



ABLE 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 ABLA Savings Plans Network (“ASPN”) 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 Section 529A ABLA programs and its interest in ensuring that State administrators of ABLA programs receive sound, balanced support from their advisors.

ASPN, an affiliate of the National Association of State Treasurers, advocates on behalf of State administrators and program managers of Achieving a Better Life Experience (ABLE) programs. ABLA programs were authorized by Congress in the Stephen Beck, Jr. ABLA Act of 2014. These programs provide tax-advantaged savings vehicles for people with disabilities. ABLA programs allow participants and their families to save for the future, while protecting eligibility for certain means-tested public benefits. ABLA programs can improve the way individuals with disabilities save and invest, participate in the workforce, and build independence.

ASPN appreciates the opportunity to provide comments on Questions 203, 204, 210, 214, 215, 218, 219 and 223 posed in the Release. Please see our responses below.

Q 203. 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?

No; because of the exempt nature of municipal securities, such an expansion would not have the desired effect.

Pursuant to 26 U.S. Code §529A (“Section 529A”), ABLÉ programs must be established and maintained by a State or agency or instrumentality thereof. The assets of each ABLÉ program are held for the benefit of the account owners invested in the program. ABLÉ programs are either created by statute or by an authorized State governing body. The ABLÉ program issues municipal securities to its account owners in the form of participation units or interests in the ABLÉ program. Because the issuer of the municipal securities is a State agency or instrumentality, (i) the offer and sale of those municipal securities are exempt pursuant to Section 3(a)(2) of the Securities Act of 1933, as amended, and (ii) the State entity administering the ABLÉ program and holding the program 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 an ABLÉ program is governed by State law and the governance policies of the State entity or State official administering the ABLÉ program. Some State ABLÉ legislation specifically includes a requirement for the independent audit of the ABLÉ assets, while other enabling legislation requires periodic legislative audits of the ABLÉ assets. In addition, some State ABLÉ legislation is silent with regard to program audits.

Many ABLÉ programs are included in the annual comprehensive financial report (“ACFR”) of the State because the program meets the definition of a “fiduciary activity” under Statement No. 84, *Fiduciary Activities*, of the Governmental Accounting Standards Board (“GASB”), as amended. Accordingly, these programs follow accounting principles generally accepted in the United States (“U.S. GAAP”) prescribed by the GASB. Under GASB, the ABLÉ program is the “reporting entity,” and the focus of the financial statement presentation is the ABLÉ program as a whole, rather than on the individual investment options offered by the program. 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 ABLÉ financial reports.

Many ABLÉ program 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 both ASPN members and College Savings Plan Network members (the “Member Survey”), 95% of the programs responding currently conduct an annual audit of their ABLE and 529 programs. Of those programs audited, 46% audit the program’s financial statements pursuant to a State statutory requirement and the State administrator’s governance practices, 32% audit the financial statements pursuant to a State statutory requirement, and 22% audit the financial statements solely pursuant to the State administrator’s governance practices.

Distribution of ABLE audited financial statements is a matter of State law, the governance policies of the State administrator, and contractual arrangements with program service providers, including program managers and investment managers. According to the Member Survey, 65% of audited programs post the financial statements on their program website. However, there is no specified or required time period for posting such statements or maintaining the statements on the website. Only 11% of the audited financial statements are delivered to account owners.

Because of the exempt nature of municipal securities, we believe that the expansion of the audit provision to cover ABLE programs would have no impact on the timing and type of audit conducted by these programs, and there would be no value in expanding the custody rule to add ABLE programs. In the event the Commission includes ABLE programs 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 ABLE 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 an ABLE program administrator and we believe that ABLE administrators will continue to engage audit firms based on their expertise in the ABLE 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 ABLE program assets are conducted by firms that are not registered with the PCAOB. In addition, some ABLE programs are audited by the applicable State legislative auditor.

Requiring ABLE programs to be audited by firms who are registered with the PCAOB and subject to regular inspection may potentially result in these 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 ABLE program participant. Many firms that audit ABLE programs 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 ABLE audits.

As noted above, requiring ABLE programs 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). While this additional cost may be bearable for more seasoned, profitable industries, it is not a burden that the ABLE industry is in a position to shoulder. ABLE programs are still new and still scaling. Budgets and revenues remain low. Many programs are only a few years old; they have not yet reached sustainable levels. Increased audit costs would have an enormous negative impact on this young industry, potentially driving out both private-sector administrators (due to increased costs) and – most troubling – program participants (due to increased fee burdens).

Finally, as stated above in response to Q 203, we believe that the expansion of the audit provision to cover ABLE programs would have no impact on the timing of and type of audit conducted, and there would be no value in expanding the custody rule to add ABLE programs. In the event the Commission includes ABLE programs 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 ABLE program administrators will continue to have ABLE audits 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?

ABLE programs 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, ABLE programs may present additional information in their financial reports to satisfy State reporting requirements.

As discussed above under our response to Q 203, ABLE programs are not subject to federal regulation. Accordingly, the programs will continue to arrange for their audits 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 an ABLE program 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 ABLE program administrators make the audited financial statements of the program publicly available, either by way of posting on the program'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 distributing 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 an ABLE program.

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 ABLE programs. According to the Member Survey, very few ABLE and 529 programs distribute audited financial statements to their account owners, and only 65% make the audited statements available on their website. The audit and any distribution of the audited financial statements of an ABLE program is strictly a matter of State law and ABLE program 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 ASPN by calling Chris Hunter at (859) 244-8177.

Sincerely,



Stacy Garrity
Pennsylvania State Treasurer
Chair, ABLE Savings Plans Network