Wisconsin State Senate
24th Senate District

Serving Wood, Portage, Adams,
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# PATRICK TESTIN
STATE SENATOR

DATE: February 24, 2021

RE: **Testimony on Assembly Bills 44, 45, and 46**

TO: The Assembly Committee on Criminal Justice and Public Safety

FROM: Senator Patrick Testin

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I would like to thank Chairman Spiros and members of the committee for accepting my testimony on Assembly Bills 44, 45, and 46.

Unfortunately, elder abuse is becoming all too common in our society, and reports of elder abuse continue to grow. According to the Bureau of Aging & Disability Resources, there has been a 177% increase in reported elder abuse in Wisconsin since 2001. One in nine seniors has reported being abused. These numbers are likely to grow as Wisconsin's senior population is on track to have increased by 72% between 2015 and 2040.

In 2017 and 2018, I had the opportunity to serve as a member of the Attorney General's Task Force on Elder Abuse. The task force was made up of stakeholders from state agencies, law enforcement, the court system, long-term care agencies, financial service groups, and citizen advocacy organizations. We were tasked with studying the impact of elder abuse in the state and finding ways to improve outcomes for the elderly.

Assembly Bill 44 makes criminal law changes that address crimes against elder populations. The task force found that crimes of elder abuse should better align with provisions under current law that address other vulnerable populations. This legislation will do the following:

- Modifies the law to require a sexual assault of a person over the age of 60 to be Class B Felony.
- Brings the physical abuse of an elder person in line with the age definition of other statutes.
- Creates a mechanism for freezing assets in elder financial abuse cases for the purpose of preserving the assets for restitution for the victim.
- Creates a system that allows a term of imprisonment that is imposed for a criminal conviction to be increased in length if the crime victim was elderly.
- Removes barriers for an individual to seek a restraining order by allowing them to appear in court by telephone or audiovisual means.

Assembly Bill 45 would allow broker-dealers and investment advisers to temporarily delay

PO Box 7882 • Madison WI 53707-7882 •608-266-3123 • 800-925-7491 • Sen.Testin@legis.wi.gov • www.SenatorTestin.com

transactions when financial exploitation is suspected. This legislation requires certain notifications if a transaction is delayed and establishes time limits on a delay.

Assembly Bill 45 also allows securities professionals to provide to the Department of Financial Institutions, adult protective service agencies, and other individuals notice of suspected financial exploitation of individuals ages 60 and older.

Additionally, current law includes a penalty enhancer for securities law violations committed against a person who is at least 65 years of age and older. Under this bill, these enhanced penalties also apply to vulnerable adults (age 60+).

Assembly Bill 46 continues in the same vein, and would allow financial institutions, mortgage bankers and brokers, check cashing services, and other types of lenders to delay financial transactions when exploitation of an adult ages 60 and older is suspected.

A financial service provider may also refuse or delay a financial transaction if an elder-adult-at-risk agency, such as a county social services agency or law enforcement, provides information to the financial service provider that financial exploitation of a vulnerable adult may have occurred or has been attempted.

The bill requires notice if a financial service provider refuses or delays a financial transaction under these circumstances and establishes time limits related to the refusal or delay of a financial transaction.

Thank you again for listening to my testimony and I hope that you will join me in supporting these bills.

# JOHN J. MACCO

STATE REPRESENTATIVE • 88TH ASSEMBLY DISTRICT

DATE: February 24, 2021

TO: Assembly Committee on Criminal Justice

FROM: Representative John Macco

RE: Testimony on 2021 Assembly Bills 44, 45, and 46

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Chairman Spiros and members of the Assembly Committee on Criminal Justice and Public Safety:

Thank you for hearing testimony on our package of bills to combat elder abuse. It is my hope that by passing these bills, we will provide increased certainty and security for our elderly and their families.

Today, Americans over the age of 50 hold 70 percent of the nation's disposable income. As these Americans reach retirement age, it often becomes more difficult for them to manage their financial and physical well-being. It is not uncommon for seniors to rely on friends, family, or hired help to assist them with their day-to-day life. However, with their reliance on others comes the risk of financial exploitation and other forms of abuse and neglect.

Understandably, those who are reaching retirement age are worried about their personal and financial security as they exit the workforce. Since 2001, reported allegations of elder abuse increased by 160 percent in Wisconsin. The number of retirees will only increase as more "baby boomers" exit the workforce at a rate of 10,000 individuals per day, making these bills essential for Wisconsin retirees.

Assembly Bill 44 helps to discourage bad actors from engaging in the abuse and exploitation of vulnerable Wisconsinites by increasing criminal penalties for related crimes and makes it easier for victims to file restraining orders. Additionally, this bill streamlines court processes to freeze assets of a defendant, making it more likely for victims to receive financial restitution.

Assembly Bill 45 expands the tool belt of financial service providers by allowing them to refuse or delay a transaction when an elder-adult-at-risk agency such as a county social services agency, or law enforcement agency provides information to the financial service provider that financial exploitation has occurred or has been attempted. This bill also allows financial service providers

P.O. Box 8953 • Madison, Wisconsin 53708 • 608-266-0485 • Toll-Free: 888-534-0088
RepJohnMacco.com • Rep.Macco@legis.wi.gov

to create a list of individuals that a vulnerable adult authorizes to be contacted if financial exploitation is suspected.

Assembly Bill 46 allows securities industry professionals to provide to the Department of Financial Institutions and other appropriate entities notice of suspected financial exploitation of vulnerable adults and them to temporarily delay transactions or disbursements from the accounts of vulnerable adults when financial exploitation is suspected.

Colleagues, these issues hit close to home for me and my family. My mother-in-law was financially exploited by a relative years ago and my wife and her siblings had little recourse once the damage had been done. Additionally, my own mother was recently the victim of financial fraud and I am not sure if she will ever see that money again. It is my hope that these bills will help prevent others from going through what my family went through.

Our elder care bills are an important first step in our efforts to combat elder abuse. Our most vulnerable citizens will benefit from their passage. I want to thank you once again, Mr. Chairman, for holding this hearing and I urge you and the rest of the committee to vote for recommendation of passage.

# ROBERT WITTKE

STATE REPRESENTATIVE • 62nd ASSEMBLY DISTRICT


February 24, 2021

Assembly Committee on Criminal Justice and Public Safety

Chair Spiros and Committee Members,

Thank you for holding a public hearing on several bills relating to elder abuse. These bills were derived from the workings of former Attorney General Schimel's Task Force on Elder Abuse and while I was not a member, I am pleased to support the recommended legislation brought forward.

Elder abuse is a growing concern for many. Reporting of physical, emotional and financial abuses are on the rise. These bills will strengthen existing law and empower frontline financial workers to take necessary steps to protect vulnerable and disabled individuals. Assembly Bills 44, 45 and 46 relate to financial exploitation of vulnerable adults and increase penalties for crimes against elder persons.

I am pleased to register in favor of Assembly Bills 44, 45 and 46. I encourage you to recommend passage of each.

Thank you.

**Robert Wittke**
**State Representative**
**62nd Assembly District**


P.O. Box 8953 • Madison, WI 53708-8953 • (608) 266-0731 • Toll Free: (888) 534-0062
Rep.Wittke@legis.wi.gov

The Wisconsin Credit Union League

*One League, One Focus - Your Success!*

*February 24, 2021*

To: Honorable Members – Assembly Committee on Criminal Justice and Public Safety
From: Sarah Wainscott, Senior Vice President of Advocacy
Re: **Support for AB 46/SB 19 - Introduced by Rep. Macco & Sen. Testin**

The Wisconsin Credit Union League, the trade association for Wisconsin's credit unions and their 3.4 million members, **supports Assembly Bill 46.**

As member-owned not-for-profit financial cooperatives, credit unions' core mission is to serve their members. This task is made more difficult by the growing prevalence of financial abuse of vulnerable adults.

For your consideration, we offer the testimony of Rex Fair, President of Sentry Credit Union in Stevens Point, to highlight one of the many challenging scenarios credit unions face in serving financial abuse victims:

> *We have a multiple times victim of fraud. I have discussed the situation with our member (who denies being a victim). The credit union has reported to authorities the various frauds against this person. I talked to a statewide fraud task force officer about our reports – who then called and talked to our member. The officer reported back to me that the member is a victim – and that the officer even knew who the person was who was receiving the member's money. This same officer suggested there was not much they could do without the cooperation of our member. I talked to the Portage County Elder Abuse coordinator who then called our member. That person reported back to me that the member is a victim, but could not do more as the member declined to be assisted. I was told that Portage County would be able to do more once this person becomes destitute. I talked to an assistant district attorney about this situation who indicated there was nothing they could do.*
>
> *I have known this member for years – her kids grew up with my kids. The problem started after her husband died. While it would be easy enough for me to contact one or both of the children (as our member has no one as joint owner on their account), current laws prevent me from doing so – and may create legal problems for me and my credit union. If/when all of this comes to light, I will have a hard time explaining to this member's children why I did not let them know. They might also want to know why all of these other organizations did not/or could not do more.*
>
> *In these situations, we need to be able to take action to assist our member.*

By statute, a Wisconsin credit union is to "provide opportunity for its members to improve their economic and social conditions"- *Wis. Stats. § 180.01(2)*. AB 46 enhances credit unions' ability to do so, by empowering them to better protect members' wealth and financial stability and be effective partners in preventing financial abuse.

**On behalf of Wisconsin's credit unions, we thank you for your consideration and ask that you support Assembly Bill 46.**

If you would like additional information on credit unions or have questions regarding the bill, please contact me at swainscott@theleague.coop or (608) 640-4030.

District Attorney
**Susan L. Opper**

Deputy District Attorneys
**Lesli S. Boese**
**Ted S. Szczupakiewicz**
**Michael D. Thurston**

Office Services Coordinator
**Julie A. Moelter**

Victim/Witness Program
**Jennifer S. Dunn, Coord.**

Support Staff Supervisor
**Rebecca L. Gifford**

# Waukesha County

*Office of the District Attorney*

Assistant District Attorneys
**Kevin M. Osborne**
**Michele W. Hulgaard**
**Mary C. Brejcha**
**Jayne Davis Dewire**
**Andrea M. Will**
**Lindsey H. Hirt**
**Abbey L. Nickolie**
**Melissa J. Zilavy**
**Shawn N. Woller**
**Kristina J. Gordon**
**Jack A. Pitzo**
**Molly M. Schmidt**
**Zachary A. Wittchow**
**Randolph P. Sitzberger**
**Claudia P. Ayala Tabares**
**Peter M. Tempelis**
**Edward M., Bremberger**

February 24, 2021

Wisconsin State Legislature
Wisconsin State Capitol
2 East Main Street
Madison, Wisconsin 53702

Re: Assembly Bill 44 / Senate Bill 17
Assembly Bill 45 / Senate Bill 20
Assembly Bill 46 / Senate Bill 19

Good afternoon everyone. My name is April DeValkenaere. I am a paralegal certified by the State Bar of Wisconsin and currently focusing on White Collar Crime, with the Waukesha County District Attorney's Office. I am also a Certified Financial Crimes Investigator (CFCI) through the International Association of Financial Crimes Investigators (IAFCI). The IAFCI is a global non-profit organization comprised of approximately 7000 members. We provide services and an environment where information regarding financial fraud, financial investigations and fraud prevention methods can be collected, exchanged, and taught for the common good of the financial payment industry and our global society. Our membership brings together law enforcement, financial institutions, and the retail industry in an effort to safeguard the world's economy through collaborative teamwork. IAFCI has been fighting financial transaction crimes for more than 50 years. I am currently serving my second term as President of the Wisconsin chapter of IAFCI.

I had the honor and privilege of serving on the Elder Abuse Task Force that developed the bills we are discussing today. I believe that these bills, if enacted, will provide an effective tool to assist the victims of financial crimes in Wisconsin.

Most people believe that a majority of elder financial exploitation is being perpetrated by unknown suspects, however studies have shown that approximately 90% of elder financial exploitation is being perpetrated by someone they know and trust.

I work with several organizations that investigate and collaborate to combat financial crimes and I have firsthand knowledge that these bills will assist in the prosecution of these financial crimes as well as provide an opportunity for the victim to be heard, in their own words.

515 West Moreland Boulevard, Room CG-72
Waukesha, Wisconsin 53188-9877
Phone: (262) 548-7076

We need Assembly Bills 44/45/46 here in Wisconsin. As they provide a number of benefits in the fight against criminals who engage in fraudulent schemes making victims of our Wisconsin residents. This includes;

1. Allowing a victim to be heard at an injunction hearing via phone or audiovisual means, which is imperative for older adults as they may have medical or physical limitations that would not otherwise allow for them to participate in these hearings. As well as those who have been victims of undue influence and fear retaliation if they have to appear in person.
2. Allowing for the freezing or seizing of funds/assets of the defendant up to the amount of the alleged fraud during the pendency of the judicial process, is very important for older adults who have been victimized and are attempting to recoup their losses to keep or secure their homes, their care, etc., so they do not need to or can prolong the need to become a benefit recipient of the State.
3. Providing increased penalties for defendants against elder victims, this would certainly be a deterrent as a lot of elder financial crimes are committed by first time offenders based on the opportunity to take advantage of a situation. It would also be a deterrent because the current Individual at Risk enhancer only equals the theft penalty up to $10,000. Most Power of Attorney (POA) thefts are substantially larger than that, generally in the $100,000 range.
4. Allowing prosecution of financial crimes based on the age of a vulnerable adult at age 60 would assist when a victim is unable or unwilling to be a witness against the defendant because of capacity issues or undue influence.

Additional resources and example as to why we need Assembly Bills 44/45/46 in Wisconsin:

1. The North American Securities Administrators Association (NASAA) adopted a model that included a specific age limit and a 15-day delay of transactions in January 2016 and it has been adopted or served as a model for acts adopted in 31 states to date. (http://serveourseniors.org/about/policy-makers/nasaa-model-act/ ) The overwhelming feedback from states that have adopted a version of the Model Act is that is has been successful in preventing financial exploitation of vulnerable adults and that in a great majority of instances where a delay was placed on a transaction, the suspected financial exploitation was found to be substantiated, and there are very few reports of investors filing a complaint about a broker-dealer delaying a transaction in their accounts.
2. FINRA, a government-authorized not-for-profit organization that oversees U.S. broker-dealers, also enacted rules similar to NASAA with the Security and Exchange Commission (SEC) approval, that include a specific age limit and a 15-day delay of transactions believed to be fraudulent. (https://www.finra.org/rules-guidance/rulebooks/finra-rules/2165?rbid=2403&record_id=17538&element_id=12784 ) However, this does not include Investment Advisors which is why we need the new legislation that would cover the entire industry.

In my role with the District Attorney's Office I work on many cases involving elder financial exploitation. I have assisted in the prosecution of cases where;

1. Documents were utilized by a trusted individual, whether that be a family member, friend or caregiver, who took advantage of their fiduciary duty.
2. Caregivers who were hired to assist older adults with personal hygiene and/or daily routine duties have gained access to financial accounts, stolen identities, stolen funds, changed wills, and added themselves as a beneficiary to the victims finances.

3. Family and/or caregivers have taken advantage of the frail nature of older adults and used it against them, in instances of undue influence.
4. Power of Attorney (POA) documents have been signed unknowingly by victims, multiple POA documents have been drafted and submitted to financial institutions over a short period of time, POA documents have been utilized by the agent(s) to intentionally spend the principals funds to make them eligible for state assistance.
5. The current law allows us to use an individual-at-risk enhancer to a theft statue however the amount of money stolen from the elder victim has a higher penalty than the enhancer allows.

For the reasons stated above and the reasons expressed in my verbal testimony, I am here to wholeheartedly support these Bills as a representative of the Wisconsin chapter of IAFCI along with the Waukesha County District Attorney's Office.

Respectfully Submitted,

*April DeValkenaere*

April DeValkenaere, SBWCP, CFCI

Wisconsin Bankers ASSOCIATION

**Testimony of the Wisconsin Bankers Association**

**John Cronin, Assistant Director – Government Relations, WBA**

**Assembly Committee on Criminal Justice and Public Safety**
**Assembly Bills 45 and 46**

**February 24, 2021**

Chairman Spiros and members of the Assembly Committee on Criminal Justice and Public Safety,

Thank you for the opportunity to testify today. My name is John Cronin and I am the Assistant Director of Government Relations at the Wisconsin Bankers Association.

WBA represents approximately 212 commercial banks and savings institutions, their branches and over 21,000 employees. Joining me today is Gary Kuter, Senior Vice President/Retail Banking and Chief Compliance Officer at Capitol Bank here in Madison. Gary is also immediate past chair of WBA's Government Relations Committee.

WBA is happy to testify in favor of Assembly Bills 45 and 46, authored by Rep. John Macco and Sen. Patrick Testin. These bills will enhance financial institutions' ability to detect and prevent the increasing problem of elder financial exploitation in our state, and we encourage you to support them. WBA is grateful to members of this committee who supported this legislation last session, and to the Assembly as a whole for passing 2019 Assembly Bills 481 and 482.

Bankers are in a unique position to be able to identify, prevent, or stop elder financial abuse – they just need some additional empowerment. Our goal is to be part of the solution, so any tools that help bank staff prevent customers from becoming elder fraud victims are efforts we support.

Over the next two decades, Wisconsin's 65 and older population will increase by 72% and one in nine seniors have reported being abused, neglected, or exploited in 2017. According to the Wisconsin Department of Justice (DOJ), the rate of elder financial abuse has increased by double digits in our state in recent years.

Unfortunately, elder financial exploitation is a growing issue in Wisconsin and across the country. The Wisconsin DOJ under AG Brad Schimel created a task force in September 2017 to find ways to protect Wisconsin's senior citizens and our association had several members serve in that group. WBA continues assisting with this effort under AG Josh Kaul.

A February 2019 report from the Consumer Financial Protection Bureau (CFPB) report shows the rise of suspicious activities involving financial abuse targeting older adults. Here are some of the key findings:

- Suspicious Activity Reports (SARs) filings on elder financial exploitation quadrupled between 2013 and 2017. The 63,500 SARs in 2017 likely represent only a fraction of actual incidents.
- The financial damage related to suspected activities in 2017 totaled $1.7 billion.
- When a monetary loss occurred, seniors lost $34,200 on average. In 7% of the cases, the losses exceeded $100,000.
- Losses were nearly three times greater when the older adult knew the suspect.

(over)

Additionally, a December 2019 report from the Financial Crimes Enforcement Network (FinCEN) provides more scope and context of fraud perpetrated against elders by looking at SARs.

- Monthly elder fraud SARs filed by securities companies increased by 300% from 2013 to 2019
- Suspicious activity amounts reported for elder fraud annually have more than doubled in the same time frame to over $5 billion.
- Elder theft is most often committed by people they trust- 46% of the time it was a family member, 19% of the time it was a non-family caregiver.

These facts underscore the need to empower frontline personnel and incorporate power of attorney provisions in the bills.

Thankfully, Wisconsin is not alone in our efforts to curb elder financial abuse. According to NCSL, the number of bills seeking to address elder financial exploitation has risen dramatically in legislatures across the country. Numerous states have enacted tougher criminal penalties, defined the specific crime, instituted reporting systems, adopted the Uniform Power of Attorney Act (UPOAA), or taken other measures.

Let's add Wisconsin to that growing list of states taking action to protect its older populations from elder financial exploitation. Please support Assembly Bills 45 and 46.

**Amendments requested by WBA:**

In order to achieve better parity among the bills and in furtherance of our goal to ultimately protect consumers, WBA is requesting two amendments – one to each bill.

**Assembly Bill 46**

We ask that the committee adopt an amendment lengthening the allowable hold time on transactions from five days to 15 days. While banks are usually able to complete their necessary steps on a suspicious transaction quickly, a five day window often does not correspond well with the timeframes APS or law enforcement need to complete investigations. 15 days would match with the allowable time in AB 45.

**Assembly Bill 45**

We request the committee adopt an amendment allowing qualified individuals, as defined in the bill, to decline to honor power of attorney as bank personnel would be able to under AB 46. If our goal is consumer protection, the bills should both have this provision. In a securities context, dollar amounts and account balances are often higher, therefore the consequences of financial exploitation are also higher.

I want to again thank Chair Spiros and members for taking the time to hear our testimony today. We would be happy to answer any questions you may have.

# ELDER LAW AND SPECIAL NEEDS SECTION

To: Assembly Committee on Criminal Justice and Public Safety
Date: February 22, 2021
Subject: Financial exploitation proposals AB 45 and AB 46 –regarding concerns of the Elder Law and Special Needs Section of the State Bar of Wisconsin

The Elder Law and Special Needs Section (ELSN) of the State Bar of Wisconsin has registered a position in opposition to AB 46 regarding financial institutions and AB 45 regarding financial advisors. We are willing to discuss our concerns, and proposed modifications, in detail if requested. Below are the primary recommendations for modifications to each bill.

## AB 46 REGARDING FINANCIAL INSTITUTIONS

**Authority for financial institutions to delay transactions and refuse to honor DPOAs.**

- **Concern over age alone as a basis for action:** As an alternative to the blanket age of 60 used in the bill to define a "vulnerable adult" the definition in § 55.01(1e) should be used exclusively. The financial institution should be required to document the basis for its determination that the individual meets these criteria. ***Recommendation: The language "or an individual who is at least 60 years of age" should be deleted from proposed § 224.46(1)(j). Add language requiring documentation of basis for decision.***

- **Refusal of power of attorney:** Due to the serious concerns we have expressed previously in detail, **proposed §224.46(4) should be deleted.**

- **Concern over lack of autonomy:** Instead of the bill applying on a blanket basis, there should be an opt-in provision, so this entire protective setup is voluntary, or an opt-out provision. ***Recommendation: Suggested "opt-in" language would be added to proposed §224.46(2)(a) to start at the beginning of the paragraph with "If a customer has elected to have this section apply with respect to the customer's account, then...." An additional section §224.46(2)(i) would be added to set forth the "opt-in" (or alternatively, opt out) process.***

  An opt-in could allow a broader range of safety precautions to be elected by the customer, such as:
  - Limits on cash withdrawals and EFT transfers
  - Geographical limits on transactions
  - "Read only" account access to designated third parties
  - Alerts to designated third parties

- **"Reasonable cause" needs clear standards:** "Reasonable Cause," used throughout the bill, should be specifically defined to include:
  - The transaction is a payment to a known scam.
  - The customer is accompanied by an unknown individual or group of individuals who appear to be exerting undue influence based on observations documented by the financial institution
  - There has been a series of transactions by the customer that are inconsistent with the individual's pattern of spending and have not been explained by the individual after inquiry by the financial institution, and the factual background for this conclusion is supported by the records of the financial institution.

STATE BAR OF WISCONSIN

P.O. Box 7158 | Madison, WI 53707-7158 5302 Eastpark Blvd. | Madison, WI 53718-2101
(800) 728-7788 (608) 257-3838 Fax (608) 257-5502 www.wisbar.org service@wisbar.org

- The individual appears to be in distress at the time of the transaction, which is documented in written notes, and after inquiry by the institution, provides an explanation that leads the institution to conclude that the individual is being subjected to financial abuse or undue influence.
- If the suspected abuser is an agent under a power of attorney, a request has been made of the agent for information and the agent has failed to respond.

The conclusion that "reasonable cause" exists must be documented in notations in the individual's account record, with dates, times observations and the names of all individuals involved in the transaction or determination. This should be provided upon request to the individual or the individual's attorney at no charge immediately upon request.

- **Notice: Change 224.46 (2) to require:**
  - Mandatory and *immediate* notice to the customer in writing. The notice should also include the information on how the individual demands a release.
  - Where the account is a guardianship account, mandatory notice to the court overseeing the guardianship.
  - Where the account is a trust account, mandatory notice to the trustee.
  - Where the account is a business account, mandatory notice to the registered agent for the business.
  - There also needs to be notice to the individual's agent or designated third party, even if the agent or third party is suspected of abuse. While this might seem counterproductive, it is important to remember that the vast majority of power of attorney agents are acting consistent with their fiduciary duty and within the scope of their authority. Thus, **proposed §224.46(3)(d) should be deleted.**

- **Indeterminate "extension" should not be allowed: Proposed §224.46(2)(f) should be deleted.**

- **Required release of hold: Proposed §224.46(2)(c) should amended** to add a requirement that transaction be immediately released upon receipt of correspondence from the customer's attorney explaining that the transaction is the basis of the informed decision of the client or the client's duly appointed agent, or is done upon direction of or in consultation by the client or their duly appointed agent with the attorney. It should also clarify that the requirement for release upon demand of the account owner should not be subject to any extension of the delay.

- **Lack of Training and waiver of liability:** Recommendation: **Waiver of liability provisions at §224.46(2)(h)(3)(f) and (4)(b) should be deleted.** If retained at all, should be modified to apply to a provider who "has completed a course of approved training on identifying financial abuse under §224.26(5)." §224.26(5) or a similar statute should be added to include a training program on identifying financial abuse, to be approved by the Department and provided to financial institutions and financial advisors on a voluntary basis. The training is voluntary, but only financial institutions who have completed the training may avail themselves of the waiver of liability provisions.

- **Additional protections needed:** There is potential for significant financial harm to the client as a result of the imposition of the delay.

  - A customer could be charged with late fees or service charges. These should be 100% waived in cases where the bank has imposed a delay. Customer should be relieved of liability from bank charges or any outside charges resulting from the delay.

- A client attempting to spend down for Medicaid could be found ineligible if funds are still in their account due to the delay. Therefore, if a transaction is suspended in any way, the statute needs to provide that those funds are immediately considered unavailable as long as the freeze is in place. Further, any transaction shall be deemed effective as of the original date, when it is later released.
- It should be clarified that a customer may recover all costs and damages resulting from an inappropriate delay, including attorney fees.
- Where the institution can be held liable, for example by unreasonably delaying a transaction, the liability of the institution for an inappropriate determination should be excluded from any mandatory arbitration provisions that are otherwise part of the financial institution's account agreement.

**AB 45 REGARDING FINANCIAL ADVISORS**

1. **Concern over age alone as a basis for action: Recommendation: § 551.102 (33) "Vulnerable adult" should be changed by removing the language "or an individual who is at least 60 years of age."**

2. **Release on demand of owner:** There is no provision for release upon request of the account owner. **Recommendation: a provision should be added as § 551.413 (3)(d)3** requiring immediate release upon demand of customer, customer's power of attorney agent, or attorney for customer.

3. **Opt-in/out: "Opt-in" language should be added to proposed as § 551.413(3)** to start at the beginning of the paragraph with "If a customer has elected to have this section apply with respect to the customer's account, then…." An additional section §551.413(3)(f) would be added to set forth the "opt-in" (or alternatively, opt out) process.

4. **Lack of Training and waiver of liability:** Recommendation: **Waiver of liability provisions at §551.413(5) should be deleted.** If retained, should be modified to apply to a provider who "has completed a course of approved training on identifying financial abuse under §551.413(7)." §551.413(7) or a similar statute should be added to include a training program on identifying financial abuse, to be approved by the Department and provided to financial institutions and financial advisors on a voluntary basis. Also, liability of the qualified individual for an inappropriate determination should be excluded from any mandatory arbitration provisions that are otherwise part of the financial institution's account agreement.

5. **"Reasonable suspicion" needs clear standards:** Specific standards not be added to define "reasonable suspicion." These include:

    a. The transaction is a payment to a KNOWN scam.

    b. The customer is accompanied by an unknown individual or group of individuals who appear to be exerting undue influence based on observations documented by the qualified individual.

    c. There has been a series of transactions by the customer that are inconsistent with the individual's pattern of spending and have not been explained by the individual after inquiry by the qualified individual, and the factual background for this conclusion is supported by the records of the qualified individual.

    d. The individual appears to be in distress at the time of the transaction, which is documented in written notes, and after inquiry by the qualified individual, provides an explanation that

leads the advisor to conclude that the individual is being subjected to financial abuse or undue influence.

e. If the suspected abuser is an agent under a power of attorney, a request has been made of the agent for information and the agent has failed to respond.

The conclusion that "reasonable suspicion" exists must be documented in notations in the individual's account record, with dates, times observations and the names of all individuals involved in the transaction or determination. This should be provided upon request to the individual or the individual's attorney at no charge immediately upon request.

6. **Notice: Changes to Notice provisions**
   - There should be mandatory and **immediate** notice (not up to a 2 business day delay) to the customer in writing. The notice should also include the information on how the individual demands a release.
   - For a guardianship account, mandatory notice to the court overseeing the guardianship.
   - For a trust account, mandatory notice to the trustee.
   - For a business account, mandatory notice to the registered agent.
   - There also needs to be notice to the individual's agent or designated third party, even if the agent or third party is suspected of abuse. Without notice, the irreparable financial harm created due to an inappropriate act by the financial institution outweighs the effect of "surprise" that could be gained by omission of notice. **The language of proposed § 551.413(3)(a)2.a., stating "except to any party reasonably suspected to have engaged in or attempted financial exploitation of the vulnerable adult" should be deleted.**

7. **Additional protections needed:** There is potential for significant financial harm to the client as a result of the imposition of the delay.

   - A customer could be charged with late fees or service charges. These should be 100% waived in cases where the advisor has imposed a delay. Customer should be relieved of liability from charges or any outside charges resulting from the delay.

Elderly individuals planning for long term care often need to spend money in various ways and rely on those transactions processing quickly. A client attempting to spend down for Medicaid could be found ineligible if funds are still in their account due to the delay. Therefore, if a transaction is suspended in any way, the statute needs to provide that those funds are immediately considered unavailable as long as the freeze is in place. Further, any transaction shall be deemed effective as of the original date, when it is later released.

If you have any additional questions please contact Cale Battles, Government Relations Coordinator, at (608) 695-5686 or cbattles@wisbar.org.

**TO:** **Representative John Spiros, Chair**
**Assembly Committee on Criminal Justice and Public Safety**

**FROM:** **Attorney Carol J. Wessels**

**RE:** AB 44, 45 and 46

**DATE:** Feb. 22, 2021

INTRODUCTION

This testimony is in my personal capacity as an attorney who has practiced elder law in Wisconsin for 29 years. I am in private practice now. In a prior position as the director of the SeniorLAW program at Legal Action of Wisconsin, I secured a groundbreaking grant to provide legal services to victims of elder abuse. It was one of the first of its kind, but I am proud to say that in the years since, that pilot program has grown into a statewide program called the Elder Rights Project. I am on the board of Directors of the National Academy of Elder Law Attorneys, the Board of Directors of the Wisconsin Chapter of the Alzheimer's Association, and a past board chair of, and current advisor to, the Elder and Special Needs Law Section and the Wisconsin Chapter of the National Academy of Elder Law Attorneys. I have represented individuals who were the victims of elder financial abuse, both in my work at the SeniorLAW program and in private practice.

I support AB 44, which has strong consequences and penalties against people accused of elder abuse.

I oppose AB 45 and AB 46. I take this position with an amount of regret, because I hope for a strong support system for victims of elder abuse, and I hope that financial and securities industries can be partners in this effort. But these two bills go about that process in a way that has the potential to create severe, lasting and irreparable financial damage to the individuals they seek to protect, and for that reason, I have no choice but to ask that these bills be substantially changed from their current form before they would ever become law.

In the year since I last submitted testimony opposing the prior version of these bills, the world has changed. One of the items of discourse over the last year has been on the question of what the extent of peoples' individual freedom is and is not, in light of threats to health and safety. These proposed bills are a substantial threat to individual liberty. These bills up-end a competent person's right to manage their finances, to direct their investments, and to choose who their power of attorney agent is and have that authority enforced. Those rights are turned over into the control of financial institutions, allowing government-sanctioned interference with an individual's hard-earned funds and investments. Any person who is 60 years of age or over will be subject to government-sanctioned restrictions on their financial freedom and will have literally no recourse and no way to opt out of this interference. Any committee members who

are approaching or over age 60 ought to pay special attention and start the process of moving your accounts and investments out of state if these bills pass. Here is how these bills would affect you (and any of your constituents who are 60 or over.)

- It starts with age. The bills define a "vulnerable adult' to include *any individual who is 60 or over* – there is no test for whether the person is mentally incapable of handling their finances. As long as you are over 60, you will lose your right to control your financial affairs because at any time, a financial institution questioning a transaction you are trying to complete, could interfere and put a hold on it. A financial advisor could similarly interfere with your investments. Just because you are 60.
- It creates delays in what you want to do with your finances. The bills allow financial service providers to delay financial transactions for what can be significant periods of time, causing irreparable financial harm. Let's say you are trying to close a purchase or a stock investment, a very important one but something you have not done before. If you are 60 or over, the bank or financial advisor could flag this as suspicious and possible abuse. That would result in a hold on what you are doing, potentially the loss of the financial opportunity you were trying to pursue.
- It wreaks havoc with your carefully drafted estate plan. You went to a lawyer who drew up detailed financial powers of attorney to cover all bases for you. You chose your son to be your agent because you trust him completely. You know him better than any bank. If you become incapacitated, your choice of your son as your agent can be second-guessed by the local bank teller who can refuse to honor your financial powers of attorney if they believe he is acting suspiciously, even if he is following careful instructions you gave him on how to handle your finances and investments when you had the ability to do so. What is worse, if the bank chooses to ignore your power of attorney or put a hold on the transaction your son is completing, they do not even have to tell him. You are incapacitated, and he is kept out of the loop. Your finances go into a downward spiral as nobody has control to do anything, and only the bank knows why. Do you trust the bank more than the person you choose as your agent?
- There is no relief from the penalties and fees, and other financial damage that will happen as a result of these delayed and refused transactions. While the bank was busy ignoring your power of attorney and refusing to let your son act as your agent, bills went unpaid, late fees were accrued, a major investment opportunity was lost, your credit score was damaged, possibly your son had to go to court to have you declared legally incompetent and have the court appoint him as your guardian. This would take weeks and sometimes months. And nobody can be held responsible for the cost of all this this except you. You end up holding the bag for the havoc that the financial institution wreaked when it interfered with your financial choices.

- Meanwhile, if you or your spouse were in a nursing home, and the transactions that the bank suspended were necessary steps for you or your spouse to qualify for Medicaid, the bills contain no protections requiring those frozen funds to be considered unavailable in the Medicaid application. So during the delays caused by the holds, or the delays caused by the refusal of the power of attorney, you can be accruing debt to the nursing home in the amount of tens of thousands of dollars, with no recourse whatsoever.
- The government-sanctioned power granted to the financial institutions will come free of any requirement that their staff actually get trained to understand what is and is not elder abuse. Do you feel the government should put the power to interfere with an older citizen's financial freedom in the hands of untrained individuals? If you allow this bill to pass as written, then you do. Perhaps they assure you they will be trained even if it is not in the law. When was the last time you completely trusted a financial institution to do the right thing without a mandate? Let's be honest.
- Your constituents will ask, "Well I heard about how the government is allowing banks to mess with my financial transactions. I want complete control over my finances. I do not want this interference, no matter what. I would rather risk being a victim of abuse than give up my financial freedom. And I have the right to make that choice. How can I get out of these requirements?" If you let the bills pass as is, you will have to say, "No, you do not have the right to make that choice, the government took it away when you turned 60. There is no way to opt out. This is forced upon you whether you want it or not."
- And finally, the bills cloak the financial institutions and investment advisors in immunity and lower the standard of care applied to those institutions. So after all is said and done, you truly have no way to recover the losses you suffer when the institution takes action under these laws, no matter how much damage it causes you, as long as the institution acted in "good faith" even if it was wrong.

<u>THE GOOD PARTS</u>

There is some good in these bills, and as an advocate for victims of abuse I wish to point this out. Both AB 45 and AB 46 contain provisions for the reporting of suspected financial abuse to the appropriate authorities. On balance, even though the reporting can be seen as an intrusion on an individual's privacy, particularly in the cases where no abuse is actually occurring, it is better to encourage the reporting process because it can result in action where there is a legitimate concern.

Reporting suspected financial abuse is already a protected activity under federal law. As recognized by the Federal Senior SAFE Act of 2018, (Section 303 of PL 115-174 (05/24/2018), financial institutions, securities advisors and the employees of those institutions who *receive appropriate training* and make a

report of suspected financial abuse to the appropriate agencies are immune from civil and administrative liability. (Interestingly, the Senior SAFE act applies an age of 65 to its provisions.)

What concerns me about even the good part of these state bills, is the lack of any training requirement that would help appropriately identify elder financial exploitation and also provide training on properly and respectfully handling the situation during the process of reporting.

SOME SPECIFIC PROVISIONS OF CONCERN

If a customer is 60, they are "vulnerable." Both AB 45 and AB 46 contain troubling definitions of a "vulnerable adult." "Vulnerable adult" in both bills includes a definition that is strictly based on age, which is *60 or older.* This is five years younger than even the model bill from the Securities Industry itself, the North American Securities Administrators Association ("NASAA") (NASAA's proposal can be found at http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf). It is also five years younger than the Senior SAFE act.

Both bills also include a non-age-based definition that incorporates Wis. Stat. §55.01(1e), which is not based on age but instead includes the requirement of a physical or mental condition that substantially impairs the individual's ability to care for his or her needs. That is the sole definition that should be used.

Having a standard age, especially one as young as this, without objective evidence that the person is unable to care for their own financial matters, or is truly vulnerable to exploitation or influence, is an insult to the autonomy of most individuals. It is ageist. Ageism is the stereotyping, prejudice, and discrimination against people on the basis of their age. Ageism is an insidious practice which has harmful effects on older adults. Even if the standard age were 90, it's time to recognize that age alone is not a sign of vulnerability. I have worked with 90+ year old clients who are "sharp as a tack" and certainly capable of managing their own financial decisions. The government should not sanction a loss of financial freedom for a competent senior just because of their age.

Bear in mind that having a clear age *is* appropriate for the provisions related to penalties for committing elder abuse, since it can then provide clear notice to an alleged defendant. But in the context of these bills, we are also talking about when a financial institution can take action that affects an *innocent* individual's finances, and the action may actually be an error that could have a significant negative effect on that innocent individual. In *that* context, applying a strict age, without evidence of impairment, is inappropriate and ageist.

In considering this testimony, I would ask you to consider the *possibility* that the bank or investment advisor may act in error. If you think that financial

institutions never make mistakes, ask yourselves why there are entire books of regulation on the issue. I can tell you it has happened to my clients.

Account transactions can be frozen for long periods of time: Both bills allow the financial institution or securities advisor to freeze ("delay") a transaction or series of transactions based on "reasonable cause" to believe that financial exploitation is occurring, has occurred or may occur. After an initial period of delay, both bills allow those holds to be extended. AB 46 is particularly troubling wince the extension is indefinite. While these freezes are in place, the customer is potentially incurring bounced check fees, late fees or other penalties, none of which either bill requires to be waived or paid by the institution.

Also, the delays could have an irreparable effect in situations where a person is in the process of applying for Medicaid. Medicaid eligibility is a complicated process that depends on timing with respect to the consideration of a person's financial eligibility. If a transaction that is part of a person's spend down process for Medicaid is delayed for any length of time, it may make the difference between qualifying or not qualifying for Medicaid in that month. This could cost a nursing home resident over $14,000. There is nothing in either bill that protects the consumer from this consequence.

A Durable Power of Attorney Can be Disregarded: AB 46 eliminates well-established consumer protections that were put into Wisconsin's financial power of attorney law in 2009. The bill allows a financial provider to disregard a customer's durable power of attorney (DPOA) if they believe the agent is perpetrating financial abuse. The ability of banks to refuse DPOAs is exactly what Wis. Stat. § 244.20 -- the statutory prohibition on refusing a power of attorney -- was intended to remedy after a long history of financial institutions refusing to accept powers of attorney for inappropriate reasons, such as the fact that the documents was not on the bank's preferred form or was more than 6 months old. § 244.20 was the product of hard work by elder law attorneys in Wisconsin and protects individuals against arbitrary refusal of a properly drafted power of attorney. Proposed § 224.46(4) does an end run around the protections of this section.

The Consumer Financial Protection Bureau (CPFB), in its 2016 report entitled, "Advisory for financial institutions on preventing and responding to elder financial exploitation"[1] recommended that to prevent exploitation, financial institutions need to:

> **Honor powers of attorney.** A financial institution's refusal to honor a valid power of attorney can create hardships for account holders who need

[1] CPFB, *Advisory for financial institutions on preventing and responding to elder financial exploitation*, 2016, located online here: https://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf

designated surrogates to act on their behalf. Financial institutions should establish procedures to ensure that the institution makes prompt decisions on whether to accept the power of attorney, that qualified staff make decisions based only on state law and other appropriate considerations and that frontline staff recognize red flags for power of attorney abuse.

I work with many families where an individual, often a person with Alzheimer's, is in a nursing home and a financial agent such as a child is doing the work. In this scenario, the proposed law would allow the financial institution to disregard the power of attorney, and potentially delay transactions, without advising the agent if the institution suspected the agent was involved in abuse. While at first glance, this might seem completely appropriate, it is critical to think through what will happen if the bank teller is mistaken. Consider this example:

*Daughter is agent under durable power of attorney, drafted by an elder law attorney while mom was not incapacitated. Mom is now in the later stages of Alzheimer's and cannot comprehend financial matters. Daughter is following the plan put in place by mom and the attorney prior to mom's incapacity. Daughter loaned mom a considerable amount of money over the years to help her stay in her home. The agreement was that this would be repaid if mom had to be in a nursing home. Mom is now in a nursing home, and daughter writes a check to herself, for less than the amount she is owed because mom's funds are limited. Bank teller finds this check to daughter suspicious and determines the power of attorney should be disregarded and the transaction delayed. However, the bank sends a notice to mom, who is incapacitated, and not to the daughter because she is – incorrectly – suspected to be the abuser. It is weeks before daughter can figure out what is going on, because bank refuses to speak with daughter. Meanwhile, because the funds were not spent, mom was ineligible for Medicaid for a month, costing $14,000 in nursing home fees. This creates significant damage in the plan that was established while mom was competent.*

***This is a scenario that is highly likely to happen if the law is enacted as written.***

Reasonable cause is not defined: Both AB 45 and AB 46 allow a transaction to be frozen if the provider has "reasonable cause" to believe that financial exploitation has occurred, is occurring or is about to occur. However, there is no definition for "reasonable cause." There is no requirement that the basis for the decision be documented in writing and provided to the customer.

No Training: What is even worse, is that neither bill requires the financial services provider to receive *any* training regarding identifying financial abuse or elder abuse. If these bills pass as currently written, untrained individuals will be making judgment calls on an undefined standard, and exercising control over an individual's money in a way that could have severe and lasting damage.

The CPFB in its 2016 report also recommended that banks and financial institutions:

> **Train management and staff to prevent, detect, and respond to elder financial exploitation.** Financial institutions should train employees regularly and frequently, and should tailor training to specific staff roles. Key topics for training include:
>
> - Clear and nuanced definition of elder financial exploitation
> - Warning signs that may signal financial exploitation, including behavioral and transactional indicators of risk, and
> - Action steps to prevent exploitation and respond to suspicious events, including actionable tips for interacting with account holders, steps for reporting to authorities, and communication with trusted third parties.

The lack of a robust training requirement in these bills is without any valid explanation, and even directly against the provisions of the Senior SAFE Act which requires training as a condition of the immunity provided to institutions for reporting abuse.

No opt-out provision: There is no provision in either bill for a customer to knowingly "opt out" of this "protection" or better yet, to knowingly "opt-in." Customers should be able to decline the "protections" that involve interference with the person's finances.

Immunity: Both bills relieve the financial institutions of any liability if they are acting "in good faith and exercising reasonable care" under these provisions. The immunity related to financial institutions extends to a *failure to act* as well. This author believes that this lowers standards of care, such as negligence or breach of fiduciary duty, that would otherwise apply to a financial institution or securities advisor. It is no surprise that the financial industry played a large role in the development of this legislation.

CONCLUSION

Stopping financial exploitation of elders is an important protection to provide. These two bills show that the issue is being considered, and that is good. But the technical aspects of the bills are flawed in ways that will leave the consumer with irreparable financial damage, while at the same time largely granting immunity to the financial institutions for their actions that may cause this harm.

I am aware that bills like the two before you have in various forms been passed in some other states. There are also states that have done better than this. In Wisconsin, we can do better. Wisconsin has a history of taking the lead to protect the rights of elders. Consider our guardianship bills, and the original elder abuse law that was enacted in Chapter 46. These both are deliberately structured to protect autonomy and ensure that the people tasked with applying the law are

properly trained. We can do this better too. Substantial work needs to be done to revise these bills. I am aware that the State Bar of Wisconsin has submitted a list of proposed improvements for both of these bills. These should be implemented before the bills pass.

Please do not hesitate to reach out to me at my office if any of the committee members has follow-up questions or concerns. I regret that I am unable to attend in person.

Thank you.

Carol J. Wessels

Home: 128 Aqua View Rd., Cedarburg WI 53012

Office:

Wessels & Liebau LLC
11649 N. Port Washington Rd., #210 Mequon WI 53092.
Phone 262-264-7702
Email: carol@wesselsllc.com

AARP Wisconsin

222 West Washington Ave Suite 600 | Madison WI 53703
866-448-3611 | Fax: 608-251-7612
aarp.org/wi | wistate@aarp.org | twitter: @aarpwi
facebook.com/wi

# Assembly Committee on Criminal Justice and Public Safety
# February 24, 2021
# Madison WI
# Helen Marks Dicks

Good Morning. I am Helen Marks Dicks, State Issues Advocacy Director for AARP Wisconsin, which has over 840,000 members here in Wisconsin. We advocate on behalf of Wisconsin's 50 and older population. The issue of elder abuse and neglect is of grave concern to us and we greatly appreciate the attention being paid to this critical issue. I am going to address AB44, AB45 and AB46 in one document. We support all three of these bills as we did this legislation last session and continue to do so. The situation is not improving and the need for action is even greater.

AARP supports AB44, AB45 and AB46 as needed steps to help curb abuse, neglect, and financial exploitation of Wisconsin's elders. There has been a 160% increase in reported elder abuse from 2001 to 2017. Even with this startling statistic we know most elder abuse goes unreported. It is estimated that 47% of adults with dementia suffer from some form of abuse. Elder abuse and neglect triple the likelihood of a victim being hospitalized or dying prematurely.

Financial exploitation is one of the most common forms of elder abuse and has a life-altering effect on Wisconsin residents' livelihoods with untold millions of dollars exploited, extorted, or stolen from older adults each year in Wisconsin. While nearly $3 billion was reported lost to financial elder abuse in the USA, a study in New York State found that only 2% of elder financial exploitation cases were reported to law enforcement, suggesting that the actual number impact on older adult's financial wellbeing is far higher than official counts. Often victims of elder abuse have little or no chance of financial recovery and the rest of their lives might be spent in a compromised financial position or even in poverty.

These would allow and encourage financial service providers under the Wisconsin Uniform Security Law and other banking regulations to proactively protect the finances of elderly clients by refusing or delaying suspicious transactions for a limited time and

increasing communication and cooperation with law enforcement, social service providers, and trusted advisors. Older people have less time and ability to recover financial losses so it is important to prevent the loss in the first place. They freeze the assets of the suspected abuser. They allow for involvement by law enforcement and Adult Protective Services. They attempt to prevent the harm from happening.

I personally have one concern about all of the bills. That is the assumption of vulnerability and decreased judgement at age 60. No one should be the victim of financial exploitation or any type of abuse regardless of age and I object to the ageist assumption of cognitive decline and judgement at the age of 60. Mere age should never be used as a measure of capacity. I do recognize the value in creating new tools to deal with elder abuse and allowing them to be used where appropriate.

I am forgiving the ageism in the use of age 60 by attributing good intentions to the sponsors and recognizing their attempt to conform to other statutes which deal with elder abuse so my concerns will in no way diminish AARP's support of the bills. I believe this ageist assumption can be dealt with in a case-to-case review.

AARP Wisconsin strongly encourages the committee to vote in favor of all three bills: AB44, AB45 and AB46 to protect Wisconsin's victims of elder abuse and financial exploitation. Thank you for your time and attention. As always I would be glad to answer any questions.

I can be reached at hmdicks@aarp.org or by phone at 608-332-9542. Thank you.

Greater Wisconsin
Agency on Aging Resources, Inc.

Date: February 24, 2021

To: Chairman Spiros, Vice-Chairman Horlacher, and members of the Assembly Committee on Criminal Justice and Public Safety

From: Janet L. Zander, Advocacy & Public Policy Coordinator

Re: **Support for AB 44** – increased penalties for crimes against elder person; restraining orders for elder persons; freezing assets of a defendant charged with financial exploitation of an elder person; sexual assault of an elder person; physical abuse of an elder person; and providing a penalty.

**For Information Only AB 45** – financial exploitation of vulnerable adults with securities accounts, violations of the Wisconsin Uniform Securities Law, granting rule-making authority, and providing a penalty.

**For Information Only AB 46** – financial exploitation of vulnerable adults

The Greater Wisconsin Agency on Aging Resources, Inc. (GWAAR) is a nonprofit agency committed to supporting the successful delivery of aging programs and services in our service area consisting of 70 counties (all but Dane and Milwaukee) and 11 tribes in Wisconsin. We are one of three Area Agencies on Aging in Wisconsin. We provide lead aging agencies in our service area with training, technical assistance, and advocacy to ensure the availability and quality of programs and services to meet the changing needs of older people in Wisconsin. Our mission is to deliver innovative support to lead aging agencies as we work together to promote, protect, and enhance the well-being of older people in Wisconsin. There are over one million adults age 60 and older residing in our service area.

Thank you for this opportunity to share testimony on AB 44, 45, and 46. The number of reported elder abuse cases in the state continues to rise, increasing by nearly 70% percent from 2009[1] to 2019 when there were 8,929 reported cases.[2] The actual number of elder abuse cases is likely much higher, as fear and embarrassment lead to underreporting of abuse. According to the National Council on Aging approximately 1 in 10 Americans age 60 and older have experienced some form of elder abuse.[3]

[1] Wisconsin Coalition Against Domestic Violence, Volume 29, Issue 2; https://www.endabusewi.org/wp-content/uploads/2018/11/Chronicles-29-2.pdf
[2] Wisconsin's Annual Elder Abuse and Neglect Report: 2019; https://www.dhs.wisconsin.gov/publications/p00124-19.pdf
[3] https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/

The consequences of elder abuse can be devastating, placing abused elders at increased risk of hospitalization, nursing home admission, and even death. Given the significant negative impacts of elder abuse, GWAAR supports AB 44 which increases the penalties for crimes against older people and freezes or seizes assets from a defendant who has been charged with a financial exploitation crime against an older adult to aid in the payment of restitution. Additionally, we support changes made in this bill that would allow an older adult seeking a domestic violence, individual-at-risk, or harassment restraining order to appear in court by phone or live-video, thereby minimizing any further negative impacts on the victim's health, independence, and dignity.

Financial exploitation can occur at any stage of the lifespan; however, older adults are targeted disproportionately. Health related effects of aging, higher income levels, lower levels of connectedness to the community and a reduced probability of reporting financial exploitation can all make older adults more susceptible to financial exploitation. Prevalence of elder financial exploitation ranges from 2.7 percent to 6.6 percent. The true numbers are likely much higher, as like other types of abuse, most incidents of elder financial exploitation go unreported. Nationally, estimated losses related to elder fraud/abuse range from $2.9 billion to $36.5 billion a year.[4] Despite the high number of suspected incidents of elder financial exploitation, most adults age 60 and older are in relatively good health, function independently, and are not in need of additional oversight from their financial institutions. While we wholeheartedly support the efforts of financial institutions to provide information and services to consumers (of all ages) to enhance protections against financial exploitation, we feel it is imperative these efforts strike the right balance between autonomy and protection.

AB 45 & AB 46:

Both AB 45 and AB 46 pertain to the role of financial service providers in protecting vulnerable adults against financial exploitation. GWAAR believes that financial institutions can provide enhanced protection against the risk of elder financial exploitation while still maintaining the balance between autonomy and protection. Through GWAAR's Elder Law and Advocacy Center and the Guardianship Support Center, GWAAR attorneys have experienced numerous incidents in which financial institutions would not honor valid Powers of Attorney for Finances (POA-F). In one situation, the daughter was the POA-F agent for her mother and needed to access funds in the mother's savings account to pay for her mom's nursing home care (as funds in the mom's checking account had been depleted) and finalize her mom's funeral/burial funds, but the daughter's attempts to withdraw the funds were repeatedly denied. These funds needed to be spent in order for her mother to meet the eligibility requirements ($2,000 asset limit) for Medicaid. Medicaid funding was needed to continue to pay for her mom's nursing home care. After 9 months, the mom was finally approved for Medicaid as the local Income Maintenance Consortia deemed the savings account as "unavailable" since multiple efforts (including efforts by the local Elder Benefit Specialist and GWAAR attorney) to help the daughter access the savings account funds failed. In another case involving an adult daughter POA-F, the bank refused to accept the POA-F and told the daughter her mother would need to sign a signature card to make the POA-F agent a joint account holder (this should not have been necessary with a POA-F). The mother was in a nursing home for rehabilitation

[4] Older Americans Hit Hard by Financial Fraud, AARP, February 29, 2019; https://www.aarp.org/money/scams-fraud/info-2019/cfpb-report-financial-elder-abuse.html, accessed on Feb. 24, 2021.

and unable to receive visitors (due to the COVID-19 pandemic) making it very difficult to get the card signed. Additionally, the mom may no longer have had the capacity to sign the card, which is why people plan ahead and create a POA-F. GWAAR recognizes financial abuse and exploitation deprive older adults of their resources and ultimately their independence, and therefore; we support balanced measures to provide precautions while still respecting individuals' choices. Documentation of "reasonable cause" and establishing an ascertainable standard for when and under what circumstances a POA-F can be questioned would be a great place to start. In addition, consumers should be protected from significant financial harm resulting from a delayed transaction. We recommend the following additional protections be added:

- All late fees or service charges should be waived.
- A person attempting to spend down for Medicaid could be found ineligible if funds are still in their account due to the delay. Funds frozen or delayed should be considered unavailable for Medicaid as long as the freeze is in place.
- Customer shall be able to recover all costs and damages resulting from an inappropriate delay, including attorney fees.

Thank you for your consideration of these comments supporting AB 44 and providing additional information on AB 45 and AB 46. We appreciate the interest in and efforts of policy makers to protect older adults against elder abuse, neglect, and exploitation and to address this growing problem. We look forward to continuing to work with you on policies that improve the quality of life of older people in Wisconsin.

Contact:
Janet Zander
Advocacy & Public Policy Coordinator, MPA, CSW
Greater Wisconsin Agency on Aging Resources
janet.zander@gwaar.org
(715) 677-6723 or (608) 228-7253 (cell)

**Chairman, Members of the Committee:**

I had the privilege of serving on the Elder Abuse Task Force that developed the bills introduced as 2021 AB 45 and 2021 AB 46. Our group spent many hours collectively and individually discussing, considering, drafting, and revising the language. What you have before you today is the culmination of that effort. I believe that these bills, if enacted, will provide an effective tool to prevent and remedy financial exploitation in our State. As an Assistant Corporation Counsel since 2012, I have often seen the difficulties in preventing, reporting, and investigating financial exploitation of our vulnerable adults. Others will provide oral and written statements detailing those difficulties facing our law enforcement agencies, County Adult Protective Services, and financial service providers and brokers, in preventing, reporting, and investigating financial exploitation.

The purpose of my written statement, however, is to provide a response to what I anticipate to be objections made against the bills. The Elder Law and Special Needs Section of the State Bar of Wisconsin ("the Section") has voted to oppose these bills. Based on previous verbal and written statements made by some of the Section Board members who oppose these bills, my written statement identifies the Section's likely objections, along with the anticipated reasoning for those objections and the Section's proposed solutions. Following that, I provide my response to those objections. I trust that after you have heard and read all the statements made today, you will have a fuller understanding of these bills, recognize the important need for these bills, and vote to recommend for passage.

While this statement recognizes that the pair of bills cover separate spheres of financial transactions, this statement will discuss the objections and provide responses as it relates to 2021 AB 46. This is done for the purpose of simplifying the comments. As a general matter, the objections, stated reasons for the objections, stated proposed solutions, and the responses to the objections can be applied to both bills.

Section Objection 1: "Vulnerable adult" is defined as anyone over 60. Age alone is not a sufficient indication that the person is vulnerable.

Stated Reasoning for Objection 1: Most who are over 60 are capable of making decisions about their finances and do not need the threat of oversight by financial institutions. Using an age alone without objective evidence that the person is unable to manage their finances or is vulnerable to exploitation is ageist.

Stated Proposed Solution to Objection 1: Use the definition in Wisconsin's protective services law of "any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." Delete "or an individual who is at least 60 years of age" language.

Response to Objection 1: This objection from the Section fails to consider how the term

"vulnerable adult" is used in the context of the bill itself and fails to realize how this bill would fit into the broader statutory protections for vulnerable adults.

First, the Objection presumes that because a "vulnerable adult" includes everyone over 60, then financial service providers will be able to block transactions merely because the individual is over 60. This is a faulty presumption. The bill requires not merely a transaction involving a vulnerable adult, but also that the transaction involves the financial exploitation of that vulnerable adult. AB 46 at Page 4, L13-15. (The requirement of reasonable cause to suspect will be covered in 2A, below).

Second, the Objection does not recognize that "age 60" is an age demarcation used throughout Wisconsin Statutes in vulnerable adult law contexts. It is necessary that the laws that protect individuals in our society are consistent so that gaps in protection can be minimized and confusion about a law's applicability are removed. Wisconsin has a strong system for protecting vulnerable adults. A system that divides vulnerable adults into two categories: (1) adults, regardless of age, who have a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who have experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation and (2) adults, aged 60 or more, who have experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. Wis. Stat. §§ 46.90, 55.043, 813.123. If a financial service provider wanted to refuse or delay a transaction, it must involve either an adult at risk, which is the first category, or an adult, aged 60 or more, and that financial exploitation of that adult, either occurred, attempting, or being attempted, which falls under the second category.

If the Stated Proposed Solution is adopted, a gap in protection under Wisconsin law will result. If this law were to only protect "adults at risk," as proposed by the Section, then a 62 year old, who did not have physical or mental disability that impairs his or her ability to care for his or her needs, would not be protected. If there were financial exploitation of that individual, then, under the Section's proposal, the financial service provider cannot refuse or delay the transaction and would have no obligation to report the financial exploitation to the elder adult at risk agency. However, the current language of the bills would allow, but not require, the financial service provider to refuse or delay the transaction to allow for investigation and would require it to report the financial exploitation to the elder adult at risk agency. In sum, under the current law and the Section's proposal, the individual in this paragraph is not protected from financial exploitation, but these bills would help prevent financial exploitation.

In the context of the broader vulnerable adult systems, maintaining the term "vulnerable adult" is appropriate. Moreover, defining the term to include the two categories of vulnerable adults used in other, related statutes, allows for consistency in application and understanding.

As an aside, it is interesting to note that the Section has voted to oppose these two bills, in part, because "vulnerable adult" is defined here to include individuals who are 60 years of age or older, but they have voted to support 2021 AB 44, which would create several new provisions defining an "elder person" as "any individual who is 60 years of age or older."

Section Objection 2A: Reasonable Cause is not defined.

Stated Reasoning for Objection 2: Reasonable cause is an extremely vague term that could mean whatever the financial service provider says it is.

Stated Proposed Solution to Objection 2: Add clear definitions of reasonable cause and require that the facts be documented in writing. Specific standards should include: (1) the transaction is a payment to a known scam; (2) the customer is accompanied by an unknown individual or group who appear to be exerting undue influence based on observations of the financial service provider; (3) there is a series of transactions by the customer that are inconsistent with the pattern of spending and have not been explained by the individual and the financial records support that pattern and inconsistency; (4) the individual appears to be in distressed at the time of the transaction and the financial service provider concludes after inquiry that the individual is subject to financial exploitation or undue influence; or (5) if the suspected abuser is an agent under a power of attorney, the agent has failed to respond to a request for information. Minimum standards for documenting in writing include: dates, times, observations, and the names of all individuals involved in the transaction. These notations should be provided to the individual or individual's attorney at no charge immediately upon request.

Response to Objection 2: This objection fails to understand that "reasonable cause" as a standard for acting is well-established in Wisconsin law and that reasonable cause, by its very nature, cannot be captured as a list of examples. Beginning in Terry v. Ohio, 392 U.S. 1 (1968) and continuing through countless cases, reasonable cause is an objective test that requires that a reasonable person, knowing the same facts as known to the actor, and under the totality of the circumstances, would reasonably conclude the same thing as the actor. *See* State v. Post, 2007 WI 60, ¶26, 301 Wis. 2d 1 ("[W]e maintain the well-established principle that . . . whether there was reasonable suspicion . . . [is] based on the totality of the circumstances.").

While the Stated Proposed Solution does provide examples of when a financial service provider may have reasonable cause sufficient to refuse or delay a transaction, it fails to encompass the variety or the complexity of financial exploitation. By way of brief examples, the first two proposed standards demonstrate a lack of familiarity with financial exploitation. Most scams are not known until after they happen. While "sweetheart scams" exist as a type of financial exploitation, any individual that has had to investigate, prosecute, or attempt to remedy sweetheart scams can tell you that no two sweetheart scams are the same and new scams are invented. Some use Facebook, others use email. Some involve supposed foreign individuals, some involve supposed locals. Some ask for large amounts of money, some small amounts; others ask for vehicles, electronics, or other personal property. Likewise, most in person financial exploitation is done not by an "unknown individual or group," but by family and close friends that are often known to the financial service provider. The fifth proposed standard fails to include other fiduciaries or trusted individuals (trustee, guardians, care givers, etc), who are sometimes the perpetrator. The Section's proposed standards are extremely limited and reflect that it is impossible to capture every situation that may raise to "reasonable cause."

Section Objection 2B: The bill does not require Financial Service Providers to receive any training on financial abuse or elder abuse.

Stated Reasoning for Objection 2B: Untrained individuals are making judgment calls on an undefined standard and exercising control over the customer's money.

Stated Proposed Solution to Objection 2B: Make waiver of liability provisions only available to those financial service providers who have availed themselves of training programs approved by DFI.

Response to Objection 2B: Setting aside whether mandatory training for financial service providers should be done by legislation or by administrative rule and also setting aside what any approved training would consist of, this objection appears to be based on an assumption that financial service providers would not voluntarily train their employees on financial exploitation. The Wisconsin Bankers Association already is taking a proactive approach to preventing financial exploitation.

Before these bills were even introduced in the last session, the Wisconsin Bankers Association had prepared training videos for its members to use in training their employees for free. Elder Financial Abuse Awareness Video for Wisconsin Banks, Wisconsin Bankers Association, https://www.wisbank.com/elder-financial-abuse/ (last accessed February 24, 2021); Elder Financial Abuse Awareness, uploaded August 15, 2018, Wisconsin Bankers Association, https://www.youtube.com/watch?v=nwcHkIhLSf4 (last accessed February 24, 2021).

Section Objection 3: Transactions can be frozen for long periods of time. While the initial period is 5 days, it can be extended indefinitely.

Stated Reasoning for Objection 3: Unilateral extensions by the financial service provider may result in bounced check fees, late fees, or other penalties. The investigation should not be handled by the financial service provider, but by law enforcement and County Adult Protective Services. 5 days is sufficient for a report to be made and an investigation by those entities to commence.

Stated Proposed Solution to Objection 3: 5 days should be the absolute maximum, unless extended by a court based on a petition by APS or law enforcement.

Response to Objection 3: Setting aside whether APS or law enforcement would have standing to bring such a petition (there presently is no statutory authority to do so), this Objection fails to understand the totality of the provisions regarding the length of the refusal or delay of the transaction.

The bill specifies that the refusal or delay expires upon the earliest of any of the following: (1) 5 business days after the initial refusal or delay, unless a court orders it terminated earlier; (2) when the financial service provider has reason to believe that financial exploitation will not result from the transaction; or (3) when the customer requesting the transaction requests that the transaction continue after being informed about the potential risk, unless the customer is the suspected perpetrator of financial exploitation. AB 46 at Page 6, L. 2-12. Clearly, the bill structures the length of the delay to be as short as possible. The delay may be extended only if the financial service provider has a reasonable suspicion that additional time is needed to investigate or if a court orders the delay to continue. AB 46 at Page 6, L. 13-20.

Taken together, the provisions regarding the length of the delay clearly require the length of the delay to be as short as possible. Any extension cannot be from the financial service provider wanting to control the money, rather any extension must be from a reasonable belief that the transaction is financial exploitation and more time is needed to investigate.

To clarify another objection by the Section, the statute does not require the financial service provider to investigate the transaction, although they may. Rather, the language is written to accommodate an investigation by County APS or law enforcement, which, as the Objection points out, are better equipped to conduct those investigations. Again, once that investigation reveals that no financial exploitation is involved, the delay terminates.

Further, if the individual, with the assistance of an attorney, accountant, or other professional, will be conducting one or more financial transactions that might appear to be financial exploitation, then that individual or the professionals involved can communicate with the financial service to provider prior to the transaction occurring to prevent any delay.

After preparing this written statement, but before submission, I saw that an amendment has been filed that would change the 5 days to 15 days. The bills still require that any delay be as short as possible. The comments here are as applicable whether the number is 5 or 15.

Section Objection 4: This bill would allow financial service providers to refuse to honor a valid financial power of attorney if they believe the agent is perpetrating the financial exploitation. The language allowing financial service providers to refuse to honor financial powers of attorney will lead to financial service providers refusing to honor valid financial powers of attorney for inappropriate reasons, as they did prior to Wis. Stat. § 244.20.

Stated Reasoning for Objection 4: Prior to Wis. Stat. § 244.20, financial services providers refused to honor financial powers of attorney for inappropriate reasons, like not using the bank's form or having a document that was more than 6 months old. Wis. Stat. § 244.20 corrected that and the proposed language in the bill will provide an end-around of those protections in Wis. Stat. § 244.20.

Stated Proposed Solution to Objection 4: Delete that provision entirely.

Response to Objection 4: This objection fails to realize that financial services providers already may refuse to honor a financial power of attorney under Wis. Stat. § 244.20 and that the provision in this bill is substantially similar to Wis. Stat. § 244.20.

Wis. Stat. § 244.20 allows a person to refuse to accept an acknowledged financial power of attorney if any of several listed circumstances exist, including if a requested transaction with the agent that would be inconsistent with federal or state law, if there is a belief that the agent does not have the authority to perform the act requested, or if the person has made or has actual knowledge that another person has made a report to County APS stating a good faith belief that the principal may be subject to financial exploitation by the agent or a person acting for or with the agent. Wis. Stat. § 244.20(1)(b), (e), (f).

Under these existing provisions, if the financial service provider has reasonable cause to suspect that the transaction by the agent involves financial exploitation, which is theft and illegal, then that transaction would be inconsistent with federal or state law. Likewise, an agent does not have the authority to commit financial exploitation because that action cannot be permitted by a financial power of attorney document. Thus, under existing law, a financial service provider already can refuse to accept a financial power of attorney under limited circumstances. These bills, then, cannot be an end-around. Rather, these bills would supplement Wis. Stat. 244.20.

The purpose of the provisions in Wis. Stat. § 244.20 and this bill regarding refusal of the financial power of attorney are the same: a person, including a financial service provider, should be able to refuse to accept a power of attorney if the agent is attempting to use that document or authority to financially exploit the principal. To accomplish that purpose, Wis. Stat. § 244.20 focuses on the type of the transaction, on the document itself, and on the agent. Wis. Stat. § 244.20 does not expressly allow for refusing to accept a power of attorney because the principal is vulnerable and the transaction would exploited the principal. These bills would fill that gap.

These bills authorize, but not require, a financial service provider to refuse to accept an acknowledged financial power of attorney if the principal is a vulnerable adult and there is reasonable cause to suspect that the agent or a person acting for or with the agent is engaged in or may engage in the financial exploitation of the vulnerable adult. AB 46 at Page 8, L. 8-13.

Section Objection 5: There is no provision that allows the customer to opt-in to the program or to opt-out.

Stated Reasoning for Objection 5: People have a right to control their finances and make decisions about what to do with their money. A person should be able to consider the risks and to knowingly accept the risk that a questionable transaction may go through.

Stated Proposed Solution to Objection 5: "If a customer has elected to have this section apply with respect to the customer's account, then . . ."

Response to Objection 5: The premise for the Objection is faulty. Financial exploitation is not a "questionable transaction." It is a crime. The implication from the Section's reasoning is that an individual, whether or not a vulnerable adult, should be free to accept the risk that someone will commit a crime against them. These bills are not about controlling the individual's money. These bills say if there is a transaction that, under the totality of the circumstances, looks like financial exploitation, then the financial service provider may refuse or delay that transaction only as long as necessary to determine if it is financial exploitation.

As to the idea that an opt-in or an opt-out provision advances an individual's autonomy, consider that if the individual has a financial power of attorney, the agent almost certainly will have the authority to decide whether to opt-out of or decline the protections for the principal. In other words, the agent would have the authority to decide to prevent the financial service provider from having the ability to delay the agent's transactions of the principal's money.

In sum, these bills are not designed to be a blank check for financial service providers and brokers to refuse and delay transactions arbitrarily. These bills are drafted to provide financial service providers and brokers with tools to help prevent financial exploitation before it happens. This help fits well with existing statutes regarding vulnerable adults and financial exploitation investigations and prevention.

Respectfully submitted,

Peter M. Navis
Assistant Corporation Counsel
Walworth County Office of Corporation Counsel

Feb. 22, 2021

Senator Felzkowski -

I understand there will be a public hearing in the Assembly Committee on Criminal Justice and Public Safety on Wednesday, February 24th concerning Senate Bills 19 and 20 / Assembly Bills 45 and 46.
I would appreciate it if you would pass on my concerns with these bills under consideration as I feel it would be a mistake to pass these bills in their current form.

Some of the points that trouble me are:

1. Setting an age of 60 years old to define a vulnerable adult seems very arbitrary. Most 60 year olds are still working! Some people may need to be protected at 50 years and some people remain competent well in to their 80's! I have been 'casually questioned' when making a larger transaction at the bank, but to think that the bank would have the power to delay my transaction is concerning. A random teller, following some random bank policy, will be able to prevent me from completing my transactions?

2. What guidelines, training, and education, is required for those bank employees given the authority to deny or delay transactions? Many bank employees are entry level employees. Will they have a checklist to follow without any real understanding of the process? Some small banks even employ work-study high school students. Are there any guidelines set up to define which employees are able to over-ride or alter the legitimate financial decisions of their customers?

3. Financial decisions sometimes are time sensitive. To give bank employees, who are supposed to be servicing their customers, the power to delay financial transactions, for what could be significant periods of time, could cause irreparable financial harm.

4. People who have done financial and/or estate planning have put significant time, effort, and money into organizing their financial future To refuse to honor financial powers of attorney, carefully drafted by attorneys, is very troubling. Why would that seem to be a good idea?

5. Is there protection for penalties or fees charged as a result of these bank actions? Could it impact qualification for Medicare or low income programs? Could decisions made by bank employees actually produce revenue for the bank? These areas should be clarified.

By re-crafting the bill, improvements could be made in almost all areas. Instead of designation a "vulnerable adult age," financial decisions should follow the pathway for evaluation competency set forth in healthcare.

Healthcare has a fairly clear pathway to protect decision making. Concerns should be addressed by professionals and family, if available, for a decision on competency. If that individual has pre-planned with a Financial Power of Attorney, that should take precedence over a random bank that only has a business relationship. Many accounts ask for a 'trusted individual' to be named. That, too, should be taken in to consideration. A timeframe could be set to protect against changes made last minute, with undue influence, if that is the concern of the bill.

At the very least, there should be an independent party involved. I understand the goal is to prevent the vulnerable from being taken advantage of, but giving control over to "bank employees" seems very vague and not a big improvement. Large banks cannot know their customers intimately; small banks may know their customers too well! Banks already have many controls over your money... it seems like increasing such power with poor guidelines is unwise.

In the present political atmosphere, this would be a very liberal intrusion in to our financial lives and it is quite concerning. Targeting senior citizens could be seen as one more step closer having control over a large block of citizens (and their money)! Financial pre-planning is expensive. To be penalized for doing so by having those decisions easily over-ridden by "a bank" would be distressing indeed!

Thank you for considering my concerns. I will look forward to following the progress of this bill and hope it will be re-evaluated to the benefit of Wisconsin citizens.

Jean Mejerle
Woodruff, WI 54568

sifma

*Invested in America*

February 24, 2021

The Honorable John Spiros
The Honorable Cody Horlacher
Assembly Committee on Criminal Justice and Public Safety
State Capitol
Madison, WI 53708

**RE: Support of AB 45, relating to financial exploitation of vulnerable adults with securities accounts**

Dear Chair Spiros, Vice-Chair Horlacher and Members of the Assembly Committee on Criminal Justice and Public Safety:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is a national trade association representing over 350 large, medium and small broker-dealers, investment banks and asset managers, many of whom have a strong presence in in Wisconsin. In fact, 130,000 people in the state work in the finance and insurance industries, 12,000 of them work at securities firms, and 33 broker-dealer main offices call Wisconsin home.

SIFMA is proud to be a vocal advocate in the fight against senior financial exploitation. Among other things, SIFMA has worked to educate policymakers and the general public on the need for increased senior protections and founded a large working group for member firms to share ideas and best practices. SIFMA has also worked with federal and state legislatures and regulators on various "Report and Hold" proposals that would allow reporting firms to place temporary holds on suspicious transactions and/or disbursements. Such laws are now in place in 31 states, and the Financial Industry Regulatory Authority (the industry's national regulator) has had similar rules in effect for three years.[2]

We are writing today in strong support of AB 45. Financial exploitation of older adults by family members, scammers, caregivers and others has grown exponentially in the last decade. Estimates of annual losses vary significantly, ranging from $2.9 billion to $36.5 billion, depending on terminology and methodology.[3] The numbers are staggering regardless of which ones are used and result in devastating economic consequences for many victims. The impact, however, is not just economic. Financial exploitation can result in fear, a loss of independence, a reduced quality of life and even death.[4]

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Financial Industry Regulatory Authority Rule 2165.

[3] Office of Financial Protection for Older Americans. Suspicious Activity Report on Elder Exploitation: Issues and Trends, (2019, February).

[4] Burnett, Jason, "Elder Financial Exploitation: More than Just Financial Loss," SIFMA, February 2019.

AB 45 helps protect investors in a variety of ways. It provides firms that suspect financial exploitation with a reporting pathway to designated agencies equipped to investigate. It also permits firms to notify third parties reasonably associated with the vulnerable adult of the suspected exploitation so that they can be aware of and assist in stopping the suspected abuse. Perhaps most importantly, AB 45 would give firms the ability to place a temporary hold on suspicious transactions or disbursements while the suspected exploitation is being investigated – so that the investor is not irreparably harmed before the investigation is completed.

We believe AB 45 is a fair and balanced tool that will help curb both the economic and psychological damage associated with financial exploitation. We thank Rep. Macco and the bill sponsors for introducing this bill, and we encourage this Committee to favorably report it.

Please do not hesitate to contact me at 202-962-7411 with any questions.

Sincerely,

Kim Chamberlain

Kim Chamberlain
Managing Director and Associate General Counsel
State Government Affairs

Cc: The Honorable John Macco
Members, Assembly Committee on Criminal Justice and Public Safety