



# COLLEGE SAVINGS PLANS NETWORK

A Network of the National Association of State Treasurers

By Electronic Delivery

May 8, 2023

Vanessa A. Countryman, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Comments Concerning SEC Release No IA-6240  
Safeguarding Advisor Client Assets

Dear Ms. Countryman:

The College Savings Plans Network (“CSPN”), on behalf of its members, is pleased to have this opportunity to comment on SEC Release No IA-6240, *Safeguarding Advisor Client Assets* issued February 15, 2023 (the “Release”). We appreciate the Securities and Exchange Commission’s (the “Commission” or the “SEC”) continuing commitment to assist and safeguard consumers seeking to invest in 529 College Savings Plans (“529 Plans”) and its interest in ensuring that State administrators of 529 Plans receive sound, balanced support from its advisors.

Established to make higher education more financially attainable, CSPN is a national non-profit association and the leading objective source of information about 529 College Savings Plans (“529 Plan” or “Plans”)<sup>1</sup>. An affiliate of the National Association of State Treasurers (“NAST”), CSPN works with its members to enhance 529 Plans and assist American families in planning and saving for education. CSPN members include State officials and State-sponsored 529 Plans, as well as program managers, investment managers, and many organizations providing services to 529 Plans, including legal, accounting and general consulting services.

CSPN appreciates the opportunity to provide comments on Questions 203, 204, 210, 214, 215, 218, 219 and 223 posed in the Release related to municipal fund securities and is pleased to offer the following responses.

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<sup>1</sup> The comments of CSPN in this letter relate only to 529 Plans but we note that the same plan structure and audit-related considerations equally apply to Achieving a Better Life Experience Plans established and maintained by States pursuant to 26 U.S. Code §529A.

**Q203. Should we expand the availability of the audit provision beyond limited partnerships, limited liability companies, or other types of pooled investment vehicle to entities as proposed? If not, explain why. If we expand the availability of the audit provision, in what circumstances would this likely be utilized? Should we impose any limits on the types of entities that can make use of the audit provision? If so, what limits, and why? It is our understanding that a separate account cannot be audited. Is our understanding correct? If not, are separate accounts currently being audited, and if so, for what purpose? To the extent separate accounts can be audited, should the audit provision be available for separate account clients in addition to entities?**

Pursuant to 26 U.S. Code §529 (“Section 529”), 529 Plans must be established and maintained by a State or agency or instrumentality thereof or by 1 or more eligible educational institutions.<sup>2</sup> The assets of each 529 Plan are held in trust for the benefit of the account owners invested in the Plan (a “529 Trust”). 529 Trusts are either created by statute (a statutory trust) or the State governing body creates a 529 Trust for purposes of holding the Plan’s assets. In each case, the trustee is either a State entity or a State official (i.e. – a governing board or a State Treasurer). As such, the 529 Trust issues municipal fund securities to its account owners in the form of participation units or interests in the 529 Trust. Because the issuer of the municipal fund securities is a State entity, (i) the offer and sale of those municipal fund securities are (i) exempt securities pursuant to Section 3(a)(2) of the Securities Act of 1933, as amended and, (ii) the State entity administering the Plan and the 529 Trust holding the Plan assets is not an investment company pursuant to Section 2(b) of the Investment Company Act of 1940, as amended; and therefore, not subject to federal jurisdiction or oversight.

Any audit of a 529 Trust is governed by State law and the governance policies of the State entity or State official serving as trustee of the 529 Trust. Some 529 Plan enabling legislation specifically includes a requirement for the independent audit of the 529 Trust assets while other enabling legislation requires periodic legislative audits of the 529 Trust assets. In addition, some 529 Plan enabling legislation is silent with regard to 529 Plan audits.

Many 529 Plans are included in the annual comprehensive financial report (“ACFR”) of the State because the Plan meets the definition of a “fiduciary activity” under Statement No. 84, *Fiduciary Activities*, of the Governmental Accounting Standards Board (“GASB”), as amended. Accordingly, these Plans and the 529 Trusts follow accounting principles generally accepted in the United States (“U.S. GAAP”) prescribed by the GASB. Under GASB, the 529 Trust is generally the “reporting entity”, and the focus of the financial statement presentation is the 529 Trust as a whole, rather than on the individual investment options offered pursuant to the Plan. Individual investment option information may be presented as other supplementary information in the ACFR, but this is not required by the GASB. Some States elect not to include investment option information in their 529 Plan financial reports.

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<sup>2</sup> For purposes of Section 529, an “eligible educational institution” means an institution— (A) described in section 481 of the Higher Education Act of 1965 ( 20 U.S.C. 1088 ), and (B) which is eligible to participate in a program under title IV of such Act.

Many 529 Plan audit engagements are currently performed in accordance with auditing standards generally accepted in the United States (“U.S. GAAS”) and *Government Auditing Standards*, issued by the Comptroller General of the United States, as is required by the sponsoring State.

In a recent survey of CSPN members (the “Member Survey”), 95% of the Plans responding currently conduct an annual audit of the 529 Trust. Of those Plans audited, 46% audit the 529 Trust financial statements pursuant to a State statutory requirement and the State administrator’s governance practices, 32% audit the 529 Trust financial statements pursuant to a State statutory requirement and 22% audit the 529 Trust financial statements solely pursuant to the State administrator’s governance practices.

The distribution of the audited financial statements of 529 Trusts is a matter of State law, the governance policies of the State administrator and contractual arrangements with Plan service providers, including program managers and investment managers. According to the Member Survey, of the 529 Trusts audited, 65% of those Plans post the financial statements of the 529 Trust on the Plan website. However, there is no specified or required time period for posting such statements or maintaining the statements on the Plan website. Only 11% of the 529 Trusts deliver the audited financial statements to Plan account owners.

Because of the exempt nature of municipal fund securities and the sovereignty of the States under the federal securities laws, we believe that the expansion of the audit provision to cover 529 Plans would have no impact on the timing of and type of audit conducted for 529 Trusts and there would be no value in expanding the custody rule to add 529 Plans. In the event the Commission includes 529 Plans in the audit provisions of the custody rule, we strongly believe that the PCAOB registration and inspection requirement should not apply as discussed below in response to the following questions.

**Q 204. Do commenters agree that expanding the scope of entities eligible for the audit provision, as proposed, is likely to result in a greater percentage of client audits?**

Based on the results of the Member Survey and as described in our response to Q 203, we do not believe that expanding the scope of entities eligible for the audit provision, as proposed, is likely to result in a greater percentage of client audits. If PCAOB registration is required, we do not believe the requirement would change the way 529 Trust audits are conducted. Requiring audits performed by a firm that is registered with and subject to regular inspection by the PCAOB would be cost-prohibitive to a 529 Plan administrator and we believe that 529 Plan administrators will continue to engage audit firms based on their expertise in the 529 Plan industry and not on their registration status with the PCAOB. Accordingly, we believe that an adviser subject to this rule would opt to have the surprise custody exam.

**Q 210. Should the rule require accountants performing audits under the rule to be**

**registered with the PCAOB as proposed? Should the rule require accountants to be subject to regular inspection by the PCAOB as proposed? Do accounting firms registered with and subject to regular inspection by the PCAOB implement their quality control systems throughout the accounting firm related to their assurance engagements? Why or why not?**

Currently, many audits of 529 Trust assets are conducted by firms that are not registered with the PCAOB. In addition, some 529 Trusts are audited by the applicable State legislative auditor.

Requiring 529 Plans to be audited by firms who are registered with the PCAOB and subject to regular inspection may potentially result in these audits being performed by professionals who may not have relevant industry expertise. Registration with the PCAOB in no way ensures that audit quality will improve. The increased risk of audit failure associated with an audit performed by an engagement team who may not have sufficient understanding of the industry to properly design effective audit procedures ultimately is detrimental to the 529 Plan participant. Many firms that audit 529 Trusts have adopted AICPA quality control standards and participate in the AICPA peer review program. This is a much more suitable and effective standard as it relates to the audit provisions and 529 Trust audits.

As noted above, requiring 529 Plans to be audited by firms who are registered with the PCAOB and subject to regular inspection would drive the cost of these audits up significantly (due to higher billing rates associated with the larger firms and the limited number of professionals who have expertise in this industry). This increased cost would ultimately negatively impact Plan participants.

Finally, as stated above in response to Q 203, we believe that the expansion of the audit provision to cover 529 Plans would have no impact on the timing of and type of audit conducted for 529 Trusts and there would be no value in expanding the custody rule to add 529 Plans. In the event the Commission includes 529 Plans in the audit provisions of the custody rule, we strongly believe that the PCAOB registration and inspection requirement should not apply.

**Q 214. By extending the availability of the audit provision and continuing to require that the independent accountants performing audits be registered with and subject to regular inspection by the PCAOB, the proposed rule may narrow the pool of auditors who would be able to perform services under the proposed rule. Should the proposed rule instead require only PCAOB-registered public accounting firms to be used to perform certain services under the proposed rule? If so, which services and why?**

Please see our response to Q 210 above.

**Q 215. Do commenters agree that the availability of accountants to perform services for purposes of the proposed rule is sufficient? If not, please describe how the proposed rule could provide greater availability.**

As noted above in our response to Q 204 and Q 210, we believe that 529 Plan administrators will continue to have the audits of the 529 Trusts conducted as usual without regard to the proposed changes to the audit provisions.

**Q 218. In light of our proposal to make the audit provision available to advisers to additional entities (e.g., pension plans, retirement plans, 529 plans, and ABLE plans), would these additional entities be able to meet the proposed accounting standards? Would they present any challenges for such entities? Should we modify this aspect of the proposal to address these additional entities? If so, how?**

529 Plans that issue audited financial statements generally follow GASB accounting standards, which is U.S. GAAP for governmental entities. Some audits may also follow State regulatory or statutory requirements. Additionally, the Plans may present additional information in their financial reports to satisfy State reporting requirements.

As discussed above under Q 203, 529 Plans are not subject to federal regulation. Accordingly, the Plans will continue to arrange for the audit of the 529 Trusts in accordance with State law and governance policies without regard to the requirements of the proposed rule.

**Q 219. It is our understanding that the financial statement presentation required under U.S. GAAP may be different for pooled investment vehicles, e.g., private funds, compared to other entities, e.g., 529 plans. Would these presentation differences have an impact on investor's ability to understand the financial statements?**

As discussed above under Q 203, the financial statements of a 529 Trust are prepared under GASB standards, rather than the standards imposed by Financial Accounting Standards Board (FASB), which are followed by registered investment companies, mutual funds, employee benefit plans, and private trusts.

**Q 223. For entities, we understand that audited financial statements are posted to the entity's website, e.g., a 529 plan's website, along with a written notification sent to accountholders of the availability of the financial statements. The entity also provides a hardcopy of the financial statements by mail within three business days upon an accountholder's request. Should we continue to allow this type of electronic delivery to meet the distribution requirement? Should we expand the availability of electronic delivery of audited financial statements? If so, how?**

According to the Member Survey many 529 Plan State administrators make the audited financial statements of the 529 Trust publicly available, either by way of posting on the Plan's website or another State government website, sharing the audit with the State's legislative body, posting on the EMMA website of the Municipal Securities Rulemaking Board, or distribution to account owners. However, as discussed above, there is no federal jurisdiction over the timing, content or availability of the audited financial statements or the ACFR of the 529 Trust.

Q 223 states that "*audited financial statements are posted to the entity's website, e.g., a 529 plan's website, along with a written notification sent to accountholders of the availability of the financial statements. The entity also provides a hardcopy of the financial statements by mail within three business days upon an accountholder's request.*" However, as discussed in response to Q 203, these assumptions do not apply to all 529 Plans. According to the Member Survey, very few Plans distribute audited financial statements to their account owners and only 65% make the audited statements available on the Plan website. The audit and any distribution of the audited financial statements of a 529 Trust is strictly a matter of State law and 529 Plan governance policies and procedures. There is no uniform requirement and/or practice in the industry as suggested in the Commission's question.

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Thank you again for providing an opportunity to comment on the Release. We hope these observations are helpful as the SEC considers possible rulemaking. Please do not hesitate to contact us with any questions or for more information. You may reach CSPN by calling Chris Hunter at (859) 244-8177.

Sincerely,



Rachel Biar  
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NEST 529 College Savings Program Director  
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