

# ABLE ACCOUNTS

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## **I. Introduction<sup>1</sup>**

The Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act (the “Act”) was passed by the 113th United States Congress and signed into law by President Barack Obama on December 19, 2014. There have been significant changes to the Act since its passing, which will also be addressed in this presentation. As the Act itself states, it is meant to “(1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life,” and “(2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary’s employment, and other sources.” (Achieving a Better Life Experience Act (“ABLE Act”), Pub. L. No. 113-295 § 101). According to the Social Security Administration’s (SSA) Monthly Statistical Snapshot for June 2024, over 5.3 million Americans receive Supplemental Security Income (SSI) benefits and just shy of 2.7 million Americans receive SSI coupled with their traditional Social Security benefits. As such, close to 8 million people with disabilities in the United States can potentially benefit from this monumental Act. Thanks to the tireless work of many advocacy organizations, lawmakers have recognized and attempted to address the significant costs and burdens inherent to people living with a disability.

This presentation will provide an overview of ABLE accounts and their utility in trust administration and planning for people with disabilities. Coordination with Special Needs Trusts (a/k/a Supplemental Needs Trusts and Disability Trusts) administration will be evaluated as well as ABLE accounts' effect on both short- and long-term planning. Analysis of ABLE Act changes and facets of beneficiary distribution mechanisms and public benefits eligibility will be provided, along with recent case law. In other words, all aspects of ABLE accounts will be covered - including The Good, The Bad and the Unknown.

## **II. Overview**

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The ABLE Act is named after the late National Down Syndrome Society's Vice Chairman and quarterback of the legislation, Stephen Beck, Jr. - a father of a daughter with Down syndrome. The Act amends the Internal Revenue Code (IRC) Section 529 by adding Section 529A, creating a tax-free savings account option for people with disabilities. At its core, the ABLE Act provides an avenue for people with disabilities to save funds in excess of the \$2,000 resource cap in order to qualify for SSI and preserve their other vital public benefits such as Medicaid. ABLE accounts have become an incredible option not only as savings vehicles, but also to empower and promote independence for people with disabilities. Additionally, all income earned within an ABLE account can grow tax-free if properly administered. A copy of the applicable IRC section (26 U.S. Code § 529A) may be found in Appendix A.

In March of 2015, the U.S. Department of the Treasury, in collaboration with the Internal Revenue Service (IRS) issued Internal Revenue Bulletin 2015-18 providing authority for states to establish ABLE programs before full federal guidance on IRC § 529A. The majority of states who have established an ABLE program have done so through their State Treasurer or their state's existing 529 Qualified Tuition Program (QTP). Other states have authorized governmental agencies, such as their Department of Health and Human Services, to provide ABLE account administration services. It is important to note that the original Act language indicated that qualified individuals were only allowed to open ABLE accounts in their specific state of residence. However, that regulation was amended to remove the beneficiary residency requirement in the Consolidated Appropriations Act of 2016 (Pub. L. No. HR 2029 § 303). This means that people with disabilities can open an ABLE account sponsored by any state, regardless of their residence.

Some of the more salient features of ABLE accounts presented throughout this presentation include:

- Income and capital gains (as applicable) are non-taxable if the account is properly administered
- Contributions of up to \$18,000 per year (2024), \$19,000 (2025) may be made by any "person"

- Includes ABLE account beneficiary third parties, trusts
- Contributions are not tax deductible
- ABLE accounts do not count as a resource for SSI and Medicaid determination
- Limited eligibility: the onset of an ABLE account beneficiary's disability must have occurred prior to age 26
- State law governs whether an ABLE account is subject to estate recovery.
- ABLE accounts may only be used to pay for Qualified Disability Expenses (QDEs)
- The maximum amount that may be held in an ABLE account without a potential reduction in an account holder's public benefits is \$100,000 (2024)

### **III. ABLE Account Qualifications**

The Act limits eligibility in its program to individuals with disabilities who can prove that their disability had an age of onset before 26. A common misconception is that a person with a disability must be under the age of 26 to open an ABLE account, which is not true - the ABLE account holder must only be able to prove that their disability had an onset before age 26. If individuals with disabilities meet this age requirement and already receive SSI or Social Security Disability Insurance (SSDI) benefits, they automatically qualify for participation in an ABLE program.

However, if an individual with a disability is not a recipient of either SSI or SSDI, they may still qualify to open an ABLE account. This may be achieved by submitting a letter of disability certification from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathic Medicine (D.O.)). It may behoove the applicant to follow the procedures outlined in the Disability Evaluation Under Social Security process. More information on this process and qualifications may be found at <https://www.ssa.gov/disability/professionals/bluebook>. It is important to note that should the person with a disability qualify for an ABLE account by submission of a doctor's certification, this does not mean that they are qualified to receive SSI or SSDI benefits. Rather, they must apply for such benefits separately.

Limiting ABLE accounts to people with disabilities that have an onset before age 26 truly curbs the effectiveness and utility of this potent tool. Advocacy groups such as the National Academy

of Elder Law Attorneys (NAELA) and the ABLE National Resource Center ([www.ablenrc.org](http://www.ablenrc.org)) continue to push for legislation that would adjust this age requirement. Current proposed legislation in Congress suggests an extension of this age requirement to age 46 from age 26.

#### **IV. Contributions**

In its simplest terms, a “contribution” to an ABLE account is the payment of funds, regardless of source, into an ABLE account. Contributions may be made by any “person.” This includes third party monies (e.g. from a relative of the ABLE account holder), first party monies (e.g. the ABLE account holder’s personal funds received from wages, inheritances, public benefit programs, etc.), or trust vehicles. In 26 CFR 301.7701-6(a), the Internal Revenue Code (IRC) defines “person” to include “an individual, *trust*, estate, partnership or corporation” [emphasis added] Transfers from an SNT to an ABLE account are certainly allowable and the effectiveness of such transfers will be addressed further herein.

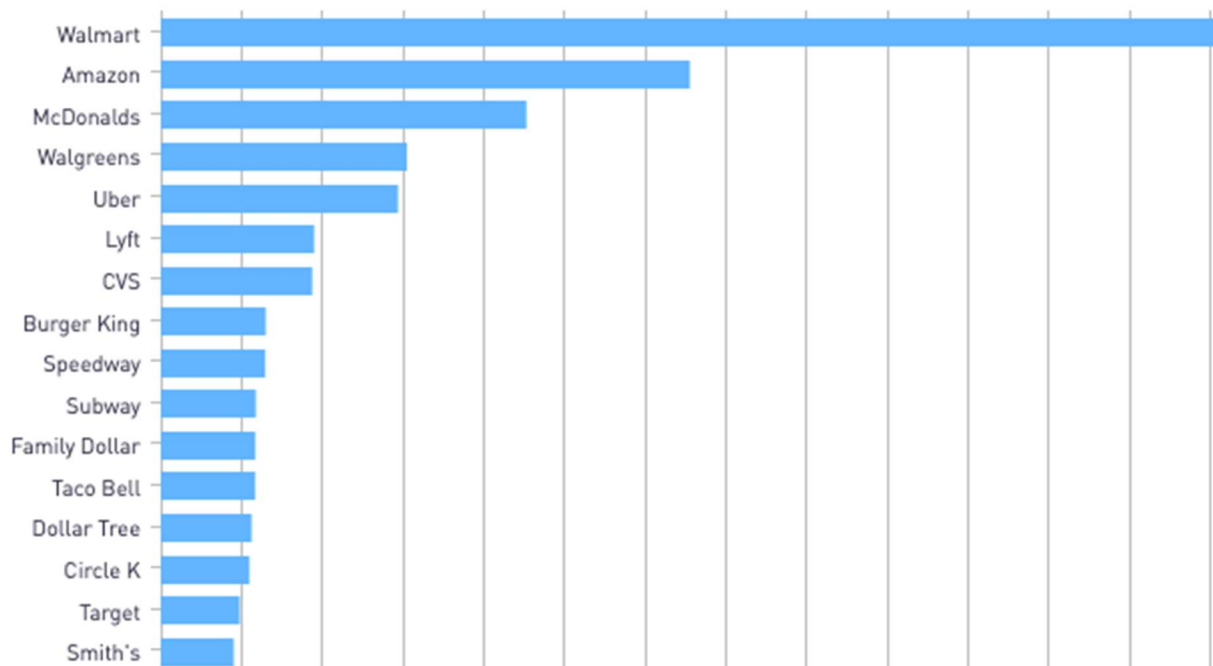
More information for treatment of deposits into an ABLE account may be found in the Social Security Administration (SSA) Program Operations Manual System (POMS) SI 01130.740.B.2, which states (in part) that:

- Contributions are payments of funds into an ABLE account
- Contributions may be made by any person. (Again, “person,” as defined by the Internal Revenue Code (IRC), includes an individual, *trust*, estate, partnership, association, company, or corporation.) [emphasis added]
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.

The amount of funds allowable for contribution to an ABLE account in any calendar year is currently set at \$18,000 (2024), subject to additional situations that will be subsequently reviewed. As stated above, this amount coincides with the federal gift tax exclusion amount. This contribution limit is applicable per ABLE account beneficiary, and not per donor to the ABLE account. This is important to note as it is a deviation from the rules governing 529 QTPs.

Per POMS § SI 01130.740.A.1 “a designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules.” However, should an ABLE account holder have more than one ABLE account, they have 90 days from the latest ABLE account opening to close or transfer one of the accounts and avoid the extra ABLE counting as a resource. Again, the overall contribution limit of \$18,000 annually is applicable in aggregate across all accounts.

Section 103 of the Act “requires amounts in ABLE accounts to be disregarded in determining eligibility for means-tested federal programs except...for amounts in an ABLE account exceeding \$100,000.” (Pub. L. No. 113-295 § 103). However, funds in an ABLE account tend to be transitory in nature. In other words, funds deposited to an ABLE account are typically expended on the ABLE beneficiary’s needs more often than they are used as a savings vehicle. Research provided by True Link Financial, LLC (True Link), extracted from their data as the True Link Protection Visa Prepaid Card (True Link Card) provider for the STABLE program through January 16, 2024, shows that most purchases made from the ABLE accounts analyzed are for daily necessities at low-cost merchants and food vendors:



Additionally, this transitory money theory is further illustrated in the chart below, which shows that the average ABLE account size nationally is only approximately \$5,000:

As of September 30, 2018	Plan Type	Launch Date	Accounts	Accounts (%)	Assets	Assets (%)	Average Account
<b>STABLE Account (12)</b>			<b>8,324</b>	<b>28%</b>	<b>\$42,107,507</b>	<b>29%</b>	<b>\$5,059</b>
Ohio	National	6/1/2016	5,426		\$30,941,841		\$5,703
Kentucky	State	12/13/2016	260		\$1,229,372		\$4,728
Vermont	State	2/22/2017	211		\$684,299		\$3,243
Missouri	State	4/24/2017	786		\$3,421,898		\$4,354
Georgia	State	6/14/2017	392		\$1,374,114		\$3,505
South Carolina	State	11/16/2017	442		\$1,569,916		\$3,552
New Hampshire	State	12/15/2017	129		\$534,644		\$4,145
New Mexico	State	1/18/2018	156		\$565,833		\$3,627
West Virginia	State	2/9/2018	75		\$154,647		\$2,062
Wyoming	State	3/2/2018	54		\$153,760		\$2,847
Arizona	State	3/5/2018	296		\$1,238,404		\$4,184
Oklahoma	State	5/31/2018	97		\$238,779		\$2,462
<b>National ABLE Alliance (15)</b>			<b>5,129</b>	<b>17%</b>	<b>\$27,051,129</b>	<b>19%</b>	<b>\$5,274</b>
Alaska	National	12/15/2016	197		\$925,716		\$4,699
Colorado	National	8/23/2017	327		\$1,618,229		\$4,949
Delaware	National		13		\$60,646		\$4,665
District of Columbia (DC)	National	7/27/2017	33		\$135,762		\$4,114
Illinois	National	1/26/2017	519		\$2,825,937		\$5,445
Indiana	National	7/27/2017	217		\$762,948		\$3,516
Iowa	National	1/26/2017	336		\$1,754,338		\$5,221
Kansas	National	1/26/2017	233		\$1,149,132		\$4,932
Minnesota	National	1/26/2017	648		\$3,382,724		\$5,220
Montana	National	7/27/2017	135		\$567,093		\$4,201
Nevada	National	1/26/2017	308		\$1,355,671		\$4,402
New Jersey	National	6/18/2018	60		\$242,150		\$4,036
North Carolina	National	1/26/2017	450		\$2,248,464		\$4,997
Pennsylvania	National	4/3/2017	1,550		\$9,539,173		\$6,154
Rhode Island	National	12/15/2016	103		\$483,146		\$4,691
<b>Other Partnership States (2)</b>			<b>1,190</b>	<b>4%</b>	<b>\$6,403,609</b>	<b>4%</b>	<b>\$5,381</b>
Nebraska	National	6/30/2016	1,065		\$5,945,437		\$5,583
Alabama	State	2/27/2017	125		\$458,172		\$3,665
Florida	State	7/1/2016	2,521	8%	\$10,611,710	7%	\$4,209
Louisiana	State	6/28/2017	129	0%	\$396,679	0%	\$3,075
Massachusetts	National	5/10/2017	1,771	6%	\$11,611,534	8%	\$6,556
Maryland	National	11/28/2017	762	3%	\$3,428,184	2%	\$4,499
Michigan	National	11/1/2016	1,265	4%	\$6,234,904	4%	\$4,929
New York	State	8/10/2017	489	2%	\$2,471,003	2%	\$5,053
Oregon		12/6/2016	1,713	6%	\$8,289,988	6%	\$4,839
	National		1,355		\$6,495,034		\$4,793
	State		358		\$1,794,954		\$5,014
Tennessee	National	6/10/2016	1,821	6%	\$12,217,135	8%	\$6,709
Texas	National	5/8/2018	261	1%	\$424,547	0%	\$1,627
Virginia		12/19/2016	4,230	14%	\$12,593,117	9%	\$2,977
	National		4,173	14%	\$12,290,454	9%	\$2,945
	Advisor		57	0%	\$302,663	0%	\$5,310
Washington	National	7/23/2018	102	0%	\$186,991	0%	\$1,833
<b>Totals</b>			<b>29,707</b>	<b>100%</b>	<b>\$144,028,040</b>	<b>100%</b>	<b>\$4,848</b>



Ignoring the aforementioned \$100,000 cap for SSI, the total limit over time that can be made to an ABLE account is subject to the individual state program and their limit for 529 QTPs. This aspect of ABLE accounts, compounded by the \$18,000 annual contribution limit, most likely indicates that it will be quite some time before any practitioners or planners will ever have to address any negative consequences to ABLE beneficiaries as they relate to this overall limit. For example, the maximum amount one can contribute to a 529 QTP in Colorado is \$400,000. Assuming \$18,000 per year in contributions to a Colorado ABLE account (and disregarding any investment growth, and change in annual contribution limitation), it would take just over 22 years to exceed that limit. Additionally, if these contributions were, for example, third party contributions, there are most likely better planning options available - such as a third party SNT (especially given estate recovery considerations). Lastly, there are no “catch up” or “lump-sum” contribution provisions to ABLE accounts as there are for contributions to 529 QTPs.

Contributions to an ABLE account must also always be after-tax dollars, and thus grow tax-free similar to 529 QTPs and Roth IRAs. Per POMS SI 01130.740.B.2, “contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, Gift of Independence card, or a similar method.” Transfer of securities or other investments into an ABLE account is unallowable. In other words, donors looking to pass highly appreciated assets on to beneficiaries for tax planning purposes should review other avenues to achieve their goals.

The vast utility of ABLE accounts is beginning to manifest itself in unique and creative ways throughout the country. In *Warchol v Kings County Office of Education*, 2018 WL 118 5052 (ED Calif, March 6, 2018), the plaintiff (a minor who had “previously been diagnosed with autism and is non-verbal”) alleged that over the course of a school year they had been subjected to verbal and physical abuse by the defendant. The settlement provisions in the case stipulated in part that settlement proceeds were to be placed in an ABLE account for the plaintiff, staggered in roughly \$18,000 amounts annually over a period of four years.

In a 2015 child support proceeding (*Kirby v Semeyn*, 2017 Ark App 556, 531, S.W. 3d 462 (October 25, 2017)), the custodial parent petitioned the court for an increase in child support

payments as well as requesting child support payment in arrears. The custodial parent argued that the original child-custody agreement required annual computations of child support and contained an automatic escalation clause. Further, the custodial parent took the position that the non-custodial parent had a duty to revise their income figures annually and adjust their child-support obligation accordingly, which had not been done. The claim for child support in arrears totaled \$255,000. To further complicate the issue, the parents had a child with special needs. They had previously agreed to set up a trust for the benefit of their child with disabilities, with each party funding the trust with three percent of their gross income. It came to light during the proceedings that the trust had never been established nor funded. As such, part of the order of the lower court ordered both parties to establish an SNT for the child and pay their past due amounts into the trust. The order of the lower court also erroneously held that these payments constituted child support. Statutorily, child support is paid by the noncustodial parent to the custodial parent - not to a trust, and not by each party. Additionally, funding the SNT with child support payments comes with its own set of problems and potentially confusing the important distinction between first-party and third-party money. Parental income is deemed to the child for SSI and most Medicaid programs. In other words, the parents' income is considered the child's own income when determining the child's financial eligibility for means-tested benefits. Additionally, child support payments are considered unearned income to the child on whose behalf the payments are made, thus potentially further reducing their SSI benefits. While the particulars associated with the child's needs and planning are unknown in this case, there may have been a creative way to use an ABLE account to satisfy some of the complexities of the child support payments. The point of this section is to emphasize that planners and attorneys have a tool at their disposal in ABLE accounts and should always be looking for opportunities to use it.

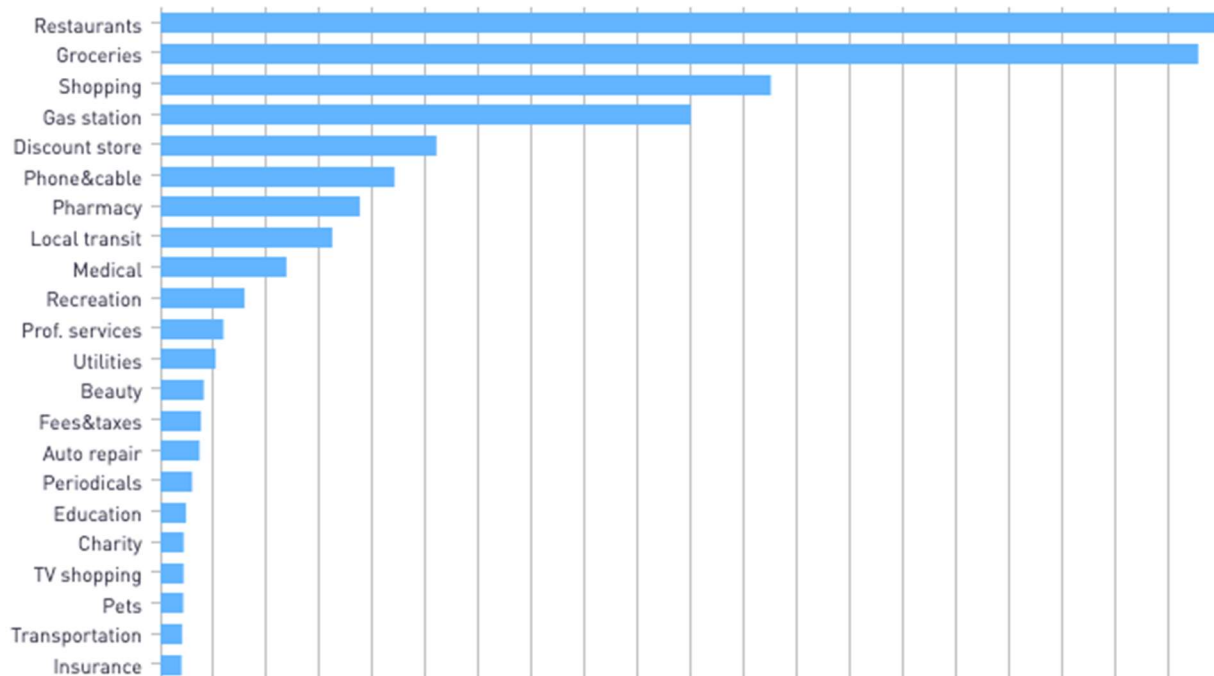
## **V. Qualified Disability Expenses**

Distributions from an ABLE account are to be used for a Qualified Disability Expense (QDE) only. Thankfully, QDEs cover a vast number of categories and allowable distributions which should greatly increase ABLE's efficacy in empowering individuals with disabilities and assisting them in achieving a better quality of life.

POMS SI 01130.740.B.8 indicates that a "QDE includes, but is not limited to, an expense for":

- 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 ABLE account oversight and monitoring
- Funeral and burial
- Basic living expenses

Of note, POMS SI 01130.740.B.9 clarifies that “for ABLE purposes, food is considered a qualified disability expense (basic living expense).” The payment of food has been eliminated as part of ISM. In general, the POMS defines ISM as unearned income in the form of shelter to the recipient and/or beneficiary. In many cases, receipt of ISM by an SNT beneficiary from their SNT would result in a reduction of their SSI benefit amount. See POMS SI 00604.058 for ISM attribution specifics.

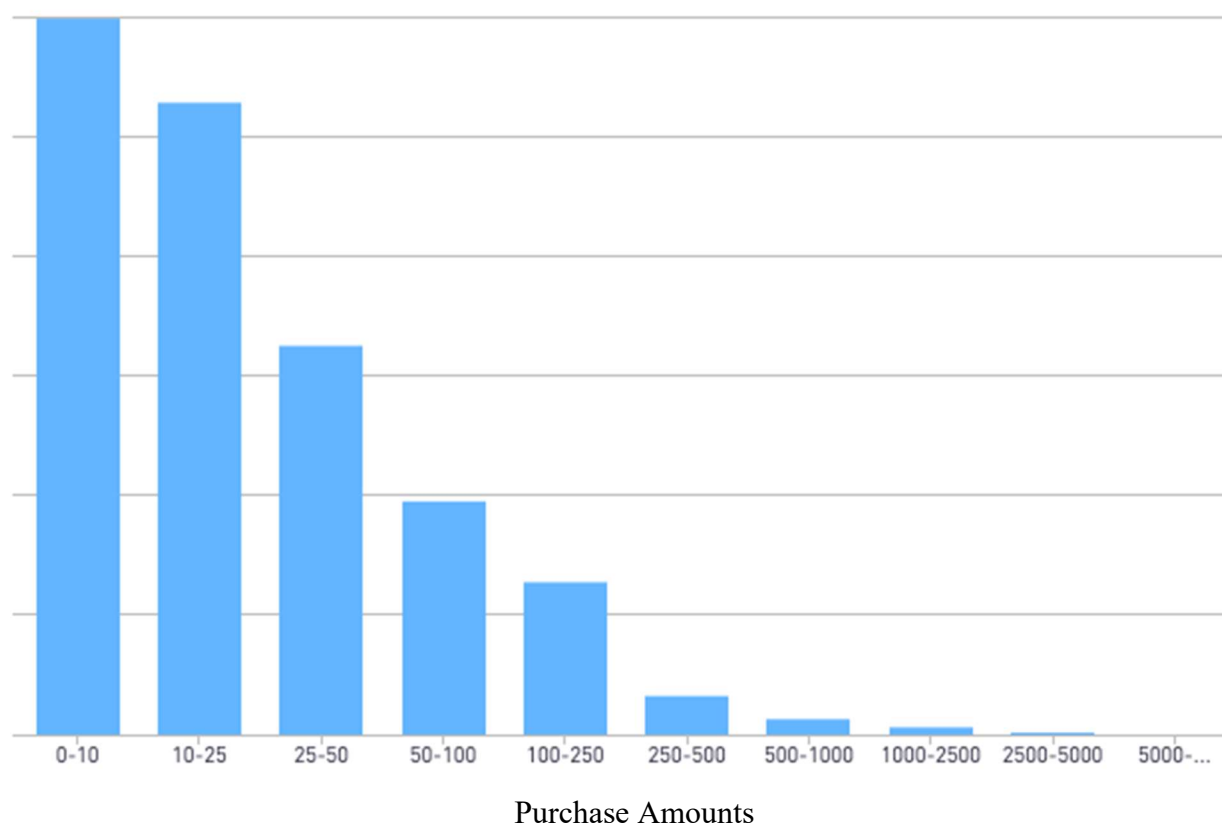


The payment of housing expenses is another way in which ABLE account administration differs from ISM attribution. When computing household operating expenses for ISM the following categories are typically considered (again, please note POMS SI 00604.058 for ISM attribution specifics):

- Rent
- Heating fuel
- Electricity
- Water
- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes
- Gas
- Sewage
- Garbage removal

Interestingly, POMS SI 01130.740.B.9 defines allowable housing distributions from an ABLE account as “similar to household costs for in-kind support and maintenance purposes” and lists the exact same categories above as QDEs. Here again, whereas the SNT trustee is limited in their

avenues of paying for housing or shelter without potentially negatively impacting their beneficiary's SSI amount via ISM attribution, an ABLE account beneficiary has no such barriers. However, as per the data provided from True Link's analysis, it does appear that the payment of rent is a widely adopted practice from ABLE accounts. The chart below shows that ABLE beneficiaries are typically using their accounts to make purchases of \$25 or less, and overwhelmingly for transactions \$250 or less. Because rent payments are typically much higher than \$250 per month, it may be inferred that rent payments from the ABLE accounts analyzed are not common.



Along this vein, an ABLE account may be invaluable to beneficiaries with an SNT in certain states. Some states Medicaid programs highly scrutinize or even disallow any payments (prepaid or otherwise) from an SNT for funeral and burial expenses. For reference, the specific payment of funeral and burial expenses is not only cited in POMS SI 01130.740.B.8, but also in the Act itself (Pub. L. No. 113-295 § 102).

The Internal Revenue Service (IRS) is the auditing body for ensuring that ABLE funds are expended on QDEs. It is recommended that all ABLE beneficiaries keep detailed records of all purchases (including receipts) in case of an audit. Additionally, should an ABLE account holder use their ABLE account to make a non-QDE purchase, the ABLE account earnings attributable to that withdrawal are subject not only to regular income tax, but also to a 10% penalty. It is important to note that in addition to this 10% federal penalty, such non-QDE purchases may be subject to state-specific penalties as well.

## **VI. ABLE Advantages (a/k/a - “The Good”)**

One of the main advantages of ABLE accounts is their previously unavailable ability to provide people with disabilities a tax-free vehicle for their savings. Before the ABLE Act, many people with disabilities on means-tested public benefits were forced into the untenable position of being unfairly impoverished (e.g. having to potentially frivolously waste monies at month end to meet their \$2,000 resource cap). For this reason alone, the ABLE Act is a monumental step forward for disability rights advancement.

Additionally, allowing people with disabilities to pay for shelter/housing expenses from their ABLE accounts without any ISM reduction to their SSI benefits is a tremendous game changer - not only for the individual with a disability, but also for planners, attorneys and trustees. Family members are now able to contribute their own funds to their loved one’s ABLE account and have those monies used for rent without worrying about running astray of public benefits regulations, albeit only up to the \$18,000 annual contribution limit.

Most contributions to an ABLE account do not count as income to the beneficiary for SSI determination purposes. In addition to contributions of the ABLE beneficiary’s social security funds and contributions from any “person” (to include third parties and trusts - see above), POMS SI 01130.740.C.1 excludes the following contributions as countable income for the ABLE beneficiary:

- Rollovers from a family member’s ABLE account
- Rollovers from a 529 qualified tuition plan

- Contributions in excess of the \$18,000 annual limit if the ABLE beneficiary worked and did not contribute in the same taxable year to a defined contribution plan, annuity contract under section 403(b) of the IRC, or eligible deferred compensation plan
- Contributions from an employed ABLE beneficiary annually up to the lesser of:
  - Federal Poverty Level (FPL) for a one-person household for the preceding calendar year
  - The amount of the ABLE beneficiary's earnings and other compensation

However, POMS SI § 01130.740.C.1 goes on to state that “income received by the designated beneficiary and deposited into his or her ABLE account is income to the designated beneficiary.” In other words, making a deposit of income to an ABLE account does not remove its treatment as income for public benefit qualification purposes. POMS SI 01130.740.C.1.a makes it clear that “an individual cannot use direct deposit to avoid income counting”. Lastly, POMS SI 01130.740.C.2 states that income earned on investments within the ABLE account does not count as income for the ABLE account beneficiary.

The financial independence and empowerment for people with disabilities achieved through the ABLE Act is also tremendous in the ease and facility of simply paying for goods and services. Many people without disabilities take for granted the fact that they can easily pay for goods and services using a credit card, cash or other forms of payment. For beneficiaries of a SNT, this is not always the case. Oftentimes, an SNT beneficiary must coordinate with the vendor and the SNT trustee to arrange for payment. Thankfully, many states' ABLE programs offer credit cards or checks to their beneficiaries. STABLE ([www.stableaccount.com](http://www.stableaccount.com)), the largest national provider of ABLE accounts, offers fee-free True Link cards to its beneficiaries. With its online account management and tracking of distributions, a True Link card may be a very valuable tool in case of an IRS audit of a beneficiary's QDE compliance. Additionally, True Link cards are noted as a viable distribution mechanism in POMS SI 01120.201. I.1.e.

A distribution from an ABLE account does not count as income to the beneficiary for public benefits qualification purposes. POMS SI 01130.740.C.4 states that a “distribution from an ABLE account is not income but is a conversion of a resource from one form to another....” This is further confirmed in POMS SI 01110.600B.4. Additionally, distributions from an ABLE account

do not count as income of the designated beneficiary, even if the distributions are for a QDE that is not related to housing, are for a housing expense, or for a non-qualified expense. Grandparents (or any family, individual, or SNT) funds an ABLE account. Adult disabled beneficiary receiving SSI lives with parents. ABLE account pays the parents a monthly rent that equals to or exceeds the one-third federal benefit rate plus \$20. Since the rent payments are being made to parents from the ABLE account, the beneficiary's SSI is not reduced by PMV.

- The payment of rent from the ABLE account allows beneficiary to retain his or her full SSI payment. The parents receive a rental payment to offset monthly costs for housing the beneficiary.
- If the Beneficiary's SSI application is pending, an ABLE account can be used to pay rent for the beneficiary so that if a back benefit is awarded it will not be reduced by 1/3 for ISM.

#### **Example 1.**

Eric takes a distribution of \$500 from his ABLE account in June 2024 to pay for a health-related QDE. His health-related expense is not due until September, so Eric deposits the distribution into his checking account in June. The distribution is not income in June. Eric maintains his ABLE account at all relevant times, and the distribution is both unspent and identifiable until Eric pays his health-related expense in September. The \$500 is excluded from Eric's countable resources in July, August, and September. Since other expenses are being paid from Eric's account, he may have difficulty maintaining the necessary identity of the \$500 ABLE distribution.

#### **Example 2.**

Sam takes a distribution of \$25,000 from his ABLE account to modify a specially equipped van in May. He pays a \$10,000 deposit to the repair shop. While waiting for delivery of the van, Sam takes a trip to a local casino in July, and loses \$1,000 of his remaining \$15,000 ABLE distribution gambling. The \$1,000 he lost gambling is a countable resource in July. The other \$14,000 Sam retains is an excluded resource while it meets the requirements of SI 01130.740C.5.a.



### **Example 3.**

In June, Jennifer takes a \$7,000 distribution from her ABLE account to pay her college tuition which qualifies as a QDE. Her tuition payment is due in September. In August, Jennifer receives a job offer and decides not to return to school. Since Jennifer no longer intends to use the \$7,000 for tuition, the \$7,000 becomes a countable resource in September unless Jennifer redesignates it for another QDE or returns the funds to her ABLE account prior to September. How is Jennifer to redesignate her QDE from tuition to another QDE?

## **VII. Disadvantages (a/k/a “The Bad”)**

The full utility of ABLE accounts is somewhat hampered by their limited scope. These limitations include:

- \$100,000 balance disqualification for SSI benefits;
- State balance disqualifies for Medicaid;
- Small annual contribution limits (\$18,000 annually);
- Age restrictions (must be able to prove onset of disability before age 26)-age 46 in 2026;
- Non-SSI/SSDI recipients must obtain a doctor’s (M.D. or D.O.) certification of disability;
- Various state-to-state differences in administration of ABLE plans;

Additionally, financial fraud and exploitation is one of the largest issues for older adults and people with disabilities. According to the National Adult Protective Services Association, 1 in 20 older adults or people with disabilities reports some form of financial exploitation. That number may in fact be even higher as some studies indicate that only 1 in 44 cases such as these are actually even reported. Financial exploitation may include instances where trusted individuals force a person with a disability to take cash from an ATM using their ABLE account funds or even obtaining a financial power of attorney from the person with a disability, allowing the fraudster potential unfettered access to their ABLE account. Individuals with disabilities are sometimes more trusting and may not realize that they are being taken advantage of. Coupling this trusting nature with a person with a cognitive disability makes it more likely that such predatory behaviors will go unreported. As such, the “pros” of empowerment and financial independence must be carefully weighed against the potential for fraud and exploitation when considering opening an ABLE account.

More States have eliminated the estate recovery rule for ABLE accounts. A State that requires estate recovery of funds within an ABLE account must also be considered a disadvantage. A prudent planner or attorney will almost certainly advise family members or other potential third-party donors to an ABLE account to consider a third-party SNT or other vehicle when contemplating estate planning of larger funding amounts.

Although an ABLE account is not considered an asset or resource for SSI determination, it may certainly be considered as such in a creditor proceeding. Of note, the Act itself removes an ABLE account from bankruptcy proceedings in certain circumstances. Pub. L. No. 113-295 § 104 amends the bankruptcy code to exclude ABLE account funds from a person's estate if "(1) the designated beneficiary of such account was a child, stepchild, grandchild, or step grandchild of the debtor; (2) such funds are not pledged or promised to any entity in connection with any extension of credit and are not excess contributions to an ABLE account; and (3) such funds do not exceed \$6,225 during a specified time period." That noted, there are no such exclusions for other creditor proceeding. A distribution from an ABLE account is not income, but it may be a conversion of an exempt resource to a non-exempt resource. A distribution for a housing-related QDE or for an expense that is not a QDE is a countable resource if the beneficiary retains the distribution into the month following the month of receipt. If the beneficiary spends the distribution within the month of receipt, there is no effect on eligibility. If the distribution is a non-QDE, there may be tax consequences to the beneficiary.

s such as divorce or foreclosure.

Distributions for a non-housing related QDE are excluded from the designated beneficiary's countable resources (other than housing) if he or she retains the distribution beyond the month received. This exclusion applies while:

The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;

The distribution is unspent;

The distribution is identifiable. (NOTE: excludable funds commingled with non-excludable funds must be identifiable.); and

The individual still intends to use the distribution for a non-housing related QDE.

**Example 1.**

In June, Martha takes a \$2000 distribution from her ABLE account to pay her security deposit and first month rent for her new apartment which is a QDE. Her landlord notifies Martha that her apartment will not be ready for occupancy until August. Martha keeps the \$2,000 in her checking account until August. Because Martha did not return the \$2,000 distribution to her ABLE account in June, the \$2,000 is a resource to her in July. If Martha has more than \$500 in her checking account August 1, she will be over resourced.

**Example 2.**

In June, Jennifer takes a \$7,000 distribution from her ABLE account to pay her college tuition - a QDE. Her tuition payment is due in September. However, she needs to make a \$750 advance rent payment to her landlord for her college apartment in August. She uses \$750 of the distribution she took in June to make the rent payment – a housing-related QDE. The \$750 is a countable resource in August. The remaining \$6,250 of the retained distribution is excluded while it continues to meet the requirements of [SI 01130.740C.5.a.](#)

## **VIII. Trust Coordination**

As noted throughout this presentation, ABLE accounts offer maximum flexibility in terms of distributions not generally afforded to SNT trustees without consequences to the beneficiary's public benefits. The ability to pay for ISM items from an ABLE account with no negative effect to the beneficiary's public benefits is enviable to the SNT trustee. Thankfully, transfers from SNT to an ABLE are allowable, providing the SNT trustee with unique planning and distribution opportunities.

As noted previously, funds transferred from a trust account are excluded as being counted as income to the trust and ABLE beneficiary. Recall that POMS SI 01130.740.B.2, which states (in part) that “contributions [to an ABLE account] may be made by any person. (“Person,” as defined by the Internal Revenue Code (IRC), includes an individual, *trust*, estate, partnership, association, company, or corporation.) [emphasis added]. As such, should there be a viable and prudent need

for a beneficiary's SNT trustee to distribute funds for the beneficiary's food or shelter, they may do so via a transfer to a beneficiary's ABLE account.

Caution must be taken by the trustee to assess all of the beneficiary's public benefits before making any discretionary distribution. It is unclear if distributions from an ABLE account will be treated as income for HUD (a/k/a Section 8) waiver programs. It should be noted that it is the general practice of some housing authorities to count regular distributions from an SNT as income when determining a beneficiary's ongoing or initial waiver eligibility. Therefore, it may be in the best interest of the trust beneficiary to establish an ABLE account to pay those expenses per the HUD Notice H-2019-06.

Certainly, transferring funds from an SNT to an ABLE account is not a panacea. For example, should the beneficiary be susceptible to exploitation or undue influence, the issues mentioned in the previous section in regards to fraud remain. Additionally, the trustee should carefully consider their potential liability in changing the nature of funds under their full discretion to funds controlled only by the beneficiary. Such a transfer of discretionary authority may be challenged generally, including a potential violation of settlor intent (especially in third-party trust situations). It is highly recommended that drafting attorneys discuss ABLE options with settlors and include language permitting transfers from the trust vehicle to ABLE accounts in the trust document.

## **IX. Recent ABLE Act Changes**

Passed in December of 2017, the Tax Cuts and Jobs Act (TCJA) provided some interesting planning opportunities for ABLE account beneficiaries. Of note, all of the following provisions expire or "sunset" after 2025.

The first change for ABLE accounts in the TCJA allows a rollover of limited amounts from a 529 QTP account of a designated beneficiary to the ABLE account of the same designated beneficiary, as per the guidelines found in IRC § 529(c)(3)(C)(i)(III). This change also allows a designated beneficiary of a 529 QTP to make a transfer of funds from the QTP account to an ABLE account for a member of their family. Such transfers are not subject to income tax as long as the distributed funds are contributed to an ABLE account within 60 days of their withdrawal and, when added to all other contributions to the receiving ABLE account for the taxable year, are within the

limitations set forth in IRC § 2503(b) (the annual gift tax exclusion amount, or \$18,000 for 2024). Should such a direct transfer (or, in the case of a rollover, a contribution) exceed the annual gift tax exclusion amount, it is subject to income tax and a 10% additional tax under IRC § 529(c)(6), as applicable. This change allows attorneys and planners yet another creative avenue to provide funds for a person with a disability the ability to spend funds on ISM-related items.

The second improvement enacted in the TCJA for ABLE accounts provides for a Saver's Credit for ABLE account beneficiaries. Basically, the Saver's Credit is a tax credit that offsets income if a person makes eligible contributions to an IRA or employer-sponsored retirement plan. This credit is now available for contributions to an ABLE account for the designated beneficiary. In order to qualify for this credit, an ABLE account beneficiary must be age 18 or older, not be a full-time student, and not be claimed as a dependent on another person's tax return. The amount of the credit can range from 10-50% depending on the ABLE account beneficiary's adjusted gross income (AGI) reported on their 1040 tax return. The maximum contribution amount that can apply for the credit is \$2,000 for an individual, and \$4,000 if the ABLE account beneficiary files their 1040 as "married filing jointly". As such, the maximum amount for the Saver's Credit tops out at \$1,000 (\$2,000 x 50%), or \$2,000 if married filing jointly (\$4,000 x 50%). Rollover contributions from a QTP do not qualify for the credit. A chart illustrating the Saver's Credit specifics follows:

#### **2024 Tax Saver's Credit**

<b>Credit Rate</b>	<b>Married Filing Jointly</b>	<b>Head of Household</b>	<b>All Other Filers</b>
50% of contribution	AGI no greater than \$46,000	AGI no greater than \$34,500	AGI no greater than \$23,000
20% of contribution	AGI \$46,001 - \$50,000	AGI \$34,501 - \$37,500	AGI \$23,001 - \$25,000
10% of contribution	AGI of \$50,001 - \$76,500	AGI of \$37,501 - \$57,375	AGI of \$25,001 - \$38,250

With access to the Saver's Credit, people with disabilities are finally now afforded greater retirement savings opportunities commensurate with credits previously only afforded to people without an ABLE account.

Finally, the ABLE to Work Act (AWA) assisted people with disabilities in being able to contribute more than the \$18,000 annual limit to their ABLE account if they are working. This act also sunsets in 2025. The AWA allows employed ABLE beneficiaries who do not or cannot participate in an employer pension plan to make additional contributions to their ABLE account up to the lesser of the Federal Poverty Level (FPL) or the account beneficiary's compensation for that taxable year. The 2024 FPL limits are as follows:

- 1-person family/household: \$15,060
- 2-person family/household: \$20,440
- 3-person family/household: \$25,820
- 4-person family/household: \$31,200
- 5-person family/household: \$36,580
- 6-person family/household: \$41,960
- 7-person family/household: \$47,340
- 8-person family/household: \$52,720

The AWA allows people with disabilities to work and save their way out of unfairly imposed poverty by permitting them to save more of their earnings. Additionally, it provides an avenue for people with disabilities to potentially become less dependent on governmental support without risking the loss of their vital public benefits.

## **X. "ABLE vs. SNT"**

The benefits and utility of ABLE accounts are certainly clear. However, ABLE accounts are limited to contributions and are not a replacement for a SNT. as stated previously, an ABLE account is not a cure-all and may not be the best planning vehicle in all cases.

See below for a brief analysis of ABLE accounts versus SNTs.

	<b>ABLE Account</b>	<b>SNT</b>
Age limit	No maximum, must be disabled before age 26	1st party - pre-65 3rd party - none

Can be managed by a beneficiary/owner with a disability	Yes	No
Maintain public benefits eligibility	Yes	Yes
Annual contribution limits	\$18,000 (excluding ABLE to Work)	No
Tax-free growth	Yes	No
Unlimited number of accounts	No	Yes
Medicaid Estate Recovery	Yes (with CA exception)	1st party - yes 3rd party - no
ISM payments w/o SSI reduction	Yes	No
SSI disqualification amount	Over \$100,000	None
Fraud/exploitation concerns	Yes	Minimized when administered by professional trustee

Additionally, SNTs may offer other tax-related benefits to the settlor as well as potentially qualifying for the Qualified Disability Trust (QDT) tax exemption of \$5,050 (2024).

Lastly, not all SNT trustees or ABLE account programs offer the same benefits. Before establishing either vehicle, beneficiaries and their advocates must consider the ease of account opening, the ongoing costs of administration, investment options and returns, and the ease or difficulty of obtaining and requesting distributions. Beneficiaries and their advocates should also scrutinize the ABLE account plan or trustee's leadership, expertise, knowledge and tenure in the field, and their values or the overarching mission of the organization. Being trapped with an organization that does not share in the goal of empowerment and enhancement of quality of life for people with disabilities will at the least be unfruitful and at the worst cause legal, tax or health issues for the beneficiary. A great resource for research and guidance on ABLE program providers may be found at [www.ablecompare.org](http://www.ablecompare.org).

## **X. Conclusion**

ABLE accounts offer tremendous benefits and planning opportunities for people with disabilities. Coordinated correctly, ABLE accounts can be quite a valuable tool and resource. However, as with all vehicles related to planning for people with disabilities - beneficiaries, trustees, planners and attorneys must be prudent and cautious when using ABLE accounts. The ABLE Act continues to be a true blessing for people with disabilities, especially as amendments to its scope and limitations continue to be reevaluated and hopefully expanded over time.

### **POA Provision for an Eligible Individual**

To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.

I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(e)(1) that has been diagnosed with a disability prior to the age of 26 years old, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months or is blind. (Document should include HIPPA authorization to obtain medical records).

### **POA Provision for a Parent or Family members to authorize agent under POA or a Trustee of Revocable Trust to make contributions to ABLE Account**



To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

### **Trust Distribution Provision to Authorize a Trustee to make Contributions to ABLE Account for an Eligible Beneficiary**

To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).