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 <u>except you</u>. 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 t*raining 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.

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