allocated to a particular account. With such a system in place, qualified ABLE programs should not need to return net earnings on contributions, and thus would not need the contributor's TIN. Other commenters recommended that the obligation to request a contributor's TIN should arise only in the unlikely circumstance in which an excess contribution or excess aggregate contribution has been deposited into an individual's ABLE account and has accrued earnings or losses. One commenter suggested eliminating the TIN requirement altogether, while another suggested the collection of TINs should be required only in the case of contributions of more than a specified dollar amount.

Commenters requested interim guidance on this issue to facilitate the establishment of qualified ABLE programs by the States. In response, the Treasury Department and the IRS issued Notice 2015-81, advising that it was anticipated that the final regulations would modify the requirement that a qualified ABLE program request the TIN of a contributor at the time of the contribution. That modification, which is adopted in the final regulations, requires a qualified ABLE program to request the TIN of a contributor at the time a contribution is made (assuming the qualified ABLE program does not already have a record of the contributor's correct TIN) only if the qualified ABLE program does not have a system in place to identify and reject excess contributions and excess aggregate contributions before they are deposited into or allocated to an ABLE account. In

the event that a qualified ABLE program has such a system in place but an excess contribution or excess aggregate contribution, nevertheless, is deposited into or allocated to an ABLE account, the qualified ABLE program then must request the TIN of the contributor who made the excess contribution or excess aggregate contribution in order to permit the ABLE program to file accurate and complete required reporting of the earnings attributable thereto. A return of contributions and earnings from the ABLE account is a distribution, so the IRS and the contributor must receive a Form 1099-QA, "Distributions from ABLE Accounts", showing the contributor's TIN.

4. *Investment Direction*

Consistent with section 529A(b)(4), the 2015 proposed regulations provided that a qualified ABLE program may not allow the designated beneficiary of an ABLE account to direct, either directly or indirectly, the investment of any contributions to his or her account (or any earnings thereon) more often than twice in any calendar year. The 2015 proposed regulations provided that a program does not violate this requirement merely because it permits a designated beneficiary or a person with signature authority over a designated beneficiary's account to serve as one of the program's board members or employees, or as a board member or employee of a contractor that the program hires to perform administrative services.

One commenter inquired whether the designated beneficiary would be allowed to direct investments of contributions more than twice a year due to a change in the investment climate. Another commenter suggested that the designated beneficiary be allowed to direct the investment of contributions in his or her ABLE account at least monthly, while yet another commenter recommended up to four permitted changes per year. Because section 529A(b)(4) requires a qualified ABLE program to limit the number of times any designated beneficiary may, directly or indirectly, direct the investment of any contribution to no more than two times in any calendar year, the Treasury Department and the IRS do not adopt these suggestions in the final regulations.

Some commenters asked that the final regulations clarify that an investment direction does not include the transfer of account assets from the investment portion of an ABLE account to a money market account or similar vehicle maintained by the qualified ABLE program to process a requested distribution. The Treasury Department and the IRS agree with these commenters that moving funds from an investment fund into a cash fund within the ABLE account in order to process a distribution is not the kind of change in investment direction addressed by the statutory limit, and have made the requested clarification in the final regulations.

Another commenter suggested that the final regulations clarify that a reallocation of the assets in an ABLE account among different broad-based investment strategies offered on the qualified ABLE program's investment menu (such as a reallocation from a diversified large cap fund to a diversified bond fund, or from a small cap fund to a target date fund) does not constitute investment direction. In the commenter's view, the reallocation of a portion of an ABLE account's assets among a set of broad-based investment options offered by the qualified ABLE program, such as diversified mutual funds, age-based target date funds, or Federally-insured CDs, is not investment direction because the designated beneficiary is not exercising control over the underlying investments, as would be the case if he or she were allowed to invest in specific stocks or funds not offered as part of the qualified ABLE program's menu of broad-based strategies. The commenter asserted that, by offering a limited menu of broad-based investment options, the qualified ABLE program effectively makes the investment decisions and that giving the designated beneficiary the authority to make periodic reallocations among these options is not sufficient control to be considered an investment direction.

The Treasury Department and the IRS do not agree with this commenter. The Treasury Department and the IRS concluded that a reallocation of an account's assets among different investment vehicles or types of funds constitutes an investment direction within the meaning of section 529A(b)(4), with two exceptions. As addressed earlier in this section 4, the first exception is the transfer of assets within an ABLE account to a cash fund. The second exception is an automatic rebalancing of the assets in an ABLE account merely to maintain a particular asset allocation. The Treasury Department and the IRS concluded that such an adjustment is not a change in investment direction; instead, it is to preserve and effectuate an investment allocation or direction selected at some previous time that is needed because of the frequent fluctuations in market values of investments. Accordingly, the final regulations provide that neither of these adjustments is a change in investment direction for purposes of section 529A(b)(4).

Some commenters asked how the annual limit on investment direction applies to a successor designated beneficiary in the year in which he or she first succeeds to the ABLE account of the former designated beneficiary. The Treasury Department and the IRS understand that the former and successor designated beneficiaries may have different financial situations, and, therefore, different investment needs. These final regulations apply the contribution limits separately to each designated beneficiary, and the Treasury Department and the IRS concluded that it would be most consistent with the purpose of section 529A and its other provisions to provide that the investment change limitation also applies separately to each designated beneficiary. As a result, the final regulations provide that the successor designated beneficiary is allowed to direct the investment of contributions and earnings in the ABLE account up to two times in the calendar year in which he or she becomes the designated beneficiary of the ABLE account, regardless of whether the former designated beneficiary previously had done so in the same calendar year.

5. *No Pledging of Interest as Security for a Loan*

Consistent with section 529A(b)(5), the 2015 proposed regulations provided that a program will not be treated as a qualified ABLE program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan.

A few commenters observed that many ABLE accounts are likely to be transactional in nature. One commenter asked whether a checking account or a debit or credit card can be issued to a designated beneficiary and linked to his or her ABLE account. Another commenter asked that the final regulations clarify that advancing funds from an ABLE account to the designated beneficiary – such as through a checking account or debit card privileges connected to the ABLE account – is neither a loan nor security for a loan. Another commenter, observing that checking accounts and debit cards likely will be associated with ABLE accounts, noted that it is unlikely that a qualified ABLE program will be able to convert an account's underlying investments into cash on the same day as the transaction to be funded occurs. In other contexts, these transactional capabilities generally are effected by an issuer's zero interest advance for a short period in order to fund the account or debit card, followed by a reimbursement of the issuer when the cash generated by the liquidation of the investment is received by the issuer. The commenter further observed that these short-term advances are distinguishable from third party loans and requested that the final regulations clarify that these short-term advances are not loans. Similarly, the commenter requested that the final regulations clarify that an advance made to an ABLE account by a qualified ABLE program before settlement of a check or other money transfer by a contributor is not a loan.

The Treasury Department and the IRS agree that it is possible for an ABLE program to permit the use of checking accounts and debit cards to facilitate the qualified ABLE program's ability to make qualified distributions. For purposes of section 529A, the final regulations do not treat these uses—which are necessary to make funds available for qualified disability expenses as intended— as pledging the interest in the ABLE account as security for a loan, provided that these uses do not result in an advance of funds to a designated beneficiary in excess of the amount in his or her ABLE account. Similarly, the program administrator's advance of funds to satisfy a withdrawal request while the proceeds from the sale of an account asset, sufficient to satisfy that withdrawal request, clear or settle will not be treated as a pledge or grant of security or as a loan for purposes of this section. However, whether a different particular arrangement constitutes the use of an interest in a qualified ABLE program as security for a loan is a factual determination that is beyond the scope of these regulations.

6. *Distributions and Transfers*

A. *Qualified disability expenses*

In accordance with section 529A(e)(5), the 2015 proposed regulations defined qualified disability expenses as any expenses incurred at a time when the designated beneficiary of an ABLE account is an eligible individual that relate to the blindness or disability of the designated beneficiary, including expenses that are for the benefit of the designated beneficiary in improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral expenses, and other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. Such expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit the designated beneficiary. As an example of a qualified disability expense, the 2015 proposed regulations included the expense of buying, using, and maintaining a smartphone used by an individual with a mental impairment to help her navigate and communicate more safely and effectively. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS requested comments regarding the types of expenses that should be considered qualified disability expenses and under what circumstances.

Many commenters commended the 2015 proposed regulations' expansive definition of qualified disability expenses. Commenters generally found the example helpful. However, one commenter pointed out that the expense of maintaining a smartphone could be considered a basic living expense and need not be tied to any particular disability or impairment to be considered a qualified disability expense.

While acknowledging the difficulty of compiling an exhaustive list of qualified disability expenses, many commenters suggested a wide variety of expenses that they believed should be considered qualified disability expenses. One commenter requested that the final regulations provide more comprehensive guidance on the scope of, and exclusions from, the definition of qualified disability expenses so that a designated beneficiary may correctly determine his or her tax liability. Believing that most, if not all, expenses of an eligible individual could be considered qualified disability expenses, another commenter suggested defining types of expenses that are not qualified disability expenses. The commenter suggested that expenses that do not directly benefit the designated beneficiary, such as the expense of a gift for someone other than the designated beneficiary, are not qualified disability expenses. One commenter suggested that an online list of examples be maintained and accessible to the public. Another commenter recommended that all disbursements be deemed to be for qualified disability expenses until proven otherwise.

The Treasury Department and the IRS continue to view the definition of qualified disability expenses as expansive. Whether a particular expense is a qualified disability depends on each designated beneficiary's unique circumstances and whether the expense is for maintaining or improving the health, independence, or quality of life of the designated beneficiary. Therefore, the Treasury Department and the IRS cannot provide either a comprehensive list of qualified disability expenses or a short list of expenses that would not satisfy that standard. The Treasury Department and the IRS note that Congress did not define a qualified disability expense as any expenditure for the benefit of an eligible individual, nor did Congress define a qualified disability expense as an expense that benefits only the eligible individual. The ABLE Act mandates different tax treatment for those expenses that are qualified disability expenses and those that are not. Consequently, the final regulations retain

the 2015 proposed regulations' broad, but not unlimited, definition of a qualified disability expense.

One commenter requested that the same permissible categories of expenses be used to define a qualified disability expense for purposes of both section 529A and SSA programs to provide consistency for disabled individuals. Because the categories suggested in that comment are identical to those included in the 2015 proposed regulations, no change is required in response to this comment. Further, because the Treasury Department and the IRS have no authority with regard to any program administered by the SSA, it is up to SSA to decide whether or not to adjust SSA's definitions.

A few commenters asked that the final regulations provide a process for appealing a determination on examination by the IRS that a particular expense is not a qualified disability expense. The Treasury and the IRS note that an appeals process already exists under the IRS' examination procedures. For more information, visit the IRS Office of Appeals' website at https://www.irs.gov/appeals/considering-an-appeal, or consult IRS Publication 5: Your Appeal Rights and How to Prepare a Protest If You Don't Agree.

The 2015 proposed regulations provided that a qualified ABLE program is required to establish safeguards to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the SSI program of the SSA. One commenter requested a more specific definition of housing expenses, but other commenters noted that, because the identification of housing expenses is relevant only for purposes of determining eligibility for certain Social Security benefits and has no relevance for Federal income tax purposes, any reference to classifying distributions as housing expenses should be eliminated from the regulations. The Treasury Department and the IRS agree, and the final regulations do not require a qualified ABLE program to identify or record whether distributions were made for housing expenses.

Commenters also expressed concerns regarding the requirement that a qualified ABLE program must establish safeguards to distinguish between distributions for qualified disability expenses and other distributions. Commenters emphasized that requiring a qualified ABLE program to determine how a distribution will be used prior to making the distribution would be unduly burdensome for both the program and the designated beneficiary, and they explained that the actual use of a distribution might not be known by the designated beneficiary and thus by the ABLE program when the distribution is made. The commenters recommended that any requirement or suggestion that the qualified ABLE program classify distributions be removed from the regulations. The Treasury Department and the IRS agree that it would be burdensome and unadministrable to require the qualified ABLE programs to categorize and keep track of the actual use of each distribution by the designated beneficiary. Consistent with Notice 2015-81, the final regulations do not require, for any Federal income tax purpose, a qualified ABLE program to establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions.

Commenters also expressed concerns that the 2015 proposed regulations require designated beneficiaries to report or to justify the reason for each distribution at the time of the distribution. Another commenter requested clarification that distributions may be made for qualified disability expenses through entities including section 501(c)(3) charitable organizations and special needs trusts as described in 42 U.S.C. 1396p(d)(4). The Treasury Department and the IRS wish to clarify that the statute, the 2015 proposed regulations, and the final regulations do not require the designated beneficiary to report his or her qualified disability expenses to the qualified ABLE program or to the IRS when filing a tax return. However, just as with qualified higher education expenses under section 529, the designated beneficiary will need to categorize distributions from the ABLE account in order to properly determine his or her Federal income tax obligations. Therefore, the designated beneficiary should maintain adequate records for determining and supporting his or her qualified disability expenses for each taxable year. The final regulations clarify that the payment of administrative or investment fees charged by a qualified ABLE program is not a distribution. The Treasury Department and the IRS note that distributions may be made for all qualified disability expenses of the designated beneficiary, regardless of whether the payee is an individual, organization, or trust.

B. *Taxation of distributions*

Consistent with section 529A(c)(1), the 2015 proposed regulations provide that, if distributions do not exceed the designated beneficiary's qualified disability expenses for the year, no amount is includible in the designated beneficiary's gross income. Otherwise, the earnings portion of the distributions from the ABLE account as determined under section 72, reduced by the product of such earnings portion and the ratio of the qualified disability expenses for the year to the total distributions in that year, is includible in the gross income of the designated beneficiary to the extent not otherwise excluded from income. For purposes of applying section 72 to amounts distributed from an ABLE account, the 2015 proposed regulations provided that: (1) all distributions during a taxable year are treated as one distribution; and (2) the value of the contract, income on the contract, and investment in the contract are computed as of the close of the calendar year in which the designated beneficiary's taxable year began.

For purposes of determining whether distributions from an ABLE account exceed qualified disability expenses in any given year, one commenter suggested that the final regulations allow qualified disability expenses incurred before April 15 of any given year to count as qualified disability expenses for the immediately preceding year. The commenter expressed concern that a distribution taken late in one year but not used to pay for qualified disability expenses until the next year could cause a designated beneficiary's distributions to exceed his or her qualified disability expenses in the year of the distribution. Another commenter recommended that the final regulations require a nexus between a distribution from an ABLE account and the payment of qualified disability expenses by prescribing a period of time (for example, 60, 90, or 120 days) after a distribution is made during which the proceeds must be used to pay

for a qualified disability expense. Some commenters also raised questions regarding the relevance of incurring versus paying the expenses for purposes of comparing the total qualified disability expenses to the total distributions in the designated beneficiary's taxable year.

The Treasury Department and the IRS understand that a designated beneficiary could take a distribution in anticipation of an expense that does not materialize and thus want to redeposit the distribution into the ABLE account, or that an expense incurred in one year may be billed and paid in the following year. The Treasury Department and the IRS concluded that, for purposes of determining the designated beneficiary's income tax liability, the distributions from an ABLE account should be compared to the qualified disability expenses that are paid, rather than just incurred, during the year because it is payments that appear in a taxpayer's records and that generally determine income tax consequences. However, to relieve the possible disadvantage to a designated beneficiary from a potential timing mismatch of the distribution and the payment of the expense, and to permit the redeposit of an unused distribution, the Treasury Department and the IRS agree that it is appropriate and helpful to allow a grace period. Therefore, the final regulations provide that a designated beneficiary may treat qualified disability expenses paid by the sixtieth day immediately following the end of the designated beneficiary's taxable year as if they had been paid in the immediately preceding taxable year, but any expense so treated may not be counted again with respect to the year in which it is paid.

Section 529A(c)(1)(A) provides that any distribution under a qualified ABLE program is includible in the gross income of the distributee in the manner provided under section 72 to the extent not otherwise excluded from gross income under any other provision of the Code. Noting the similarities between the taxation of distributions under sections 529 and 529A, a few commenters recommended that the method for determining the earnings ratio of a distribution from an ABLE account be made consistent with the rule applicable to section 529 programs under Notice 2001-81, which provided that the Treasury Department and the IRS expect that final regulations under section 529, when issued, will require section 529 programs to determine the earnings portion of each distribution from a section 529 account separately as of the date of its distribution. The commenters advised that the imposition of a different method with respect to qualified ABLE programs would require service providers to build a separate recordkeeping system specific to ABLE accounts, thereby increasing program costs. Moreover, determining the earnings portion of a distribution as of the date of distribution facilitates the administration of partial rollovers and program-to-program transfers, the earnings of which must be calculated as of the date of distribution rather than at the end of the year. These commenters also explained that using the date of each distribution rather than a year-end total would not change the income tax impact on the designated beneficiary because his or her taxable income is determined by a ratio applied to total earnings.

The Treasury Department and the IRS agree with the commenters. Harmonizing how the earnings ratio is determined under section 529A with how it is determined under section 529 should reduce administrative costs of the qualified ABLE programs, making the programs more cost-effective. Therefore, the final regulations provide that the earnings ratio, as applied to a particular distribution, is determined as of the date of distribution, and is equal to the amount of earnings attributable to the account as of the date of distribution divided by the total account balance on that date.

C. *Change of designated beneficiary*

Section 529A(c)(1)(C) addresses the tax consequences of a change of designated beneficiary of an ABLE account. With respect to such a change, the 2015 proposed regulations described the circumstances in which amounts will be includible in the designated beneficiary's income. The 2015 proposed regulations provided that a change of designated beneficiary is not treated as a distribution, and therefore does not result in gross income, but this rule applies only if the new designated beneficiary is both (1) an eligible individual for his or her taxable year in which the change is made and (2) a sibling of the former designated beneficiary.

The 2015 proposed regulations required a qualified ABLE program to permit a change in the designated beneficiary of an ABLE account, but only during the lifetime of the designated beneficiary, and only if the successor designated beneficiary is an eligible individual. Because the designated beneficiary could be subject to gift tax and/or GST tax if the successor designated beneficiary is not a sibling of the designated beneficiary, the Treasury Department and the IRS requested comments on whether the final regulations should allow States to limit a permissible successor designated beneficiary to a sibling of the designated beneficiary.

Several commenters recommended that the final regulations require any successor designated beneficiary to be a sibling of the designated beneficiary. However, one commenter pointed out that a designated beneficiary might not have a sibling who is an eligible individual, and recommended that qualified ABLE programs not be permitted to limit the successor designated beneficiary to a sibling who is an eligible individual, but recommended that a change to any other eligible individual require notice to the designated beneficiary of the adverse tax implications for that designated beneficiary. Another commenter asked whether a qualified ABLE program could limit the successor designated beneficiary to a sibling of the designated beneficiary if the final regulations do not impose that limitation.

The Treasury Department and the IRS concluded that, although section 529A imposes income and transfer tax consequences on a change of designated beneficiary if the successor designated beneficiary is not an eligible individual who is a sibling of the former designated beneficiary, the statute does not prohibit such changes. Therefore, the final regulations do not impose such a restriction. However, in order to minimize the potential that the designated beneficiary will have adverse tax consequences, the final regulations permit a qualified ABLE program to limit successor designated beneficiaries to a sibling, provided that the successor designated beneficiary also is an eligible individual. If a successor designated beneficiary is not a sibling of the former designated ben-

eficiary, the former designated beneficiary will have received a deemed distribution of the amount transferred to the successor designated beneficiary that is subject to all of the tax provisions in section 529A(c).

One commenter suggested that the final regulations define "member of the family" broadly, as in the proposed regulations under section 529, to include descendants and ancestors of the designated beneficiary, rather than only a sibling. The Treasury Department and the IRS note that the term "member of the family" is expressly defined by section 529A(e)(4). Therefore, the final regulations do not expand the meaning of that term to also include descendants and ancestors of the designated beneficiary.

Several commenters asked that the final regulations allow the designated beneficiary or the person with signature authority over an ABLE account to designate an individual, who is both an eligible individual and a sibling of the designated beneficiary, to be the successor designated beneficiary of the account, effective upon the death of the designated beneficiary. Commenters suggested that such a designation should be conditioned on the named successor designated beneficiary being an eligible individual at the time of the designated beneficiary's death. One commenter suggested permitting the naming of a secondary successor designated beneficiary. Commenters suggested that, if the successor designated beneficiary already has an ABLE account, the funds of the deceased designated beneficiary's ABLE account should be rolled into the ABLE account of the successor designated beneficiary, and one commenter requested that the final regulations exempt such a rollover from the restriction under section 529A(c)(1)(C)(iii) preventing more than one rollover to the same designated beneficiary within a 12-month period. One commenter asked that the final regulations allow a reasonable bereavement period (for example, one year) after the death of the designated beneficiary, during which the guardian of the deceased designated beneficiary, the executor of his or her estate, or a court could transfer the ABLE account to a sibling of the deceased designated beneficiary who is then an eligible individual. Finally, one commenter asked that the final regulations allow the distribution of a deceased designated beneficiary's ABLE account to the section 529 account of his or her child or to a health savings account for his or her family.

The Treasury Department and the IRS recognize the difficulties faced by the family, friends, and caregivers of a designated beneficiary at the end of the designated beneficiary's life. In order to alleviate some of these difficulties, the final regulations allow a qualified ABLE program to permit a successor designated beneficiary to be named during the lifetime of the designated beneficiary that will take effect upon the death of the designated beneficiary. The designation must be made before the designated beneficiary's death. If no successor designated beneficiary is named, the assets in the ABLE account are payable to the estate of the deceased designated beneficiary. Before any transfer to the successor designated beneficiary, however, the ABLE account is subject to the Federal estate tax imposed by chapter 11 of the Code upon the estate of the deceased designated beneficiary, as well as to the payment of any outstanding qualified disability expenses of the decedent and any State claim under section 529A(f).

D. *Rollovers and program-to-program transfers*

Under section 529A(c)(1)(C), a rollover from an ABLE account is not treated as a distribution includible in the gross income of the distributee. The 2015 proposed regulations defined a rollover as an amount withdrawn from the ABLE account of a designated beneficiary and contributed, within 60 days of the date of the withdrawal, to another ABLE account of the designated beneficiary, or to the ABLE account of an eligible individual who is a sibling of the designated beneficiary, provided that, in the case of a contribution to the ABLE account of the same designated beneficiary, no rollover has been made to an ABLE account of the designated beneficiary within the prior 12 months.

The 2015 proposed regulations also provided that a program-to-program transfer is not a distribution and is not includible in income. A "program-to-program transfer" is the direct transfer of the entire balance of an ABLE account that will be closed upon completion of the transfer into an ABLE account of the same designated beneficiary, or the direct transfer of part or all of the balance to an ABLE account of another eligible individual who is a sibling of the former designated beneficiary, without any intervening distribution or deemed distribution to the designated beneficiary or former designated beneficiary. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS stated that a program-to-program transfer may be preferable to a rollover in protecting the designated beneficiary's eligibility for benefits under Federal and State means-tested programs. A program-to-program transfer also could facilitate the transfer of information concerning contributions and accumulated earnings. In light of these expected benefits, the Treasury Department and the IRS requested comments as to whether and to what extent a qualified ABLE program should be permitted to require that funds from another State's ABLE program be accepted only through program-to-program transfers.

Many commenters expressed approval of the rules allowing program-to-program transfers, but several of these commenters recommended that the final regulations continue to allow the use of a rollover as a means of transferring funds from one qualified ABLE program to another. Consistent with section 529A(c)(1)(C), the final regulations continue to permit rollovers and do not require the use of a program-to-program transfer. However, the Treasury Department and the IRS recognize that qualified ABLE programs may differ in determining how best to administer their programs. For example, a qualified ABLE program may choose to require that a transfer of funds from one ABLE account to another under the program or to or from an ABLE account under another qualified ABLE program be by a program-to-program transfer.

Like the 2015 proposed regulations, the final regulations provide that, upon a rollover or program-to-program transfer, all the attributes of the former ABLE account relevant for purposes of calculating the investment in the account and applying the cumulative limits on contributions are applicable to the recipient account. The portion of the rollover or transfer

amount that constituted investment in the account from which the distribution or transfer was made becomes an investment in the recipient ABLE account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made constitutes earnings of the recipient account. For purposes of the annual contribution limit, contributions do not include program-to-program transfers or rollovers.

Several commenters asked that the final regulations permit a tax-free rollover from a qualified tuition account under section 529 to an ABLE account for the same designated beneficiary. The commenters believe that such a provision would be particularly important to the designated beneficiary of a qualified tuition account who becomes disabled and is unable to attend college. Since the issuance of the 2015 proposed regulations, the TCJA amended section 529 to permit, before January 1, 2026, a limited rollover from a section 529 account to an ABLE account of the same designated beneficiary or a member of his or her family as defined expansively under section 529 to include, among others, a designated beneficiary's ancestors and descendants. The Treasury Department and the IRS issued Notice 2018-58, 2018-33 I.R.B. 305 (Aug. 13, 2018) announcing how they intended to provide clarification regarding the rollover provision. In light of this change, the final regulations define "contribution" to include this limited rollover from such a section 529 account.

Similarly, one commenter asked that final regulations permit the tax-free rollover from the ABLE account of an individual to a qualified tuition account under section 529 for the benefit of a child of that individual. The Code does not provide for a tax-free transfer from a qualified ABLE account to a qualified tuition account under section 529 because such a distribution would not be for a qualified disability expense. Accordingly, this comment is not adopted in the final regulations.

E. *Post-death payments*

Consistent with section 529A(f), the 2015 proposed regulations required that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary (after providing for the payment of all outstanding qualified disability expenses of the designated beneficiary) be distributed to a State that files a claim against the designated beneficiary or against the ABLE account with respect to benefits provided to the designated beneficiary under that State's Medicaid plan (Medicaid reimbursement claim). The payment of such claim is limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account over the amount of any premiums paid to a Medicaid Buy-In program under any State Medicaid plan.

One commenter asked for confirmation that a State's ABLE program will not fail to qualify as a qualified ABLE program merely because State law prohibits the State's Medicaid agency from filing Medicaid reimbursement claims. The Treasury Department and the IRS agree that a State law mandating that the State's Medicaid agency refrain from filing Medicaid reimbursement claims will not jeopardize the status of the State's ABLE program as a qualified ABLE program. Section 529A(f) does not require a State to file a Medicaid reimbursement claim.

Commenters asked whether a qualified ABLE program may make distributions, including payment on an existing contract for funeral expenses, before it receives a State Medicaid reimbursement claim. Commenters also asked whether a qualified ABLE program has an obligation to determine the validity or accuracy of a state's Medicaid reimbursement claim or whether multiple States are able to file a claim.

Consistent with section 529A, the final regulations provide that a qualified ABLE program may satisfy a State's Medicaid reimbursement claim only after providing for the payment of any outstanding qualified disability expenses of the deceased designated beneficiary, including the designated beneficiary's funeral and burial expenses, whether or not the subject of a pre-death contract for those services. The final regulations do not impose an obligation on the qualified ABLE program to verify the validity or accuracy of a State's Medicaid reimbursement claim. However, as noted previously, the payment of any claim is limited to the amount of total medical assistance paid for the designated beneficiary after the establishment of the ABLE account, net of any premiums paid (whether from the ABLE account or otherwise by or on behalf of the designated beneficiary) to a State Medicaid Buy-In program. In addition, no obligation is imposed on the qualified ABLE program to determine whether claims could be filed by multiple States. After the expiration of the applicable statute of limitations for filing Medicaid claims against the designated beneficiary's estate, a qualified ABLE program may distribute the balance of the ABLE account to the successor designated beneficiary or, if none, to the deceased designated beneficiary's estate.

The 2015 proposed regulations required a qualified ABLE program to file an annual information return on Form 1099-QA, or any successor form, with respect to each ABLE account from which any distribution is made during the calendar year, on which is reported the aggregate amount of distributions from the ABLE account during the calendar year. One commenter asked whether a qualified ABLE program should report the payment of a Medicaid reimbursement claim on Form 1099-QA. The final regulations clarify that the term "distribution" does not include a payment in satisfaction of a Medicaid reimbursement claim. Therefore, the payment is not reported on Form 1099-QA.

7. *Gift and Generation-Skipping Transfer (GST) Taxes*

The final regulations, like the 2015 proposed regulations, provide that contributions to an ABLE account by a person other than the designated beneficiary are treated as completed gifts to the designated beneficiary of the account, and that such gifts are neither gifts of a future interest nor a qualified transfer under section 2503(e). Accordingly, no distribution from an ABLE account to the designated beneficiary of that account is treated as a taxable gift. Finally, consistent with section 529A(c)(2)(C), neither gift nor GST taxes apply to the change of designated beneficiary of an ABLE account if the new designated beneficiary is an eligible individual who is a sibling of the former designated beneficiary.

8. *Unrelated Business Income Tax*

A qualified ABLE program generally is exempt from Federal income taxation. A qualified ABLE program is subject, however, to the unrelated business income tax imposed under section 511 on its unrelated business taxable income. For purposes of this tax, certain administrative and other fees do not constitute unrelated business taxable income to the ABLE program. One commenter asked for clarification regarding the definition and possible application of the unrelated business income tax.

Further guidance on the unrelated business income tax provisions of the Code already is set forth in the regulations under sections 511 through 514. Those rules generally are applicable to qualified ABLE programs and other tax-exempt entities. If any unrelated business income tax liability exists, the tax is paid by the qualified ABLE program. If it has any unrelated taxable income, a qualified ABLE program is required to file Form 990-T, "Exempt Organization Business Income Tax Return," as though it were an organization described in §§ 1.6012-2(e) and 1.6012-3(a)(5).

One commenter stated that the reporting requirements in the 2015 proposed regulations are burdensome to ABLE account holders, and recommended that the final regulations eliminate the need for any individual to file a Form 990-T. Form 990-T is for the use of a qualified ABLE program to report and pay tax on its unrelated business taxable income under section 512, if any, and is not for the use of individuals such as the designated beneficiaries of ABLE accounts.

9. *Recordkeeping and Reporting Requirements*

As in the 2015 proposed regulations, the final regulations set forth recordkeeping and reporting requirements. A qualified ABLE program must maintain records that enable the program to account to the Secretary with respect to all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLE account. In addition, a qualified ABLE program must report to the Secretary the establishment of each ABLE account, including the name, address, and TIN of the designated beneficiary, information regarding the disability certification or other basis for eligibility of the designated beneficiary, and other relevant information regarding each account. Information regarding contributions is reported on Form 5498-QA, "ABLE Account Contribution Information." Information regarding distributions from ABLE accounts is reported on Form 1099-QA, "Distributions from ABLE Accounts." The final regulations and instructions to the Forms 1099-QA and 5498-QA contain more detail on how the information must be reported.

One commenter stated that the reporting requirements in the 2015 proposed regulations would increase the cost to qualified ABLE programs of offering ABLE accounts, and therefore recommended that the final regulations eliminate the requirement to file Form 5498-QA. The Treasury Department and the IRS note that Form 5498-QA is necessary to allow the qualified ABLE program to provide the notice of establishment of an ABLE account required under section 529A(d)(3), to report contributions to an ABLE account required under section 529A(d)(1), and to report other information necessary for the public reports required under section 529A(d)(2). Because the statute requires this reporting, the final regulations do not incorporate this suggestion. Additionally, the filing of Form 5498-QA satisfies certain statutory requirements regarding the disability certification.

The 2015 proposed regulations provided that the qualified ABLE program is required to furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498-QA, which statement is required to include, among other things, the name, address, and TIN of the designated beneficiary. One commenter recommended that final regulations permit the exclusion of the TIN of the designated beneficiary from the statement required to be furnished to the designated beneficiary. The Treasury Department and the IRS confirm that a qualified ABLE program may truncate the TIN of the designated beneficiary (by replacing the first five digits of the 9-digit number with asterisks or Xs) on the copy of the Form 5498-QA (or substitute statement) that is provided to the designated beneficiary, but must include the full, untruncated TIN on the return it files with the IRS. See the General Instructions for Certain Information Returns.

In addition, section 529A(b)(3) requires that a qualified ABLE program provide separate accounting for each designated beneficiary. Separate accounting requires that contributions for the benefit of a designated beneficiary, as well as earnings attributable to those contributions, are allocated to that designated beneficiary's account. Whether or not a program ordinarily provides each designated beneficiary an annual account statement showing the income and transactions related to the account, the program must give this information to the designated beneficiary upon request.

The preamble to the 2015 proposed regulations stated that section 529A(d)(4) provides that, for purposes of section 4 of the ABLE Act, States are required to submit electronically to the Commissioner of Social Security, on a monthly basis and in the manner specified by the Commissioner of Social Security, statements on relevant distributions and account balances from all ABLE accounts. Commenters remarked that such reporting requirements may be unduly burdensome on qualified ABLE programs, and will require designated beneficiaries of ABLE accounts to justify all expenditures on a nearly continuous basis to the qualified ABLE program. One commenter suggested that the designated beneficiary self-certify, under penalties of perjury, at the time of a distribution, that the distribution will be used for (i) housing expenses, (ii) other qualified disability expenses, or (iii) non-qualifying expenses, which information the qualified ABLE program could use to report the designated beneficiary's housing expenses to the SSA. The final regulations do not require that housing or other qualified disability expenses be reported to the IRS by either the designated beneficiary or the ABLE program. The Treasury Department and the IRS note that the reporting requirement in section 529A(d)(4) concerns reporting by the qualified ABLE program to the SSA, not to the IRS, and thus is beyond the appropriate scope of these regulations.

10. *Transition Relief*

Notice 2015-18 and the preamble to the 2015 proposed regulations stated that the Treasury Department and the IRS intend to provide transition relief to enable qualified ABLE programs and ABLE accounts established before the issuance of final regulations to be brought into compliance with the requirements of the final regulations. One commenter asked that State legislatures and qualified ABLE programs be given a period of not less than one full taxable year after the issuance of final regulations to bring their legislation and programs into full compliance with Federal standards. Another commenter asked that the final regulations provide transition relief to qualified ABLE programs that begin operations within the six-month period following the issuance of final regulations, while still another asked that the relief be provided for programs that launch during the transition period.

The final regulations provide transition relief for all qualified ABLE programs, including programs that begin operation after the publication of the final regulations. The final regulations provide that, generally, a program and each account established under that program will be treated as a qualified ABLE program and as an ABLE account, respectively, during the transition period, provided that the program is established and operated in accordance with a reasonable, good faith interpretation of section 529A. Establishment and operation in accordance with the regulations under section 529A as proposed in 80 FR 35602 and as supplemented by Notice 2015-81, 2015-49 I.R.B. 784, and 84 FR 54529 is deemed to be establishment and operation in accordance with a reasonable, good faith interpretation of section 529A. However, such a program and all accounts established under that program must meet the requirements of these final regulations before the later of November 21, 2022, or the first day of the qualified ABLE program's first taxable year beginning after the close of the first regular session of the State legislature that begins after November 19, 2020. If a State has a two-year legislative session, each calendar year of the session is deemed to be a separate regular session of the State legislature.

One commenter expressed concern for individuals who are eligible to establish an ABLE account under the 2015 proposed regulations but who later fail to meet the eligibility criteria under the final regulations. The commenter suggested that the final regulations allow such individuals to be "grandfathered" into a qualified ABLE program provided the individual continues to meet the eligibility requirements under the 2015 proposed regulations. Because the definition of an eligible individual and the criteria for establishing satisfaction of that definition has not been changed in the final regulations, the Treasury Department and the IRS do not adopt this suggestion.

11. *Miscellaneous*

Numerous comments were received concerning programs administered by the SSA or the Centers for Medicare & Medicaid Services (CMS). For example, several of these comments requested confirmation that the provisions of section 103 of the ABLE Act, which exclude ABLE accounts from the assets and income of the designated beneficiary in determinations of eligibility for certain public benefits, continue to apply in certain specific situations not addressed in the 2015 proposed regulations. Because these are not tax issues, the final regulations do not address these and other comments regarding matters that are outside of the jurisdiction of the Treasury Department and the IRS. The IRS, however, has shared these comments with the SSA and the CMS.

A few other comments were received regarding non-legal issues that are not within the scope of these final regulations. Several other minor changes were made throughout the final regulations to increase clarity and consistency and to comply with **Federal Register** requirements, none of which substantively change the 2015 or 2019 proposed regulations.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

1. *Paperwork Reduction Act*

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control numbers 1545-2262 and 1545-2293. The collections of information in this final regulation are in §§ 1.529A-2, 1.529A-5, 1.529A-6, and 1.529A-7. The collection of information flows from sections 529A(d)(1), (d)(2), (d)(3), (e)(1), and (e)(2) of the Code. Section 529A(d)(1) requires qualified ABLE programs to provide reports to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require. Section 529A(d)(2) directs the Secretary to make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLE program. Section 529A(d)(3) requires qualified ABLE programs to provide notice to the Secretary upon the establishment of an ABLE account, containing the name of the designated beneficiary and such other information as the Secretary may require. Section 529A(e)(1) requires that a disability certification with respect to certain individuals be filed with the Secretary. Section 529A(e)(2) provides that the disability certification include a certification to the satisfaction of the Secretary that the individual has a described medically determinable physical or mental impairment that occurred before the date on which the individual attained age 26, as well as a copy of a physician's diagnosis. The burden under §§ 1.529A-5, 1.529A-6, and 1.529A-7 is reflected in the burden under Form 5498-QA, "ABLE Account Contribution Information," and Form 1099-QA, "Distributions from ABLE Accounts," respectively.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become mate-

rial in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

2. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will not impact a substantial number of small entities. These regulations primarily affect states and individuals and therefore will not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the NPRMs preceding these regulations were submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business. No comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

Drafting Information

The principal authors of these regulations are Terri Harris and Julia Parnell of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1, 25, 26, 301, and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry for §§ 1.529A-0 through 1.529A-8 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

* * * * *

Sections 1.529A-0 through 1.529A-8 also issued under 26 U.S.C. 529A(g).

* * * * *

Par. 2. Section 1.511-2 is amended by adding paragraph (e) to read as follows:

§ 1.511-2 Organizations subject to tax.

* * * * *

(e) *ABLE programs*—(1) *Unrelated business taxable income*. A qualified ABLE program described in section 529A and § 1.529A-1(b)(14) generally is exempt from Federal income taxation, but is subject to taxes imposed by section 511 relating to the imposition of tax on unrelated business income. A qualified ABLE program is required to file Form 990-T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§ 1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

(2) *Applicability date*. This paragraph (e) applies to taxable years beginning after December 31, 2020.

Par. 3. Section 1.513-1 is amended as follows:

1. Redesignating the first full sentence following the heading in paragraph (d)(4)(i) as (d)(4)(i)(A);
2. Redesignating the second sentence in paragraph (d)(4)(i) as (d)(4)(i)(B) introductory text;
3. Adding a heading to newly designated paragraph (d)(4)(i)(A);
4. In newly designated paragraph (d)(4)(i)(B), adding a heading and removing from the introductory text "principle" and adding "paragraph (d)(4)(i)" in its place;
5. Redesignating undesignated Examples 1 through 3 following newly designated paragraph (d)(4)(i)(B) introductory text as paragraphs (d)(4)(i)(B)(1) through (3); and
6. Adding paragraph (d)(4)(i)(B)(4).

The additions read as follows:

§ 1.513-1 Definition of unrelated trade or business.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(A) *In general*. * * *

(B) *Examples*. * * *

(*4*) *Example 4*. P is a qualified ABLE program described in section 529A and § 1.529A-1(b)(14). P receives amounts in order to establish or maintain ABLE accounts, as administrative or maintenance fees and other similar fees including service charges. Because the payment of these amounts is essential to the operation of a qualified ABLE program, the income generated from the activity does not constitute gross income from an unrelated trade or business.

* * * * *

Par. 4. An undesignated center heading and §§ 1.529A-0 through 1.529A-8 are added immediately following § 1.528-10 to read as follows:

QUALIFIED ABLE PROGRAMS

§ 1.529A-8 Applicability dates and transition relief.

Qualified Able Programs

§ 1.529A-0 Table of contents.

This section lists the following captions contained in §§ 1.529A-1 through 1.529A-8.

§ 1.529A-1 Exempt status of qualified ABLE program and definitions.

(a) In general.
(b) Definitions.
(1) ABLE account.
(2) Contribution.
(3) Designated beneficiary.
(4) Disability certification.
(5) Distribution.
(6) Earnings.
(7) Earnings ratio.
(8) Eligible individual.
(9) Excess contribution.
(10) Excess aggregate contribution.
(11) Investment in the account.
(12) Member of the family.
(13) Program-to-program transfer.
(14) Qualified ABLE program.
(15) Qualified disability expenses.
(16) Rollover.
(c) Applicability date.

§ 1.529A-2 Qualified ABLE program.

(a) In general.
(b) Established and maintained by a State or agency or instrumentality of a State.
(1) Established.
(2) Maintained.
(i) In general.
(ii) Multiple States, agencies, or instrumentalities.
(3) Community Development Financial Institutions (CDFIs).
(c) Establishment of an ABLE account and signature authority.
(1) Establishment of the ABLE account.
(2) Signature authority.
(3) Only one ABLE account.
(4) Beneficial interest.
(d) Eligible individual.
(1) Documentation.
(2) Frequency of recertification.
(3) Loss of qualification as an eligible individual.
(e) Disability certification.
(1) In general.
(2) Marked and severe functional limitations.
(3) Compassionate allowance list.
(4) Additional guidance.
(5) Restriction on use of certification.
(f) Change of designated beneficiary.
(1) In general.
(2) Change effective upon death.
(g) Contributions.
(1) Permissible property.
(2) Annual contributions limit.
(3) Cumulative limit.
(4) Return of excess contributions, excess compensation contributions, and excess aggregate contributions.
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(h) Qualified disability expenses.
(1) In general.
(2) Example.
(i) Separate accounting.
(j) Program-to-program transfers.
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(3) Investment direction limit.
(l) Investment direction.
(m) No pledging of interest as security.
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(o) Post-death payments.
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§ 1.529A-3 Tax treatment.

(a) Taxation of distributions.
(1) In general.
(2) Additional period.
(b) Additional exclusions from gross income.
(1) Rollover.
(2) Program-to-program transfers.
(3) Change of designated beneficiary.
(4) Payments to creditors post-death.
(c) Computation of earnings.
(d) Additional tax on amounts includible in gross income.
(1) In general.
(2) Exceptions.
(e) Tax on excess contributions.
(f) Filing requirements.
(g) No inference outside section 529A.
(h) Applicability date.

§ 1.529A-4 Gift, estate, and generation-skipping transfer taxes.

(a) Contributions.
(1) In general.
(2) Generation-skipping transfer (GST) tax.
(3) Designated beneficiary as contributor.
(b) Distributions.
(c) Transfer to another designated beneficiary.
(d) Transfer tax on death of designated beneficiary.
(e) Applicability date.

§ 1.529A-5 Reporting of the establishment of and contributions to an ABLE account.

(a) In general.
(b) Additional definitions.
(1) Filer.
(2) TIN.
(c) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(d) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 5498-QA.
(e) Request for TIN of designated beneficiary.
(f) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(g) Applicability date.

§ 1.529A-6 Reporting of distributions from and termination of an ABLE account.

(a) In general.
(b) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Information excluded.
(4) Time and manner of filing return.
(c) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 1099-QA.
(d) Request for TIN of contributor(s).
(1) In general.

(2) Exception.
(e) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
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§ 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) Electronic furnishing of statements.
(1) In general.
(2) Consent.
(3) Required disclosures.
(4) Format.
(5) Notice.
(6) Access period.
(b) Applicability date.

§ 1.529A-8 Applicability dates and transition relief.

(a) Applicability dates.
(b)Transition relief.
(1) In general.
(2) Transition period.
(3) Compliance after transition period.

§ 1.529A-1 Exempt status of qualified ABLE program and definitions.

(a) *In general*. A qualified ABLE program described in section 529A is exempt from Federal income tax, except for the tax imposed under section 511 on any unrelated business taxable income of that program. See § 1.511-2(e).

(b) *Definitions*. For purposes of section 529A, this section and §§ 1.529A-2 through 1.529A-8—

(1) *ABLE account* means an account established under a qualified ABLE program and owned by the designated beneficiary of that account.

(2) *Contribution* means any payment directly allocated to an ABLE account for the benefit of a designated beneficiary, including amounts transferred to an ABLE account between December 22, 2017, and January 1, 2026, from a qualified tuition program described in section 529.

(3) *Designated beneficiary* means the individual for whom the account was established at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). The designated beneficiary is the owner of the ABLE account. If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to have an ABLE account established but not to exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the person with signature authority over the account. See § 1.529A-2(c)(1) and (2).

(4) *Disability certification* means a certification to establish a certain level of an individual's physical or mental impairment that meets the requirements described in § 1.529A-2(e).

(5) *Distribution* means any payment from an ABLE account. However, a program-to-program transfer, a Medicaid reimbursement under § 1.529A-2(o), or a payment of administrative or investment fees charged by a qualified ABLE program is not a distribution.

(6) *Earnings* attributable to an ABLE account are the excess of the total account balance on a particular date over the investment in the account as of that date.

(7) *Earnings ratio* as applied to a particular distribution means the amount of earnings attributable to the ABLE account as of the date of the distribution, divided by the total account balance on that same date.

(8) *Eligible individual* for a taxable year means an individual who either:

(i) Is receiving benefits under title II or XVI of the Social Security Act based on blindness or disability or whose entitlement to such benefits under title XVI has been suspended solely due to excess income or resources, provided that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); or

(ii) Is the subject of a disability certification filed with the Secretary of the Treasury or his delegate (Secretary) for that taxable year.

(9) *Excess contribution* means 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.

(10) *Excess aggregate contribution* means—

(i) The amount contributed during the taxable year of the designated beneficiary that causes the total of amounts contributed since the establishment of the ABLE account (or of an ABLE account for the same designated beneficiary that was rolled into the current ABLE account) to exceed the limit in effect under section 529(b)(6); or

(ii) In the context of the safe harbor in § 1.529A-2(g)(3), the amount contributed that causes the account balance to exceed the limit in effect under section 529(b)(6).

(11) *Investment in the account* means—

(i) The sum of all contributions made to the ABLE account, reduced by the aggregate amount of contributions included in distributions, if any, made from the account; or

(ii) In the case of a rollover contribution into an ABLE account, the amount of the rollover contribution that constituted the amount described in paragraph (b)(11)(i) of this section with respect to the ABLE account from which the rollover contribution was made.

(12) *Member of the family* means a sibling, whether by blood or by adoption, and includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.

(13) *Program-to-program transfer* means—

(i) The direct transfer of the entire balance of an ABLE account into an ABLE account of the same designated beneficiary after which the transferor ABLE account is closed upon completion of the transfer; or

(ii) The direct transfer of part or all of the balance to an ABLE account of another eligible individual who is a member of the family of the former designated beneficiary.

(14) *Qualified ABLE program* means a program established and maintained by a State, or agency or instrumentality of a State, under which an ABLE account may be established by and for the benefit of the account's designated beneficiary who is an eligible individual, and that meets the requirements described in § 1.529A-2.

(15) *Qualified disability expenses* means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness

or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See § 1.529A-2(h). However, any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A-1(b)(8)(i) or § 1.529A-2(e)(1)(i), even if the designated beneficiary is an eligible individual for that entire taxable year, do not relate to blindness or disability and therefore are not qualified disability expenses.

(16) *Rollover* means a contribution to an ABLE account of a designated beneficiary (or of an eligible individual who is a member of the family of the designated beneficiary) of all or a portion of an amount distributed from the designated beneficiary's ABLE account, provided the contribution is made within 60 days of the date of the withdrawal and, in the case of a rollover to the designated beneficiary's ABLE account, no rollover has been made to an ABLE account of the designated beneficiary within the 12 month period immediately preceding the rollover to the ABLE account.

(c) *Applicability date*. This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-2 Qualified ABLE program.

(a) *In general*. A qualified ABLE program is a program established and maintained by a State, or an agency or instrumentality of a State, that satisfies all of the requirements of this section and under which—

(1) An ABLE account may be established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;

(2) A designated beneficiary is limited to only one ABLE account at a time except as otherwise provided in paragraph (c)(3) of this section;

(3) Any person may make contributions to such an ABLE account, subject to the limitations described in paragraph (g) of this section; and

(4) Distributions (other than returns of contributions as described in paragraph (g)(4) of this section) may be made only to or for the benefit of the designated beneficiary of the ABLE account.

(b) *Established and maintained by a State or agency or instrumentality of a State*—(1) *Established*. A program is established by a State or its agency or instrumentality if the program is initiated by State statute or regulation or by an act of a State official or agency with the authority to act on behalf of the State.

(2) *Maintained*—(i) *In general*. A program is maintained by a State or an agency or instrumentality of a State if—

(A) The State or its agency or instrumentality sets all of the terms and conditions of the program, including but not limited to who may contribute to the program, who may be a designated beneficiary of the program, and what benefits the program may provide; and

(B) The State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising the implementation of decisions relating to the investment of assets contributed under the program. Factors that are relevant in determining whether a State or its agency or instrumentality is actively involved in the administration of the program include, but are not limited to: whether the State or its agency or instrumentality provides services to designated beneficiaries that are not provided to persons who are not designated beneficiaries; whether the State or its agency or instrumentality establishes detailed operating rules for administering the program; whether officials of the State or its agency or instrumentality play a substantial role in the operation of the program, including selecting, supervising, monitoring, auditing, and terminating the relationship with any private contractors that provide services under the program; whether the State or its agency or instrumentality holds the private contractors that provide services under the program to the same standards and requirements that apply when private contractors handle funds that belong to the State or its agency or instrumentality or provide services to the State or its agency or instrumentality; whether the State or its agency or instrumentality provides funding for the program; and whether the State or its agency or instrumentality acts as trustee or holds program assets directly or for the benefit of the designated beneficiaries. For example, if the State or its agency or instrumentality exercises the same authority over the funds invested in the program as it does over the investments in or pool of funds of a State employees' defined benefit pension plan, then the State or its agency or instrumentality will be considered actively involved on an ongoing basis in the administration of the program.

(ii) *Multiple States, agencies, or instrumentalities*. A program may be maintained by two or more States or the agencies or instrumentalities of two or more States if the program meets the requirements of paragraph (b)(2)(i) of this section for each of the States represented. If a State or an agency or instrumentality of a State participates in such a consortium of States or agencies or instrumentalities of States, the consortium's program is considered to be the program of each State represented.

(3) *Community Development Financial Institutions (CDFIs)*. In addition to having the ability to contract with private contractors as provided in paragraph (b)(2)(i)(B) of this section, a State or its agency or instrumentality or qualified ABLE program may contract with one or more Community Development Financial Institutions (CDFIs) (as defined in 12 U.S.C. 4702(5) and 12 CFR 1805.104) to perform some or all of the services described in paragraphs (b)(2)(i)(A) and (B) of this section.

(c) *Establishment of an ABLE account and signature authority*—(1) *Establishment of the ABLE account*—(i) *In general*. A qualified ABLE program must provide that an ABLE account may be established only for an eligible individual.

(A) The ABLE account may be established by the eligible individual;

(B) The ABLE account may be established by a person selected by the eligible individual; or

(C) If an eligible individual (whether a minor or adult) is unable to establish his or her own ABLE account, an 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 conservator or legal guardian, spouse, parent, sibling, grandparent of the eligible individual, or a representative payee appointed for the eligible individual by the Social Security Administration (SSA), in that order.

(ii) *Authority*. A qualified ABLE program may accept a certification, made under penalties of perjury, from the person seeking to establish an ABLE account as to the basis for the person's authority to establish the ABLE account, and that there is no other person with a higher priority, under paragraphs (c)(1)(i)(A), (B), and (C) of this section, to establish the ABLE account.

(2) *Signature authority*—(i) *Signatory*. In general, the designated beneficiary will have signature authority over his or her ABLE account. However, if an individual other than the designated beneficiary establishes the account in accordance with paragraph (c)(1)(i)(B) or (C) of this section, such individual will have signature authority.

(A) At any time, the designated beneficiary may remove and replace any person with signature authority over the designated beneficiary's ABLE account. The replacement may be the designated beneficiary or any other person selected by the designated beneficiary.

(B) The designated beneficiary may designate a successor to the person with signature authority. In the absence of any designation of a successor by the designated beneficiary, a person with signature authority over the designated beneficiary's ABLE account may designate a successor, consistent with the ordering rules in paragraph (c)(1)(i)(C) of this section.

(ii) *Co-signatories*. A qualified ABLE program may permit an ABLE account to have co-signatories, consistent with paragraph (c)(1)(i)(C) of this section. If co-signatories are permitted, all of the other provisions of this paragraph (c)(2) continue to apply, and references to the *signatory* refer to the co-signatories acting separately or jointly, as determined by that qualified ABLE program.

(iii) *Authority over sub-accounts*. The person with signature authority over the ABLE account may appoint and from time to time may remove, replace, or name a successor for any person with signature authority over a sub-account described in paragraph (c)(3)(iii) of this section.

(3) *Only one ABLE account*—(i) *In general*. Except as provided in paragraph (c)(3)(ii) of this section, a designated beneficiary is limited to one ABLE account at a time, regardless of where located. To ensure that this requirement is met, a qualified ABLE program must obtain a verification, signed under penalties of perjury by the person establishing the ABLE account, that the individual establishing the ABLE account neither knows nor has reason to know that the eligible individual already has an existing ABLE account (other than an ABLE account that will terminate with the rollover or program-to-program transfer of its assets into the new ABLE account) before that program can permit the establishment of an ABLE account for that eligible individual. In the case of a rollover, the ABLE account from which amounts were distributed must be closed as of the 60th day after the date of the distribution in order to allow the account receiving the rollover to be treated as an ABLE account.

(ii) *Treatment of additional accounts*. If an individual is the designated beneficiary of an ABLE account established in accordance with paragraph (c)(1) of this section, no other account subsequently established for that individual under a qualified ABLE program (additional account) will be an ABLE account. The preceding sentence does not apply to an additional account, and that additional account is an ABLE account, if—

(A) The additional account is established for the purpose of receiving a rollover or program-to-program transfer;

(B) All of the contributions to the additional account are returned in accordance with the rules that apply to the return of excess contributions and excess aggregate contributions under paragraph (g)(4) of this section; or

(C) All amounts in the additional account are transferred to the designated beneficiary's preexisting ABLE account and any excess contributions and excess aggregate contributions are returned in accordance with the rules that apply to the return of excess contributions and excess aggregate contributions under paragraph (g)(4) of this section.

(iii) *Sub-accounts*. A qualified ABLE program may establish an ABLE account (primary account) that may include multiple sub-accounts. The person with signature authority over the ABLE account, at any time and from time to time, may create one or more sub-accounts, may transfer funds in the ABLE account to one or more of the sub-accounts, and may close one or more of the sub-accounts, to facilitate the acquisition of certain goods or services for the designated beneficiary. Each sub-account may have a different person with signature authority over that sub-account, appointed in accordance with the rules of paragraph (c)(2)(iii) of this section, and that person's authority is limited to making distributions from that sub-account. The primary account and the sub-accounts collectively constitute a single ABLE account and therefore must be aggregated for all purposes, including without limitation the limit on the number of permissible changes in investment direction under paragraph (l) of this section, the contribution limits under paragraphs (g)(2) and (3) of this section, the computation of gross income and other tax provisions, and the reporting requirements.

(iv) *Investment options*. A qualified ABLE program may offer different investment options within each ABLE account without violating the only-one-ABLE-account rule in this paragraph (c)(3). For example, an ABLE account may include a cash fund as well as one or more stock or bond funds.

(4) *Beneficial interest*. A person other than the designated beneficiary with signature authority over the ABLE account of the designated beneficiary may neither have nor acquire any beneficial interest in the ABLE account during the lifetime of the designated beneficiary and must administer the ABLE account for the benefit of the designated beneficiary of the account.

(d) *Eligible individual*—(1) *Documentation*—(i) *In general*. Whether an individual is an eligible individual is determined for each taxable year of that individual, and that determination applies for the entire year. A qualified ABLE program must specify the documentation that an individual must provide, both at the time an ABLE account is established and thereafter, in order to ensure that the designated beneficiary of the ABLE account is, and continues to be, determined an eligible individual. For purposes of determining whether an individual is an eligible individual, a disability certification as described in paragraph (e)(1) of this section will be deemed to be filed with the Secretary once the qualified ABLE program has

received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program will file in accordance with the filing requirements under § 1.529A-5(c)(2)(iv).

(ii) *Safe harbor*. A qualified ABLE program may establish that an individual is an eligible individual if the person establishing the ABLE account certifies under penalties of perjury—

(A) The basis for the individual's status as an eligible individual (entitlement to benefits based on blindness or disability under title II or XVI of the Social Security Act, or a disability certification described in paragraph (e)(1) of this section);

(B) That the individual is blind or has a medically determinable physical or mental impairment as described in paragraph (e)(1)(i) of this section;

(C) That such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday);

(D) If the basis of the individual's eligibility is a disability certification, that the individual has received and agrees to retain a written diagnosis as described in paragraph (e)(1)(iii) of this section, accompanied by the name and address of the diagnosing physician and the date of the written diagnosis;

(E) The applicable diagnostic code from those listed on Form 5498-QA (or in the instructions to such form) identifying the type of the individual's impairment;

(F) That the person establishing the account is the individual who will be the designated beneficiary of the account or is the person authorized under paragraph (c)(1)(i) of this section to establish the account; and

(G) If required by the qualified ABLE program, the information provided by the diagnosing physician as to the categorization of the disability that may be used to determine, under the particular State's program, the appropriate frequency of required recertifications.

(2) *Frequency of recertification*—(i) *In general*. A determination of eligibility must be made annually unless the qualified ABLE program adopts a different method of ensuring a designated beneficiary's continuing status as an eligible individual. Alternative methods may include, without limitation, the use of certifications by the designated beneficiary under penalties of perjury, and the imposition of different recertification frequencies for different types of impairments.

(ii) *Considerations*. In developing its rules on recertification, a qualified ABLE program may take into consideration whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future. For example, a qualified ABLE program may provide that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment. Even if the qualified ABLE program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABLE account to promptly report changes in the designated beneficiary's condition that would result in the designated beneficiary's failing to satisfy the definition of an eligible individual, the designated beneficiary will be considered an eligible individual until the end of the taxable year in which the change in the designated beneficiary's condition occurred. A qualified ABLE program that is compliant with the rules regarding recertification will not be considered to be noncompliant solely because a designated beneficiary fails to comply with this enforceable obligation.

(3) *Loss of qualification as an eligible individual*. If the designated beneficiary of an ABLE account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABLE account, the designated beneficiary will continue to be the designated beneficiary of the ABLE account (and will be referred to as such), and the ABLE account will not be deemed to have been distributed. However, beginning on the first day of the designated beneficiary's first taxable year for which the designated beneficiary does not satisfy the definition of an eligible individual, additional contributions to the designated beneficiary's ABLE account must not be accepted by the qualified ABLE program. In addition, no expense incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A-1(b)(8)(i) or § 1.529A-2(e)(1)(i), whichever had applied, is a qualified disability expense even if the individual is an eligible individual for the rest of the year under paragraph (d)(1)(i) of this section. If the designated beneficiary subsequently again satisfies the definition of an eligible individual, contributions to the designated beneficiary's ABLE account again may be accepted, subject to the contribution limits under section 529A, and expenses that are incurred thereafter may meet the definition of a qualified disability expense in § 1.529A-1(b)(15) and paragraph (h) of this section.

(e) *Disability certification*—(1) *In general*. Except as provided in paragraph (e)(3) of this section or in additional guidance described in paragraph (e)(4) of this section, a disability certification with respect to an individual, that will be deemed filed with the Secretary as provided in paragraph (d)(1)(i) of this section, and is deemed satisfactory to the Secretary, is a certification signed under penalties of perjury by the individual, or by another individual establishing the ABLE account for the individual, that—

(i) Certifies that the individual—

(A) Has a medically determinable physical or mental impairment that results in marked and severe functional limitations (as defined in paragraph (e)(2) of this section), and that—

(*1*) Can be expected to result in death; or

(*2*) Has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) Is blind (within the meaning of section 1614(a)(2) of the Social Security Act);

(ii) Certifies that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); and

(iii) Includes a certification that the individual has obtained and will continue to retain a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)) and including the name

and address of the diagnosing physician and the date of the diagnosis.

(2) *Marked and severe functional limitations*. For purposes of paragraph (e)(1) of this section, the phrase *marked and severe functional limitations* means the standard of disability in the Social Security Act for children claiming Supplemental Security Income for the Aged, Blind, and Disabled (SSI) benefits based on disability (see 20 CFR 416.906), but without regard to age or to whether the individual engages in substantial gainful activity. Specifically, this is a level of severity that meets, medically equals, or functionally equals the severity of any listing in appendix 1 of subpart P of 20 CFR part 404. See 20 CFR 416.906, 416.924 and 416.926a. Such phrase also includes any impairment or standard of disability identified in future guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). Consistent with the regulations promulgated by the SSA, the level of severity is determined by taking into account the effect of the individual's prescribed treatment. See 20 CFR 416.930.

(3) *Compassionate allowance list*. Conditions listed in the "List of Compassionate Allowances Conditions" maintained by the SSA are deemed to meet the requirements of section 529A(e)(1)(B) regarding the filing of a disability certification, if the condition was present and produced marked and severe functional limitations before the date on which the individual attained age 26. To establish that an individual with such a condition satisfies the definition of an eligible individual, the individual must identify the condition and certify to the qualified ABLE program both the presence of the condition and its resulting marked and severe functional limitations prior to age 26, in a manner specified by the qualified ABLE program.

(4) *Additional guidance*. Additional guidance on conditions deemed to meet the requirements of section 529A(e)(1)(B) may be identified in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

(5) *Restriction on use of certification*. No inference may be drawn from a disability certification described in this paragraph (e) for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(f) *Change of designated beneficiary*—(1) *In general*. A qualified ABLE program must permit a change in the designated beneficiary of an ABLE account made during the life of the designated beneficiary. At the time when the change becomes effective, the successor designated beneficiary must be an eligible individual. However, a qualified ABLE program may limit the change in designated beneficiary to a member of the family as defined in § 1.529A-1(b)(12) of the current designated beneficiary.

(2) *Change effective upon death*. A qualified ABLE program may permit a change in the designated beneficiary of an ABLE account, made during the life of the designated beneficiary, to take effect upon the death of the designated beneficiary. The amount to be transferred pursuant to such a beneficiary designation is first subject to the payment of any qualified disability expenses incurred before the designated beneficiary's death but not yet paid and those described in paragraph (o) of this section, and is subject to the provisions of § 1.529A-4.

(g) *Contributions*—(1) *Permissible property*. Except in the case of a program-to-program transfer or a change in designated beneficiary to a new designated beneficiary who is an eligible individual and a member of the family of the former designated beneficiary, contributions to an ABLE account may be made only in cash. A qualified ABLE program may allow cash contributions to be made in the form of a check, money order, credit card, electronic transfer, after-tax payroll deduction, or similar method.

(2) *Annual contributions limit*—(i) *In general*. Except as provided in paragraph (g)(2)(ii) of this section, a qualified ABLE program must provide that no contribution to an ABLE account will be accepted to the 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 during that year to exceed the amount in effect under section 2503(b) for the calendar year in which the designated beneficiary's taxable year begins. See paragraph (k)(2) of this section for purposes of applying the rules in this paragraph (g)(2) to rollovers, program-to-program transfers, and designated beneficiary changes.

(ii) *Additional contributions by an employed designated beneficiary*—(A) *In general*. An employed designated beneficiary defined in paragraph (g)(2)(iii)(A) of this section may contribute amounts up to the limit specified in paragraph (g)(2)(ii)(B) of this section in addition to the amount specified in paragraph (g)(2)(i) of this section. Although a designated beneficiary's contributions subject to this compensation income limit do not have to be made from that compensation income, any contribution of the designated beneficiary's compensation income made directly by the designated beneficiary's employer is a contribution made by the designated beneficiary. Once the designated beneficiary has made contributions equal to the limit described in paragraph (g)(2)(ii)(B) of this section, additional contributions by the designated beneficiary may be made if permissible under paragraph (g)(2)(i) of this section.

(B) *Amount of additional permissible contribution*. Any additional contribution made by the designated beneficiary pursuant to paragraph (g)(2)(ii)(A) of this section is limited to the lesser of—

(*1*) The designated beneficiary's compensation as defined by section 219(f)(1) for the taxable year; or

(*2*) An amount equal to the applicable poverty line, as defined in paragraph (g)(2)(iii)(B) of this section, for a one-person household for the calendar year preceding the calendar year in which the designated beneficiary's taxable year begins.

(iii) *Additional definitions.* In addition to the definitions in § 1.529A-1(b), the following definitions also apply for the purposes of this section—

(A) *Employed designated beneficiary* means a designated beneficiary who is an employee (including an employee within the meaning of section 401(c)), with respect to whom no contribution is made for the taxable year to—

(*1*) A defined contribution plan (within the meaning of section 414(i)) with respect to which the requirements of sections 401(a) or 403(a) are met;

(*2*) An annuity contract described in section 403(b); and

(*3*) An eligible deferred compensation plan described in section 457(b).

(B) *Applicable poverty line* means the amount provided in 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) for the State of residence of the employed designated beneficiary. If the designated beneficiary lives in more than one State during the taxable year, the applicable poverty line is the poverty line for the State in which the designated beneficiary resided longer than in any other State during that year.

(C) *Excess compensation contribution* means the amount by which the amount contributed during the taxable year of an employed designated beneficiary to the designated beneficiary's ABLE account exceeds the limit in effect under section 529A(b)(2)(B)(ii) and paragraph (g)(2)(ii)(B) of this section for the calendar year in which the taxable year of the employed designated beneficiary begins.

(iv) *Example*. The provisions of paragraph (g)(2)(ii) of this section may be illustrated by the following example: In 2020, A, an employed designated beneficiary as defined in paragraph (g)(2)(iii)(A) of this section, lives in Hawaii. A's compensation, as defined by section 219(f)(1), for 2020 is $20,000. The poverty line for a one-person household in Hawaii was $14,380 in 2019. Because A's compensation exceeded the applicable poverty line amount, A's additional permissible contribution in 2019 is limited to $14,380, the amount of the 2019 applicable poverty line.

(v) *Ensuring contribution limit is met*—(A) *Responsibility*. The employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements in section 529A(b)(2)(B)(ii) and paragraph (g)(2)(ii) of this section are met and for maintaining adequate records for that purpose.

(B) *Certification*. A qualified ABLE program may allow a designated beneficiary (or the person acting on his or her behalf) to certify, under penalties of perjury, and in the manner specified by the qualified ABLE program that—

(*1*) The designated beneficiary is an employed designated beneficiary; and

(*2*) The designated beneficiary's contributions of compensation are not excess compensation contributions.

(3) *Cumulative limit*—(i) *In general*. A qualified ABLE program must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by that State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions on behalf of a designated beneficiary include contributions to any prior ABLE account maintained by any State or its agency or instrumentality for the same designated beneficiary, or any former designated beneficiary to the extent his or her ABLE account funds were transferred to the designated beneficiary's ABLE account. The transfer of a designated beneficiary's ABLE account from one qualified ABLE program to another with a lower cumulative limit will not violate this rule, but qualified ABLE programs must prohibit subsequent contributions under this general rule. For purposes of this paragraph (g)(3), contributions do not include rollovers, program-to-program transfers or a designated beneficiary change to a new designated beneficiary who is an eligible individual and member of the family of the former designated beneficiary as defined in § 1.529A-1(b)(12).

(ii) *Safe harbor*. A qualified ABLE program maintained by a State or its agency or instrumentality satisfies the requirement under section 529A(b)(6) if it refuses to accept any additional contribution to an ABLE account (except as provided to the contrary in paragraph (g)(3)(i) of this section) while the balance in that account equals or exceeds the limit established by that State under section 529(b)(6). Nevertheless, without regard to the categories of transfers that caused the account balance to exceed the State limit, once the account balance falls below that limit, additional contributions, subject to the annual contributions limit under paragraph (g)(2) of this section and the limit established by such State under section 529(b)(6), again may be accepted.

(4) *Return of excess contributions, excess compensation contributions, and excess aggregate contributions*. If an excess contribution as defined in § 1.529A-1(b)(9), an excess compensation contribution as defined in paragraph (g)(2)(iii)(C) of this section, or an excess aggregate contribution as defined in § 1.529A-1(b)(10) is deposited into or allocated to the ABLE account of a designated beneficiary, a qualified ABLE program must return that excess contribution, excess compensation contribution, or excess aggregate contribution, including all net income attributable to that contribution, as determined under the rules set forth in § 1.408-11 (treating references to an IRA as references to an ABLE account and references to returned contributions under section 408(d)(4) as references to excess contributions or excess aggregate contributions), to the person or persons who made that contribution. Each excess contribution, excess compensation contribution, and excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess, along with all net income attributable to such excess, has been returned. In the case of an excess compensation contribution, the employed designated beneficiary, or the person acting on the employed designated beneficiary's behalf, is responsible for identifying any excess compensation contribution and for requesting the return of the excess compensation contribution. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) of the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. See § 1.529A-3(a) for Federal income tax considerations for the contributor(s). If an excess contribution or excess aggregate contribution and the net income attributable to the excess contribution or excess aggregate contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return. No notification is required if amounts are rejected by the qualified ABLE program before they are deposited into or allocated to the designated beneficiary's ABLE account.

(5) *Restriction of contributors*. A qualified ABLE program may allow the designated beneficiary, from time to time, to restrict who may make contributions to the designated beneficiary's ABLE account.

(h) *Qualified disability expenses*—(1) *In general*. Qualified disability expenses are expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See § 1.529A-1(b)(15). Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses, as well as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit an individual with a disability.

(2) *Example*. The following example illustrates this paragraph (h): B, an individual, has a medically determined mental impairment that causes marked and severe limitations on B's ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping B to maintain B's independence and to improve B's quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be a qualified disability expense.

(i) *Separate accounting*. A program will not be treated as a qualified ABLE program unless it provides separate accounting for each ABLE account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's ABLE account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) *Program-to-program transfers*. A qualified ABLE program may permit a change of qualified ABLE program or a change of designated beneficiary by means of a program-to-program transfer as defined in § 1.529A-1(b)(13). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLE program, rules similar to the rules of § 1.401(a)(31)-1, Q&A-3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) *Carryover of attributes*—(1) *In general*. Upon a rollover, program-to-program transfer, or change of designated beneficiary, all of the attributes of the former ABLE account relevant for purposes of calculating the investment in the account are applicable to the recipient ABLE account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLE account. In addition, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLE account.

(2) *Annual contribution limit*. Upon a rollover or program-to-program transfer, for purposes of applying the annual contribution limit under paragraph (g)(2) of this section to the transferee account, annual contributions to the designated beneficiary's transferor ABLE account during the taxable year in which the rollover or program-to-program transfer occurs are included. However, upon a change of designated beneficiary, or upon a rollover or program-to-program transfer to the ABLE account of a different designated beneficiary who is both a member of the family as defined in § 1.529A-1(b)(12) and an eligible individual, no amounts contributed to the prior designated beneficiary's ABLE account are included when applying the annual contribution limit under paragraph (g)(2) of this section.

(3) *Investment direction limit*. Upon a rollover or program-to-program transfer, the number of investment directions by the designated beneficiary include the number of investment directions made prior to the rollover or program-to-program transfer during the same taxable year for purposes of paragraph (l) of this section. However, upon a change of designated beneficiary, or upon a rollover or program-to-program transfer to the ABLE account of a different designated beneficiary who is both a member of the family as defined in § 1.529A-1(b)(12) and an eligible individual, the number of investment directions made for the prior designated beneficiary's ABLE account are not included in determining the number of investment directions made for the new designated beneficiary's ABLE account in that same year.

(l) *Investment direction*. A program will not be treated as a qualified ABLE program unless it provides that the designated beneficiary of an ABLE account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year. Such an investment direction does not include a request to transfer any part of the account balance from an investment option to a cash equivalent option to effectuate a distribution, or the automatic rebalancing of the assets of an ABLE account to maintain the asset allocation level chosen when the account was established or by a subsequent investment direction.

(m) *No pledging of interest as security for a loan*. A program will not be treated as a qualified ABLE program unless the terms of the program, or a State statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. For this purpose, the program administrator's advance of funds to satisfy a withdrawal request during the period between the sale of an asset in the ABLE account (whose value is sufficient to satisfy the withdrawal request) and the clearing or settlement of that sale, does not constitute a loan, pledge, or grant of security for a loan. Similarly, the use of checking accounts or debit cards to facilitate a qualified ABLE program's ability to make distributions will not be treated as a pledge or grant of security for a loan during the period between the use of the check or debit card and the clearing or settlement of that transaction, provided

that the ABLE program does not advance funds to a designated beneficiary in excess of the amount in the designated beneficiary's ABLE account.

(n) *No sale or exchange*. A qualified ABLE program must ensure that no interest in an ABLE account may be sold or exchanged.

(o) *Post-death payments*. A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of the designated beneficiary's funeral and burial expenses (including the unpaid balance of a pre-death contract for those services) and all outstanding payments due for his or her other qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account over the amount of any premiums paid, whether from the ABLE account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan. The establishment of the ABLE account is the date on which the ABLE account was established or, if earlier, the date on which was established any ABLE account for the same designated beneficiary from which amounts were rolled over or transferred to the ABLE account, but in no event earlier than the date on which the designated beneficiary became the designated beneficiary of the account from which amounts were transferred. After the expiration of the applicable statute of limitations for filing Medicaid claims against the designated beneficiary's estate, a qualified ABLE program may distribute the balance of the ABLE account to the successor designated beneficiary or, if none, to the deceased designated beneficiary's estate. A State law prohibiting the filing of such a claim against either the ABLE account or the designated beneficiary's estate will not prevent that State's program from being a qualified ABLE program.

(p) *Reporting requirements*. A qualified ABLE program must comply with all applicable reporting requirements, including without limitation those described in §§ 1.529A-5 through 1.529A-7.

(q) *Applicability date*. This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-3 Tax treatment.

(a) *Taxation of distributions*—(1) *In general*. Each distribution from an ABLE account consists of an earnings portion of the account (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary paid during that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary paid during that year (regardless of when incurred), the distributions from the ABLE account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. The amount to be included in gross income is based on the earnings portion of each distribution, computed in accordance with paragraph (c) of this section. The earnings portion that is includible in gross income is the sum of the earnings portion of all distributions made in that year, reduced by an amount that bears the same ratio to the total earnings portion as the amount of qualified disability expenses paid during the year bears to such total distributions during the year. If an excess contribution or excess aggregate contribution is returned within the time period required in § 1.529A-2(g)(4), any net income distributed is includible in the gross income of the contributor(s) in the taxable year in which the excess contribution or excess aggregate contribution was made.

(2) *Additional period*. The designated beneficiary may treat as having been paid during the preceding taxable year qualified disability expenses paid on or before the 60th day immediately following the end of the designated beneficiary's preceding taxable year. Qualified disability expenses treated, pursuant to the rule in the preceding sentence, as having been paid during the designated beneficiary's taxable year immediately prior to the year of their actual payment may not be included in the total qualified disability expenses for the year in which they were paid.

(b) *Additional exclusions from gross income*—(1) *Rollover*. A rollover as defined in § 1.529A-1(b)(16) is not included in gross income under paragraph (a) of this section.

(2) *Program-to-program transfers*. A program-to-program transfer as defined in § 1.529A-1(b)(13) is not a distribution and is not included in gross income under paragraph (a) of this section.

(3) *Change of designated beneficiary*—(i) *In general*. A change of designated beneficiary of an ABLE account is not treated as a distribution for purposes of section 529A, and is not included in gross income under paragraph (a) of this section, if the successor designated beneficiary is—

(A) An eligible individual for the taxable year in which the change is made; and

(B) A member of the family (as defined in § 1.529A-1(b)(12)) of the former designated beneficiary.

(ii) *Other designated beneficiary changes*. In the case of any change of designated beneficiary not described in paragraph (b)(3)(i) of this section, the former designated beneficiary of that ABLE account will be treated as having received a distribution of the fair market value of the assets in that ABLE account on the date on which the change is made to the new designated beneficiary.

(4) *Payments to creditors post-death*. Distributions made after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses, as well as the funeral and burial expenses of the designated ben-

eficiary, are not included in gross income of the designated beneficiary or his or her estate. Included among these obligations is the post-death payment of any part of a claim filed against the deceased designated beneficiary or his or her estate or ABLE account by a State with respect to benefits provided to the designated beneficiary under that State's Medicaid plan.

(c) *Computation of earnings*. The earnings portion of a distribution is equal to the product of the amount of the distribution and the earnings ratio, as defined in § 1.529A-1(b)(7). The balance of the distribution (the amount of the distribution minus the earnings portion of that distribution) is the portion of that distribution that constitutes the return of investment in the account.

(d) *Additional tax on amounts includible in gross income*—(1) *In general*. If any amount of a distribution from an ABLE account is includible in the gross income of a person for any taxable year under paragraph (a) of this section (includible amount), the income tax imposed on that person by chapter 1 of the Internal Revenue Code will be increased by an amount equal to 10 percent of the includible amount.

(2) *Exceptions*—(i) *Distributions on or after the death of the designated beneficiary*. Paragraph (d)(1) of this section does not apply to any distribution made from the ABLE account on or after the death of the designated beneficiary to the estate of the designated beneficiary, to an heir or legatee of the designated beneficiary, or to a creditor described in paragraph (b)(4) of this section.

(ii) *Returned excess contributions and additional accounts*. Paragraph (d)(1) of this section does not apply to any return made in accordance with § 1.529A-2(g)(4) of an excess contribution as defined in § 1.529A-1(b)(9), an excess compensation contribution as defined in § 1.529A-2(g)(2)(iii)(C), excess aggregate contribution as defined in § 1.529A-1(b)(10), or an additional account as referenced in § 1.529A-2(c)(3)(ii)(A), (B), or (C).

(e) *Tax on excess contributions*. Under section 4973(h), a contribution to an ABLE account in excess of the annual contributions limit described in § 1.529A-2(g)(2) is subject to an excise tax in an amount equal to 6 percent of the excess contribution. However, any the excess contribution or excess compensation contribution as defined in § 1.529A-2(g)(2)(iii)(C) returned in accordance with the provisions of § 1.529A-2(g)(4) is not treated as a contribution.

(f) *Filing requirements*. A qualified ABLE program is not required to file Form 990, "Return of Organization Exempt From Income Tax," Form 1041, "U.S. Income Tax Return for Estates and Trusts," or Form 1120, "U.S. Corporation Income Tax Return." However, a qualified ABLE program is required to file Form 990-T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§ 1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

(g) *No inference outside section 529A*. The rules provided in this section concerning the Federal tax treatment of contributions apply only for purposes of the application of section 529A. No inference is intended with respect to the application of any other Code provisions or Federal tax doctrines. For example, a contribution made by an employer to the ABLE account of an employee or an employee's family member is subject to the rules governing the Federal taxation of compensation.

(h) *Applicability date*. This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-4 Gift, estate, and generation-skipping transfer taxes.

(a) *Contributions*—(1) *In general*. Each contribution by a person to an ABLE account other than by the designated beneficiary of that account is treated as a completed gift to the designated beneficiary of the account for gift tax purposes. Under the applicable Federal gift tax rules, a contribution from a corporation, partnership, trust, estate, or other entity is treated as a gift by the shareholders, partners, or other beneficial owners in proportion to their respective ownership interests in the entity. See § 25.2511-1(c) and (h) of this chapter. A gift to an ABLE account is not treated as either a gift of a future interest in property, or a qualified transfer under section 2503(e). To the extent a contributor's gifts to the designated beneficiary, including gifts paid into the designated beneficiary's ABLE account, do not exceed the annual limit in section 2503(b), the contribution is not a taxable gift. This provision, however, does not change any other provision applicable to the transfer. For example, a contribution by the employer of the designated beneficiary's parent continues to constitute earned income to the parent and then a gift by the parent to the designated beneficiary. The timely return of an excess contribution or an excess aggregate contribution in accordance with § 1.529A-2(g)(4) is not a taxable gift.

(2) *Generation-skipping transfer (GST) tax*. To the extent the contribution into an ABLE account is a nontaxable gift for Federal gift tax purposes, the inclusion ratio for purposes of the GST tax will be zero pursuant to section 2642(c)(1).

(3) *Designated beneficiary as contributor*. A designated beneficiary may make a contribution to fund his or her own ABLE account. That contribution is not a gift.

(b) *Distributions*. No distribution from an ABLE account to or for the benefit of the designated beneficiary is treated as a taxable gift to that designated beneficiary.

(c) *Transfer to another designated beneficiary*. Neither gift tax nor generation-skipping transfer tax applies to the transfer (by rollover, program-to-program transfer, or change of beneficiary) of part or all of an ABLE account to the ABLE account of a different designated beneficiary if the successor designated beneficiary is both an eligible individual and a member of the family (as described in § 1.529A-1(b)(12)) of the designated beneficiary. Any other transfer will constitute a gift by the designated beneficiary to the successor designated beneficiary, and the usual gift and GST tax rules will apply.

(d) *Transfer tax on death of designated beneficiary*. Upon the death of the designated beneficiary, the designated beneficiary's ABLE account is includible in his or her gross estate for estate tax purposes under section 2031. The payment of outstanding qualified disability expenses and the payment of certain claims made by a State under its Medicaid plan may be deductible for estate tax purposes if the requirements of section 2053 are satisfied.

(e) *Applicability date*. This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-5 Reporting of the establishment of and contributions to an ABLE account.

(a) *In general*. A filer defined in paragraph (b)(1) of this section must, with respect to each ABLE account—

(1) File an annual information return, as described in paragraph (c) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (d) of this section, to the designated beneficiary of the ABLE account.

(b) *Additional definitions*. In addition to the definitions in § 1.529A-1(b), the following definitions also apply for purposes of this section—

(1) *Filer* means the State or its agency or instrumentality that establishes and maintains the qualified ABLE program under which an ABLE account is established. The filing may be done by either an officer or employee of the State or its agency or instrumentality having control of the qualified ABLE program, or the officer's or employee's designee.

(2) *TIN* means taxpayer identification number as defined in section 7701(a)(41).

(c) *Requirement to file return*—(1) *Form of return*. For purposes of reporting the information described in paragraph (c)(2) of this section, the filer must file Form 5498-QA, "ABLE Account Contribution Information," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) *Information included on return*. With respect to each ABLE account, the filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLE account;

(ii) The name, address, and TIN of the filer;

(iii) Information regarding the establishment of the ABLE account, as required by the form and its instructions;

(iv) Information regarding the disability certification or other basis for eligibility of the designated beneficiary, as required by the form and its instructions. For further information regarding eligibility and disability certification, see § 1.529A-2(d) and (e), respectively;

(v) The total amount of any contributions made with respect to the ABLE account during the calendar year; such contributions do not include any contribution rejected and returned to the contributor before being deposited into or allocated to the ABLE account or any excess contributions, excess compensation contributions, or excess aggregate contributions returned as described in § 1.529A-2(g)(4);

(vi) The fair market value of the ABLE account as of the last day of the calendar year; and

(vii) Any other information required by the form, its instructions, or published guidance. See §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general*. Except as provided in paragraph (c)(3)(ii) of this section, the information returns required under this paragraph must be filed on or before May 31 of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time*. See §§ 1.6081-1 and 1.6081-8 for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing*. See § 301.6011-2 of this chapter for rules relating to electronic filing. See also Instructions for Forms 1099-QA and 5498-QA, Distributions From ABLE Accounts and ABLE Account Contribution Information.

(iv) *Substitute forms*. The filer may file the returns required under this paragraph (c) on an acceptable substitute form. See Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(d) *Requirement to furnish statement*—(1) *In general*. The filer must furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498-QA (or any successor form). The statement must include—

(i) The information required under paragraph (c)(2) of this section;

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 5498-QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general*. Except as provided in paragraph (d)(2)(ii) of this section, the filer must furnish the statement described in paragraph (d)(1) of this section to the designated beneficiary on or before March 15 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the designated beneficiary's last known address. The statement may be furnished electronically, as provided in § 1.529A-7.

(ii) *Extensions of time*. The Internal Revenue Service may, at its discretion, grant an extension of time to furnish statements required in this section.

(3) *Copy of Form 5498-QA*. The filer may satisfy the requirement of this paragraph (d) by furnishing either a copy of Form 5498-QA (or successor form) or an acceptable substitute form. See Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(e) *Request for TIN of designated beneficiary*. The filer must request the TIN of the designated beneficiary at the time the ABLE account is established if the filer does not already have a record of the designated beneficiary's correct TIN. The filer must clearly notify the designated beneficiary that the law requires the designated beneficiary to furnish a TIN so that it may be included on an information return to be filed by the filer. The designated beneficiary may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, "Request for Taxpayer Identification Number and Certification," may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(f) *Penalties*—(1) *Failure to file return*. The section 6693 penalty may apply to the filer that fails to file information returns at the time and in the manner required by this

section, unless it is shown that such failure is due to reasonable cause. See section 6693 and § 301.6693-1 of this chapter.

(2) *Failure to furnish TIN*. The section 6723 penalty may apply to any designated beneficiary who fails to furnish his or her TIN to the filer. See section 6723, and § 301.6723-1 of this chapter, for rules relating to the penalty for failure to furnish a TIN.

(g) *Applicability date*. The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-6 Reporting of distributions from and termination of an ABLE account.

(a) *In general*. The filer as defined in § 1.529A-5(b)(1) must, with respect to each ABLE account from which any distribution is made or which is terminated during the calendar year—

(1) File an annual information return, as described paragraph (b) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (c) of this section, to the designated beneficiary of the ABLE account and to each contributor who received a returned contribution in accordance with § 1.529A-2(g)(4) attributable to the calendar year.

(b) *Requirement to file return*—(1) *Form of return*. For purposes of reporting the information in paragraph (b)(2) of this section, the filer must file Form 1099-QA, "Distributions From ABLE Accounts," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) *Information included on return*. The filer must include on the return—

(i) The name, address, and TIN of the recipient of the payment, whether the designated beneficiary of the ABLE account or any contributor who received a returned contribution in accordance with § 1.529A-2(g)(4) attributable to the calendar year;

(ii) The name, address, and TIN of the filer;

(iii) Whether the return is being filed with respect to the designated beneficiary or to a contributor;

(iv) The aggregate amount of distributions or returned contributions (including net income attributable to the returned contributions) from the ABLE account to the recipient during the calendar year;

(v) Information as to basis and earnings with respect to such distributions or returns of contributions;

(vi) Information regarding termination (if any) of the ABLE account if the recipient is the designated beneficiary;

(vii) Information regarding each program-to-program transfer from the ABLE account during the designated beneficiary's taxable year; and

(viii) Any other information required by the form, its instructions, or published guidance. See §§ 601.601(d) and 601.602 of this chapter.

(3) *Information excluded*. A State filing a claim against the estate or ABLE account of a deceased designated beneficiary with respect to benefits provided to the designated beneficiary under that State's Medicaid plan is a creditor, and not a beneficiary, so the payment of the claim is not a distribution from the ABLE account and should not be reported as such on the Form 1099-QA for that year.

(4) *Time and manner of filing return*—(i) *In general*. Except as provided in paragraph (b)(4)(ii) of this section, the Forms 1099-QA and 1096 must be filed on or before February 28 (March 31 if filing electronically) of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time*. See §§ 1.6081-1 and 1.6081-8 for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing*. See § 301.6011-2 of this chapter for rules relating to electronic filing. See also Instructions for Forms 1099-QA and 5498-QA, Distributions From ABLE Accounts and ABLE Account Contribution Information.

(iv) *Substitute forms*. The filer may file the return required under this paragraph (b) on an acceptable substitute form. See Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(c) *Requirement to furnish statement*—(1) *In general*. The filer must furnish a statement to the designated beneficiary and each contributor (if any) of the ABLE account for which it is required to file a Form 1099-QA (or any successor form). The statement must include—

(i) The information required under paragraph (b)(2) of this section.

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 1099-QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general*. Except as provided in paragraph (c)(2)(ii) of this section, a filer must furnish the statement described in paragraph (c)(1) of this section to the designated beneficiary or contributor on or before January 31 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the recipient's last known address. The statement may be furnished electronically, as provided in § 1.529A-7.

(ii) *Extensions of time*. The Internal Revenue Service may, at its discretion, grant an extension of time to furnish statements required in this section.

(3) *Copy of Form 1099-QA*. A filer may satisfy the requirement of this paragraph (c) by furnishing either a copy of Form 1099-QA (or successor form) or an acceptable substitute form. See Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(d) *Request for TIN of contributor(s)*—(1) *In general*. Except as provided in paragraph (d)(2) of this section, a filer must request the TIN of each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that person's correct TIN.

(2) *Exception*. If the filer has a system in place to identify and reject amounts that either would constitute an excess contribution or excess aggregate contribution (as defined in § 1.529A-1(b)(9) or (10), respectively) or were contributed to an additional ABLE account as described in § 1.529A-2(c)(3)(ii)(C) (excess amounts)

before those excess amounts are deposited into or allocated to an ABLE account, the filer need not request the TIN of each contributor at the time of contribution. A filer with such a system must request a contributor's TIN only if and when an excess contribution or excess aggregate contribution nevertheless is deposited into or allocated to an account and the filer must return the excess amounts including net income to the contributor. The filer must clearly notify each such 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. The contributor may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, "Request for Taxpayer Identification Number and Certification," may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(e) *Penalties*—(1) *Failure to file return*. The section 6693 penalty may apply to a filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and § 301.6693-1 of this chapter.

(2) *Failure to furnish TIN*. The section 6723 penalty may apply to any contributor who fails to furnish his or her TIN to the filer in accordance with paragraph (d) of this section. See section 6723, and § 301.6723-1 of this chapter, for rules relating to the penalty for failure to furnish a TIN.

(f) *Applicability date*. The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) *Electronic furnishing of statements*—(1) *In general*. A filer required under § 1.529A-5 or § 1.529A-6 to furnish a written statement to a designated beneficiary of or contributor to an ABLE account may furnish the statement in an electronic format in lieu of a paper format. A filer who meets the requirements of paragraphs (a)(2) through (6) of this section is treated as furnishing the required statement.

(2) *Consent*—(i) *In general*. The recipient of the statement must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) *Withdrawal of consent*. The consent requirement of this paragraph (a)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before the statement is furnished. The filer may provide that a withdrawal of consent takes effect either on the date it is received by the filer or on another date no more than 60 days later. The filer also may provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) *Change in hardware or software requirements*. If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the filer must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the filer if the recipient does not want to withdraw the consent. After implementing the revised hardware and software, the filer must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this section, a new consent or confirmation of consent to receive the statement electronically.

(iv) *Examples*. For purposes of the following examples that illustrate the rules of this paragraph (a)(2), assume that the requirements of § 1.529A-7(a)(3) have been met:

(A) *Example 1*. Filer F sends Recipient R a letter stating that R may consent to receive statements required under § 1.529A-5 or § 1.529A-6 electronically on a website instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the website, downloading the consent document, completing the consent document, and e-mailing the completed consent back to F. The consent document posted on the website uses the same electronic format that F will use for the electronically furnished statements. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(B) *Example 2*. Filer F sends Recipient R an e-mail stating that R may consent to receive statements required under § 1.529A-5 or § 1.529A-6 electronically instead of in a paper format. The e-mail contains an attachment instructing R how to consent to receive the statements electronically. The e-mail attachment uses the same electronic format that F will use for the electronically furnished statements. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(C) *Example 3*. Filer F posts a notice on its website stating that Recipient R may receive statements required under § 1.529A-5 or § 1.529A-6 electronically instead of in a paper format. The website contains instructions on how R may access a secure web page and consent to receive the statements electronically. By accessing the secure web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) *Required disclosures*—(i) *In general*. Prior to, or at the time of, a recipient's consent, the filer must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (viii) of this section.

(ii) *Paper statement*. The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) *Scope and duration of consent*. The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section, or only to the statement required to be furnished on or before the due date immediately following the date on which the consent is given.

(iv) *Post-consent request for a paper statement*. The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) *Withdrawal of consent*. The recipient must be informed that—

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, and e-mail address is provided in the disclosure statement;

(B) The filer will confirm, in writing (electronically or on paper), the withdrawal and the date on which it takes effect; and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) *Notice of termination*. The recipient must be informed of the conditions under which a filer will cease furnishing statements electronically to the recipient.

(vii) *Updating information*. The recipient must be informed of the procedures for updating the information needed by the filer to contact the recipient. The filer must inform the recipient of any change in the filer's contact information.

(viii) *Hardware and software requirements*. The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the website.

(4) *Format*. The electronic version of the statement must contain all required information. See Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(5) *Notice*—(i) *In general*. If the statement is furnished on a website, the filer must notify the recipient that the statement is posted on a website. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be in the subject line of the electronic mail.

(ii) *Undeliverable electronic address*. If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the filer's records or from the recipient, then the filer must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) *Corrected statements*. If the filer has corrected a recipient's statement that was furnished electronically, the filer must furnish the corrected statement to the recipient electronically. If the recipient's statement was furnished through a website posting and the filer has corrected the statement, the filer must notify the recipient that it has posted the corrected statement on the website within 30 days of such posting in the manner described in paragraph (a)(5)(i) of this section. The corrected statement or the notice must be furnished by mail or in person if—

(A) An electronic notice of the website posting of an original statement or the corrected statement was returned as undeliverable; and

(B) The recipient has not provided a new e-mail address.

(6) *Access period*. Statements furnished on a website must be retained on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday). The filer must maintain access to corrected statements that are posted on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected statements are posted, whichever is later. The rules in this paragraph (a)(6) do not replace the filer's obligation to keep records under section 6001 and § 1.6001-1(a).

(b) *Applicability date*. This section applies to statements required to be furnished after December 31, 2020. See § 1.529A-8 for the provision of transition relief.

§ 1.529A-8 Applicability dates and transition relief.

(a) *Applicability dates*. Except as otherwise provided in paragraph (b) of this section, §§ 1.529A-1 through 1.529A-4 apply for calendar years beginning on or after January 1, 2021, §§ 1.529A-5 and 1.529A-6 apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020, and § 1.529A-7 applies to statements required to be furnished after December 31, 2020.

(b) *Transition relief*—(1) *In general*. Any program purporting to be a qualified ABLE program will not be disqualified during the transition period set forth in paragraph (b)(2) of this section (transition period) solely because of noncompliance with one or more provisions of §§ 1.529A-1 through 1.529A-7, provided that the program is established and operated in accordance with a reasonable, good faith interpretation of section 529A. Similarly, no ABLE account established and maintained under a program that meets the requirements of this paragraph will fail to qualify as an ABLE account during the transition period. However, to be a qualified ABLE program and an ABLE account under such a program after the transition period, the program and each account established and maintained under the program must be in compliance with §§ 1.529A-1 through 1.529A-7 by the end of the transition period. In no event, however, will a complete failure to file and furnish reports, information returns and payee statements required under section 529A(d)(1) for any accounts established and maintained under the program (including for calendar years beginning prior to January 1, 2021), be deemed to be due to reasonable cause for purposes of avoiding penalties imposed under section 6693.

(2) *Transition period*. For purposes of paragraph (b)(1) of this section, the transition period begins with the establishment of the program purporting to be a qualified ABLE program and continues through the later of—

(i) November 21, 2022; or

(ii) The day immediately preceding the first day of the qualified ABLE program's first taxable year beginning after the close of the first regular session of the State legislature that begins after November 19, 2020. If a State has a two-year legislative session, each calendar year of such session will be deemed to be a separate regular session of the State legislature for purposes of this paragraph.

(3) *Compliance after transition period*. After the transition period, a program and

an account established and maintained under that program must be in compliance with §§ 1.529A-1 through 1.529A-7.

PART 25—GIFT TAXES; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 5. The authority citation for part 25 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Par. 6. Section 25.2501-1 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 25.2501-1 Imposition of tax.

(a) * * *

(1) * * * For gift tax rules related to an ABLE account established under section 529A, see § 1.529A-4 of this chapter.

* * * * *

Par. 7. Section 25.2503-3 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2503-3 Future interests in property.

(a)* * * A contribution to an ABLE account established under section 529A is not a future interest.

* * * * *

Par. 8. Section 25.2503-6 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2503–6 Exclusion for certain qualified transfer for tuition or medical expenses.

(a) * * * A contribution to an ABLE account established under section 529A is not a qualified transfer.

* * * * *

Par. 9. Section 25.2511-2 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2511-2 Cessation of donor's dominion and control.

(a) * * * For gift tax rules related to an ABLE account established under section 529A, see § 1.529A-4 of this chapter.

* * * * *

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Par. 10. The authority citation for part 26 continues to read in part as follows:

Authority: 26 U.S.C. 7805 and 26 U.S.C. 2663.

* * * * *

Par. 11. Section 26.2642-1 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 26.2642-1 Inclusion ratio.

(a) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see § 1.529A-4 of this chapter.

* * * * *

Par. 12. Section 26.2652-1 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 26.2652-1 Transferor defined; other definitions.

(a) * * *

(1) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see § 1.529A-4 of this chapter.

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 13. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

§ 301.6011-2 [Amended]

Par. 14. Section 301.6011-2 is amended by adding the word "series" after "5498" in the first sentence of paragraph (b)(1).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 15. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 16. In § 602.101, the paragraph (b) table is amended by adding the following entries in numerical order to the table to read as follows:

§ 602.101 OMB Control Numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
1.529A-2	1545-2293
1.529A-5	1545-2262
1.529A-6	1545-2262
1.529A-7	1545-2262

* * * * *

Sunita Lough,
Deputy Commissioner for
Services and Enforcement.

Approved: September 29, 2020

David J. Kautter,
Assistant Secretary of the Treasury
(Tax Policy).

(Filed by the Office of the Federal Register on November 18, 2020, 8:45 am, and published in the issue of the Federal Register for November 19, 2020, 85 F.R. 74010)

Part III

2020 Required Amendments List for Qualified Retirement Plans and § 403(b) Retirement Plans

Notice 2020-83

I. PURPOSE

This notice sets forth the 2020 Required Amendments List (2020 RA List). The Required Amendments List (RA List) applies to both individually designed plans qualified under § 401(a) (qualified individually designed plans) and individually designed plans that satisfy the requirements of § 403(b) (§ 403(b) individually designed plans).

Section 5 of Rev. Proc. 2016-37, 2016-29 I.R.B. 136, provides that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, in the case of a qualified individually designed plan, the remedial amendment period for a disqualifying provision arising as a result of a change in qualification requirements is extended to the end of the second calendar year that begins after the issuance of the RA List on which the change in qualification requirements appears. Similarly, section 5 of Rev. Proc. 2019-39, 2019-42 I.R.B. 945, provides that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, with respect to a form defect in a § 403(b) individually designed plan, the remedial amendment period arising as a result of a change in § 403(b) requirements ends on the last day of the second calendar year that begins after the issuance of the RA List on which the change in § 403(b) requirements appears. Pursuant to these sections, December 31, 2022, generally is the last day of the remedial amendment period with respect to (1) a disqualifying provision arising as a result of a change in qualification requirements that appears on the 2020 RA List, and (2) a form defect arising as a result of a change in § 403(b) requirements that appears on the 2020 RA List. In addition, under section 8.01 of Rev. Proc. 2016-37 and section 6.01 of Rev. Proc. 2019-39, December 31, 2022, generally is also the plan amendment deadline for (1) a disqualifying provision arising as a result of a change in qualification requirements that appears on the 2020 RA List, and (2) a form defect arising as a result of a change in § 403(b) requirements that appears on the 2020 RA List. Later dates may apply to a governmental plan (as defined in § 414(d)) pursuant to sections 5.06(3) and 8.01 of Rev. Proc. 2016-37 and sections 5.03(2)(c) and 6.01 of Rev. Proc. 2019-39. References to qualification requirements and to § 403(b) requirements in Parts III and IV of this notice are referred to, separately and collectively, as "requirements."[1]

II. BACKGROUND

Section 401(b) of the Internal Revenue Code (Code) provides a remedial amendment period during which a plan may be amended retroactively to comply with the qualification requirements under § 401(a). Section 1.401(b)-1 describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. That regulation also grants the Commissioner the discretion to designate certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

Sections 5.05 and 5.06 of Rev. Proc. 2016-37 extend the remedial amendment period for individually designed plans to correct disqualifying provisions that arise as a result of a change in qualification requirements. Sections 5.05 and 5.06 provide that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, sections 5.05 and 5.06 set forth the extended remedial amendment period for disqualifying provisions. Under section 5.05(3), the remedial amendment period for a plan that is not a governmental plan (as defined in § 414(d)) is extended to the end of the second calendar year that begins after the issuance of the RA List on which the change in qualification requirements appears. Section 5.06(3) provides a special rule for governmental plans that may further extend the remedial amendment period in some cases.

Section 8.01 of Rev. Proc. 2016-37 provides that the plan amendment deadline with respect to a disqualifying provision described in section 5 of Rev. Proc. 2016-37 is the date on which the remedial amendment period ends with respect to that disqualifying provision.

Section 21.02 of Rev. Proc. 2013-22, 2013-18 I.R.B. 985, establishes an initial remedial amendment period that permits an eligible employer to retroactively correct form defects in its written § 403(b) plan.

Section 3 of Rev. Proc. 2017-18, 2017-5 I.R.B. 743, as modified by Notice 2020-35, 2020-25 I.R.B. 948, provides that the initial remedial amendment period for a form defect in a § 403(b) plan ends on June 30, 2020.

Section 5.01 of Rev. Proc. 2019-39, as modified by Notice 2020-35, establishes a system of recurring remedial amendment periods for § 403(b) individually designed plan form defects first occurring after the last day of the initial remedial amendment period.

Section 5.03(1) of Rev. Proc. 2019-39 provides that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, with respect to a form defect relating to, or integral to, a change in § 403(b) requirements that occurs after the initial remedial period, the remedial amendment period for a § 403(b) individually designed plan that is not a governmental plan (as defined in § 414(d)) ends on the last day of the second calendar year

[1] In order to help plan sponsors and practitioners achieve operational compliance with changes in qualification requirements, the IRS provides the Operational Compliance List, a list of changes in qualification requirements that are effective during a calendar year, on the IRS website at https://www.irs.gov/retirement-plans/operational-compliance-list. See section 10 of Rev. Proc. 2016-37 and section 9 of Rev. Proc. 2019-39.

that begins after the issuance of the RA List on which the change in requirements appears. Section 5.03(2)(c) provides a special rule for governmental plans that could further extend the remedial amendment period in some cases.

Section 6.01 of Rev. Proc. 2019-39 provides that the plan amendment deadline with respect to a form defect in a § 403(b) individually designed plan first occurring after the initial remedial amendment period is the date on which the remedial amendment period ends with respect to that form defect.

Section 7 of Rev. Proc. 2019-39, as modified by Notice 2020-35, extends the initial remedial amendment period with respect to a § 403(b) individually designed plan form defect first occurring on or before June 30, 2020, to the later of (1) June 30, 2020, or (2) the end of the remedial amendment period provided under section 5 of Rev. Proc. 2019-39.

Section 9 of Rev. Proc. 2016-37 and section 8.01 of Rev. Proc. 2019-39, as modified by Notice 2020-35, provide that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to publish an RA List annually. In general, a change in qualification requirements will not appear on an RA List until guidance with respect to that change (including, in certain cases, model amendments) has been provided in regulations or in other guidance published in the Internal Revenue Bulletin. However, in the discretion of the Treasury Department and the IRS, a change in qualification requirements may be included on an RA List in other circumstances, such as in cases in which a statutory change is enacted and the Treasury Department and the IRS anticipate that no guidance will be issued.

The remedial amendment period applicable to a disqualifying provision arising as a result of a change in qualification requirements may be extended beyond the date that normally would apply to an item included on the 2020 RA List. Section 601 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)[2] provides, in general, that a retirement plan or annuity contract will be treated as being operated in accordance with the terms of the plan and, except as provided by the Secretary of the Treasury (Secretary), or the Secretary's delegate, a retirement plan will not fail to satisfy the anti-cutback requirements of § 411(d)(6) of the Code or § 204(g) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (1974), as amended (ERISA), as a result of a plan amendment made pursuant to a provision of the SECURE Act or the regulations thereunder, provided that:

(1) the amendment is adopted no later than the last day of the first plan year beginning on or after January 1, 2022, or, for an applicable collectively bargained plan (a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before December 20, 2019) or a § 414(d) governmental plan, the last day of the first plan year beginning on or after January 1, 2024, or such later date as the Secretary may prescribe (SECURE Act section 601 date);

(2) the amendment applies retroactively to the effective date of the SECURE Act provision or the regulations thereunder (or, in the case of an amendment not required by a provision of the SECURE Act or the regulations thereunder, the effective date specified by the plan or contract); and

(3) the plan or contract is operated as if the amendment were in effect during the period beginning on the effective date of the SECURE Act provision or the regulations thereunder (or, in the case of an amendment not required by a provision of the SECURE Act or the regulations thereunder, the effective date specified by the plan or contract) and ending on the SECURE Act section 601 date or, if earlier, the date the amendment is adopted.

Notice 2020-68, 2020-38 I.R.B. 567, Q&A G-1, provides the deadline by which a retirement plan must be amended to reflect the provisions of the SECURE Act and the regulations thereunder. In general, for (1) a qualified plan that is not a governmental plan within the meaning of § 414(d) of the Code or an applicable collectively bargained plan, or (2) a § 403(b) plan that is not maintained by a public school (as described in § 403(b)(1)(A)(ii)), the deadline to amend for provisions of the SECURE Act and the regulations thereunder is the last day of the first plan year beginning on or after January 1, 2022. The plan amendment deadline for a qualified § 414(d) governmental plan or an applicable collectively bargained plan, and a § 403(b) plan that is maintained by a public school, as described in § 403(b)(1)(A)(ii), is the last day of the first plan year beginning on or after January 1, 2024.

III. CONTENT AND ORGANIZATION OF RA LIST

In general, an RA List includes statutory and administrative changes in requirements that are first effective during the plan year in which the list is published.[3] However, an RA List does not include guidance issued or legislation enacted after the list has been prepared and also does not include:

- Statutory changes in requirements for which the Treasury Department and the IRS expect to issue guidance (which would be included on an RA List issued in a future year);
- Changes in requirements that permit (but do not require) optional plan provisions, in contrast to changes in requirements that cause existing plan provisions (which may include optional plan provisions previously adopted) to become disqualifying provisions or § 403(b) form defects;[4] or
- Changes in the tax laws affecting qualified individually designed plans or § 403(b) individually designed plans that do not change the requirements under § 401(a) or § 403(b) (such as changes to the tax treatment of plan distributions, or changes to

[2] The SECURE Act appears in Division O of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534, which was enacted on December 20, 2019.

[3] RA Lists also may include changes in requirements that were first effective in a prior year that were not included on a prior RA List under certain circumstances, such as changes in requirements that were issued or enacted after the prior year's RA List was prepared.

[4] The remedial amendment period and plan amendment deadline for discretionary changes to the terms of a qualified individually designed plan are governed by sections 5.05(2), 5.06(2), and 8.02 of Rev. Proc. 2016-37. The remedial amendment period and plan amendment deadline for discretionary changes to the terms of a § 403(b) individually designed plan are governed by sections 5.03(1)(b), 5.03(2)(b), and 6.02 of Rev. Proc. 2019-39. These deadlines for discretionary changes are not affected by the inclusion of a change in requirements on an RA List.

the funding requirements for qualified individually designed plans).

The RA List is divided into two parts. Part A covers changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.

Part B includes changes in requirements that the Treasury Department and the IRS anticipate will not require amendments to most plans, but might require an amendment because of an unusual plan provision in a particular plan. For example, if a change affects a particular requirement that most plans incorporate by reference, Part B would include the change because a particular plan might not incorporate the requirement by reference and, thus, might include language inconsistent with the change.

Annual, monthly, or other periodic changes to (1) the various dollar limits that are adjusted for cost of living increases as provided in § 415(d) or other Code provisions, (2) the spot segment rates used to determine the applicable interest rate under § 417(e)(3), and (3) the applicable mortality table under § 417(e)(3), are treated as included on the RA List for the year in which such changes are effective even though they are not directly referenced on that RA List. The Treasury Department and the IRS anticipate that few plans have language that will need to be amended on account of these changes.

The fact that a change in a requirement is included on the RA List does not mean that a plan must be amended as a result of that change. Each plan sponsor must determine whether a particular change in a requirement requires an amendment to its plan.

IV. 2020 REQUIRED AMENDMENTS LIST

Part A. *Changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change*.

- *None*

Part B. *Other changes in requirements that may require an amendment*.

- *Difficulty of care payments treated as compensation for retirement contribution limitations* (SECURE Act section 116). SECURE Act section 116(b) adds § 415(c)(8) to the Code to increase the annual additions limit for retirement plans to take into account difficulty of care payments, which are defined in § 131(c). Section 415(c)(8)(A) provides that a participant's compensation for purposes of § 415(c)(1) is increased by the amount of difficulty of care payments. Plans that are maintained by employers that have provided difficulty of care payments during plan years beginning after December 31, 2015, and before January 1, 2021, must be amended by December 31, 2022 or, if later, the SECURE Act section 601 date applicable to the plan, as set forth in section G of Notice 2020-68. If an employer changes its practice and begins to make difficulty of care payments to its employees in future years, the plan must be amended to include difficulty of care payments in the definition of § 415(c)(1) compensation by the end of the second calendar year following the calendar year in which the employer begins to make difficulty of care payments.[5]
  Note: See also section E of Notice 2020-68, which provides questions and answers related to SECURE Act section 116.
- *Application of cooperative and small employer charity pension plan* rules to certain charitable employers (CARES Act section 3609). CARES Act section 3609 adds § 414(y)(1)(D) to the Code. Section 414(y)(1)(D) provides that a cooperative and small employer charity pension plan (CSEC plan) is defined to include a defined benefit plan that, as of January 1, 2000, was maintained by a tax-exempt employer that met specific characteristics. A CSEC plan as defined in § 414(y) is not permitted to include the benefit restrictions of § 436.

V. DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Ms. Carrington at (202) 317-4148 (not a toll-free number).

Rev. Proc. 2020-51

SECTION 1. PURPOSE

This revenue procedure provides a safe harbor allowing a taxpayer to claim a deduction in the taxpayer's taxable year beginning or ending in 2020 (2020 taxable year) for certain otherwise deductible eligible expenses, as defined in section 2.03 of this revenue procedure, if (1) the eligible expenses are paid or incurred during the taxpayer's 2020 taxable year, (2) the taxpayer receives a loan (covered loan) guaranteed under the Paycheck Protection Program (PPP) authorized under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)), which at the end of the taxpayer's 2020 taxable year the taxpayer expects to be forgiven in a taxable year after the 2020 taxable year (subsequent taxable year), and (3) in a subsequent taxable year, the taxpayer's request for forgiveness of the covered loan is denied, in whole or in part, or the taxpayer decides never to request forgiveness of the covered loan, as described in section 3 of this revenue procedure. A taxpayer described in section 3.01 or 3.02 of this revenue procedure may be able to deduct some or all of the eligible expenses on (1) the taxpayer's timely filed, including extensions, original income tax return or information return, as applicable, for the 2020 taxable year; (2) an amended return or an administrative adjustment request (AAR) under section 6227 of the Internal Revenue Code (Code) for the 2020 taxable year, as applicable; or (3) the taxpayer's timely filed, including extensions, original income tax return or information

[5] Notice 2020-68, Q&A E-2, provides, in part, that if an employer does not make difficulty of care payments to its employees that are eligible to participate in the employer's plan, then the plan does not need to be amended to include difficulty of care payments in the plan's definition of § 415(c)(1) compensation.

return, as applicable, for the subsequent taxable year.

SECTION 2. BACKGROUND

.01 Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281, 286-93 (March 27, 2020), established the PPP as a new loan program administered by the U.S. Small Business Administration (SBA) as part of its section 7(a) Loan Program (15 U.S.C. 636(a)) that was designed to assist small businesses nationwide adversely impacted by the COVID–19 emergency to pay payroll costs and other eligible expenses. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811 (April 15, 2020). Under the PPP, the SBA is permitted to guarantee the full principal amount of a covered loan, defined by section 1102(a)(2) of the CARES Act as a loan made under the PPP during the covered period; a covered loan may be forgiven under section 1106 of the CARES Act.

.02 The covered period for making covered loans refers to the period beginning on February 15, 2020, and ending on December 31, 2020 (covered period). The covered period initially was to end on June 30, 2020. *See* section 1102(a)(2) of the CARES Act. The Paycheck Protection Program Flexibility Act of 2020, Public Law 116-142, 134 Stat. 641 (June 5, 2020), extended the end date of the covered period to December 31, 2020.

.03 An individual or entity that is eligible to receive a covered loan (eligible recipient) can receive forgiveness of the full principal amount of the covered loan up to an amount equal to the following costs incurred and payments made during the covered period: (1) payroll costs, (2) interest on a covered mortgage obligation, (3) any covered rent obligation payment, and (4) any covered utility payment (eligible expenses). *See* section 1106(b) of the CARES Act.

.04 Under section 1106(i) of the CARES Act, for purposes of the Code, "any amount which (but for [section 1106(i)]) would be includible in gross income of the eligible recipient by reason of forgiveness described in [section 1106](b) shall be excluded from gross income." Section 1106(i) of the CARES Act excludes the amount from gross income regardless of whether the amount would be (1) income from the discharge of indebtedness under section 61(a)(11) of the Code, or (2) otherwise includible in gross income under section 61.

.05 Section 161 of the Code provides that, in computing taxable income under section 63 of the Code, certain deductions are allowed.

.06 Revenue Ruling 2020-27, 2020-50 IRB 1552 (Dec. 7, 2020), holds that a taxpayer computing taxable income on the basis of a calendar taxable year may not deduct eligible expenses in its 2020 taxable year if, at the end of the 2020 taxable year, the taxpayer has a reasonable expectation of reimbursement in the form of covered loan forgiveness on the basis of the eligible expenses it paid or accrued during the covered period (*citing Burnett v. Commissioner*, 356 F. 2d 755 (5th Cir. 1966) cert. denied 385 U.S. 832 (1966); *Canelo v. Commissioner*, 53 T.C. 217, 225-226 (1969), *aff'd* 447 F.2d 484 (9th Cir.1971); *Herrick v. Commissioner*, 63 T.C. 562 (1975); *Silverton v. Commissioner*, T.C. Memo. 1977-198 (1977)). Revenue Ruling 2020-27 alternatively relies on section 265(a)(1) of the Code and §1.265-1 of the Income Tax Regulations, which provide that no deduction is allowed for any amount otherwise allowable as a deduction to the extent the amount is allocable to one or more classes of income other than interest wholly exempt from the taxes imposed by subtitle A of the Code. *See generally* section 265(a)(1); §1.265-1. This rule applies "whether or not any amount of income of that class or classes is received or accrued." *Id*.

SECTION 3. TAXPAYERS ELIGIBLE FOR SAFE HARBOR

Taxpayers who meet the requirements of section 3.01 or 3.02 of this revenue procedure and comply with the requirements of section 4 of this revenue procedure are eligible for the safe harbor procedures provided in sections 4.01 or 4.02 of this revenue procedure, as applicable.

.01 A taxpayer meets the requirements of this section 3.01 if:

(1) The taxpayer paid or incurred eligible expenses in the 2020 taxable year for which no deduction is permitted because at the end of the 2020 taxable year the taxpayer reasonably expects to receive forgiveness of the covered loan based on those eligible expenses (non-deducted eligible expenses);

(2) The taxpayer submitted before the end of the 2020 taxable year, or as of the end of the 2020 taxable year intends to submit in a subsequent taxable year, an application for covered loan forgiveness to the lender; and

(3) In a subsequent taxable year, the lender notifies the taxpayer that forgiveness of all or part of the covered loan is denied.

.02 A taxpayer meets the requirements of this section 3.02 if:

(1) The taxpayer meets the requirements of section 3.01(1) and (2) of this revenue procedure; and

(2) In a subsequent taxable year, the taxpayer irrevocably decides not to seek forgiveness for some or all of the covered loan. For example, a taxpayer that determines that it will not qualify for covered loan forgiveness and withdraws the application submitted to the lender as described in section 3.01.

SECTION 4. SAFE HARBOR PROCEDURES

A taxpayer described in section 3.01 or 3.02 of this revenue procedure may use the safe harbor procedures provided in section 4.01 or 4.02 of this revenue procedure.

.01 *Safe harbor for deductions to be claimed in 2020 taxable year*. A taxpayer described in section 3.01 or 3.02 of this revenue procedure who satisfies the requirements of section 4.03 and 4.04 of this revenue procedure may deduct non-deducted eligible expenses on the taxpayer's timely filed, including extensions, original income tax return or information return, as applicable, for the 2020 taxable year, or amended return or AAR under section 6227 of the Code for the 2020 taxable year, as applicable.

.02 *Safe harbor for deductions to be claimed in subsequent taxable year*. A taxpayer described in section 3.01 or 3.02 of this revenue procedure who satisfies the requirements of section 4.03 and 4.04 of this revenue procedure, may deduct non-deducted eligible expenses on the tax-

payer's timely filed, including extensions, original income tax return or information return, as applicable, for the subsequent taxable year referenced in section 3.01 or 3.02 of this revenue procedure. Taxpayers described in section 3.01 of this revenue procedure may, but do not need to, use this safe harbor to deduct non-deducted eligible expenses in a subsequent taxable year because those taxpayers may deduct the non-deducted eligible expenses in the year that the loan forgiveness is denied under general tax principles, assuming that the taxpayer does not elect to the use the safe harbor in section 4.01 of this revenue procedure.

.03 *Limitation on amount of deduction for eligible expenses*. A taxpayer applying section 4.01 or 4.02 of this revenue procedure may not deduct an amount of non-deducted eligible expenses in excess of the principal amount of the taxpayer's covered loan for which forgiveness was denied or will no longer be sought.

.04 *Statement*. A taxpayer may not apply the safe harbor procedures in section 4.01 or 4.02 of this revenue procedure to deduct any amount of non-deducted eligible expenses unless the taxpayer attaches the statement described in this section 4.04 to the return on which the taxpayer deducts non-deducted eligible expenses. The statement must be titled "Revenue Procedure 2020-51 Statement," and must include:

(1) The taxpayer's name, address, and social security number or employer identification number;

(2) A statement specifying whether the taxpayer is an eligible taxpayer under either section 3.01 or section 3.02 of Revenue Procedure 2020-51;

(3) A statement that the taxpayer is applying section 4.01 or section 4.02 of Revenue Procedure 2020-51;

(4) The amount and date of disbursement of the taxpayer's covered loan;

(5) The total amount of covered loan forgiveness that the taxpayer was denied or decided to no longer seek;

(6) The date the taxpayer was denied or decided to no longer seek covered loan forgiveness; and

(7) The total amount of eligible expenses and non-deducted eligible expenses that are reported on the return.

.05 *Additional limitations*. Nothing in this revenue procedure precludes the IRS from examining other issues relating to the claimed deductions for non-deducted eligible expenses, including the amount of the deduction and whether the taxpayer has substantiated the deduction claim. It also does not preclude the IRS from requesting additional information or documentation verifying any amounts described in the statement described in section 4.04 of this revenue procedure.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning or ending in 2020.

SECTION 6. PAPERWORK REDUCTION ACT

.01 This revenue procedure provides procedures by which taxpayers described in section 3.01 or 3.02 of this revenue procedure are eligible for the safe harbor provided in section 4 of this revenue procedure. Taxpayers taking advantage of this revenue procedure must file a statement as described in section 4.04 of this revenue procedure with their income tax return or information return. The collection of information will be associated with the income tax returns or information statements to which the statement will be attached. That collection of information has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–0123 for business filers (https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd) and 1545-074 for individual filers (https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031).

.02 This information is required to be collected and retained for compliance purposes, namely, to determine whether the taxpayer has made a decision to use the safe harbor, to determine that the amount claimed on the return is correct, and to ensure that any future action that is inconsistent with the decision to use the safe harbor is handled correctly, potentially by application of equitable estoppel and/or the doctrine of consistency.

.03 The Treasury Department and the IRS estimate that the maximum number of respondents would be 5,212,128. This number was determined by examining the PPP data for the total number of approved covered loans. See https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program?utm_medium=email&utm_source=govdelivery#section-header-11. This data is currently correct through August 8, 2020. Because some taxpayers will not decide to use the safe harbor in this revenue procedure, the number of estimated respondents is on the high end of the estimate.

.04 The maximum estimated number of respondents is 5,212,128. The estimated annual burden per respondent/recordkeeper varies from 0 to 30 minutes, depending on individual circumstances, with an estimated average of 15 minutes. The estimated total annual reporting and/or recordkeeping burden is 1,303,032 hours (5,212,128 respondents * 15 minutes). The estimated annual cost burden to respondents is $95 per hour. Accordingly, we expect the total annual cost burden for the statements to be $123,788,040 (5,212,128 * 0.25 * $95). The estimated annual frequency of responses is once because the statement only has to be filed once.

SECTION 7. DRAFTING INFORMATION

The principal authors of this revenue procedure are Sarah Daya and Charles Gorham of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Ms. Daya at (202) 317-4891 (not a toll-free number).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List[1]

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

Finding List of Current Actions on Previously Published Items[1]

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page *www.irs.gov*) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.