MEMO

Date: September 27, 2019

Subject: Financial exploitation proposals SB 428 and 429 – details regarding concerns

<u>CALL TO ACTION: Call or write your Wisconsin legislator today to let them know these bills should not be passed in their current form.</u>

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<u>SB 429 REGARDING FINANCIAL INSTITUTIONS</u>

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

<u>Key Provisions of the Bill:</u>

- Allows a financial service provider to refuse or delay a transaction on the account of a vulnerable adult if it suspects that financial exploitation is occurring.
- "Vulnerable adult" is defined as an individual age 60 or over, or a younger person who is an adult-at-risk.
- Refusal / Delay can extend to fiduciary account, e.g., a trust for the vulnerable adult or a guardianship account.
- Typically, the delay must end in no more than 5 days, but this can be extended to allow reasonable time to investigate. If the vulnerable adult is the owner of the account, learns of the delay, and asks for the transaction to go through, the delay is supposed to end, but this may also be extended. There is no time limit for the extension.
- The financial service provider is supposed to notify the elder-abuse or adult-at-risk agency, and also someone connected with the account. But may opt not to do this if named person is the suspected abuser.
- Could refuse to accept an acknowledged financial power of attorney, if it suspects that a vulnerable adult is a victim of financial exploitation by the named agent.
- Banks are protected by immunity for acting or not acting under the powers granted.

<u>Observations and Concerns:</u>

- **Age:** Age 60, by itself, is not an indication that the person is vulnerable, for this purpose. It is, quite frankly, ageist. Most people age 60 are working, in decent health, and are perfectly capable of making decisions about their finances and do not need threat of oversight by the financial institution merely because of their age.

    - As an alternative, the definition in § 55.01(1e) should be used exclusively. "Adult at risk" means 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. It is included in this statute already and does not distinguish based on age. The language "*or an individual who is at least 60 years of age*" can simply be deleted from the definition of "vulnerable adult." It will cover individuals *of any adult age* meeting the definition of § 55.01(1e).
    - 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.

- **"Opt-In" should be the standard to apply the statute:** People have a right to control their finances and make decisions about what to do with their money. They should be in control of whether they want to give this up to an outside institution. Thus, there should be an **<u>opt-in provision</u>**, so this entire protective setup is voluntary, or an **<u>opt-out provision</u>**. This would allow individuals to choose *not* to be subject to this freeze, and to knowingly accept the risk that at some point in the future, their decision to opt out would mean a questionable transaction would go through. This is a knowing choice people can make in exchange for the control that their funds will not be frozen at someone else's option. Also, customers should be provided clear notice upon opening an account, and annual notice and opportunity to opt in or out. The decision to opt-in and opt-out can easily be noted in the account records.

  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" is an extremely vague term and should include *specific* standards. These should 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.
  - 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:** The notice requirement should be stronger. Keep in mind that in cases where the delay is being put in place mistakenly, notice is key to enable the individual to act quickly to minimize the financial damage that the delay will cause.

  - There should be 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, there should be mandatory notice to the court overseeing the guardianship.
  - Where the account is a trust account, there should be mandatory notice to the trustee.
  - Where the account is a business account, there should be 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. Consider a situation where an agent was undergoing a legitimate but possibly unusual transaction for a cognitively impaired individual (such as, withdrawing a large amount of money to create a trust or to purchase exempt assets for a Medicaid "spenddown.") If the financial institution chose not to notify the agent since the agent was suspected of "abuse" – then **nobody** would know that the financial institution had taken this action. In the event that the institution is mistaken, the idea that an account could be suspended with no effective notice (if the agent is working on behalf of a principal who is incapacitated) simply flies in the face of responsible financial services.

Because the agent's relationship is fiduciary, the presumption should be that the agent is acting consistent with that duty. An agent should be given the opportunity to address a concern. Without notice, the risk of an inappropriate act by the financial institution outweighs the effect of "surprise" that could be gained by omission of notice.

Recommendation: Proposed §224.46(3)(d) should be deleted.

- **Indeterminate "extension" should not be allowed:** The financial institution should not be able to unilaterally "extend" the five-day limit for an indefinite period of time. Five days should be the absolute maximum, unless a court extends the time based on a petition of the Adult Protective Services or law enforcement agency with notice to the affected individual. Five days is enough for Adult Protective Services or law enforcement to become involved. It is important to note that financial institutions should not become the law enforcement investigators. The responsibility to investigate should be quickly turned over to the proper authorities. Wis. Stat. § 46.90(5) requires that an elder abuse investigation be commenced within 24 hours of a report, so there should be no reason that the financial institution would need to continue after turning the matter over to Adult Protective Services or law enforcement.

  Recommendation: Proposed §224.46(2)(f) should be deleted.

- **Required release of hold:** There are some provisions included that discuss when the agency may release the hold before five days. These should be expanded and clarified.
  - 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.

- Clarify that the requirement for release upon demand of the account owner should not be subject to any extension of the delay.

- **Refusal of power of attorney:** Proposed § 224.46(4), the language allowing the financial institutions to refuse to honor a power of attorney, is of grave concern. This must be deleted. The ability of banks to refuse DPOAs is exactly what Wis. Stat. § 244.20 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.

  A response to suspected exploitation should be a report, not a refusal to accept the document. The provisions of § 244.20 need to be kept in place, not substituted for a lesser standard. Bear in mind that agents have fiduciary duty and civil liability for violation of that duty. That is enough and requires proof instead of financial institutions refusing to honor the document. Allowing discretion to refuse a POA reverses the course correction that took place when § 244.20 was enacted.

  Recommendation: Proposed §224.46(4) should be deleted.

- **Lack of Training and waiver of liability:** The lack of a training requirement means that individuals at financial institutions will wield considerable power over a person's financial independence, with no requirement to complete training regarding financial abuse. In order for a financial institution to have the benefit of a waiver of liability, the institution should be required to complete training approved by the Department.

  Adult Protective Services agencies and law enforcement entities that investigate these matters are extensively trained in issues such as proper investigation, capacity assessment, autonomy and tactics used by abusers. It bears reinforcement that these trained entities should be the leaders in the elder abuse investigation, not a financial institution with little or no training.

  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.

- **Additional General Observations**:

    - The harm of improperly delayed transactions is not worth the potential benefit. People rely on transactions being carried through.
    - The proposal gives too much power to the bank, with too little cost for delaying a transaction. The result will likely be overuse.
    - Financial service providers should have to have a documented and specific reason for action, and some liability.

SB 428 REGARDING FINANCIAL ADVISORS

SB 428 would allow financial advisors and brokers to be voluntary reporters of suspected exploitation and would also allow them to delay transactions. Many of the concerns expressed with SB 429 also apply here.

Key Provisions:

- Allows a financial advisor to refuse or delay a transaction on the account of a vulnerable adult if it suspects that financial exploitation is occurring.
- "Vulnerable adult" is defined as an individual age 60 or over, or a younger person who is an adult-at-risk.
- Refusal or Delay can extend to fiduciary account, e.g., a trust for the vulnerable adult or a guardianship account.
- The delay must be no more than 15 days, but this can be extended to 25 days if an APS agency requests in order to investigate.
- Differently from the financial services proposal, there is no provision requiring the release of the transaction on demand of the individual.
- The financial service provider is supposed to notify the elder-abuse or adult-at-risk agency and also someone connected with the account. But may opt not to do this if named person is the suspected abuser.
- Financial advisors protected by immunity, for acting or not acting under the powers granted.

Observations and Concerns are:

- Age 60 alone is improper for the reasons described above.

  Recommendation: To solve this issue, § 551.102 (33) "Vulnerable adult" should be changed by removing the language "or an individual who is at least 60 years of age."

- **Release on demand of owner:** There is no provision for release upon request of the account owner.

  Recommendation: To address this issue, 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.

- **Lack of Training and waiver of liability:** The lack of a training requirement means that the broker-dealers, investment advisors and "qualified individuals" will wield considerable power over a person's financial independence, with no requirement to complete training regarding financial abuse. In order for a financial advisor, qualified individual or financial institution to have the benefit of a waiver of liability, they should be required to complete training approved by the Department.

Adult Protective Services agencies and law enforcement entities that investigate these matters are extensively trained in issues such as proper investigation, capacity assessment, autonomy and tactics used by abusers. These trained entities should be the leaders in the elder abuse investigation, not a financial institution with little or no training.

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. 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 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.

- 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.

- Should prohibit qualified individual from charging or passing along any charges for suspended transaction (i.e. stopped check, NSF etc.)

- **"Opt-In" should be the standard to apply the statute:** People have a right to control their finances and make decisions about what to do with their money. They should be in control of whether they want to give this up to an outside institution. Thus, there should be an **<u>opt-in provision</u>**, so this entire protective setup is voluntary, or an **<u>opt-out provision</u>**. This would allow individuals to choose NOT to be subject to this freeze, and to knowingly accept the risk that at some point in the future, their decision to opt out would mean a questionable transaction would go through. This is a knowing choice people can make in exchange for the control that their funds will not be frozen at someone else's option. Also, customers should be provided clear notice upon opening an account, and annual notice and opportunity to opt in or out. The decision to opt-in and opt-out can easily be noted in the account records.

Recommendation: Suggested "opt-in" language would 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.

Having this serve as an opt-in could allow a broader range of safety precautions 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 suspicion" needs clear standards:** SB 428 uses the terms "reasonable suspicion" and "reasonably suspects" instead of referencing reasonable cause as in SB 429, but the concern is the same. These are extremely vague terms and should include *specific* standards. These should 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 qualified individual.
  - 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.
  - 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.
  - 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.

- **Notice:** The notice requirement should be stronger. Keep in mind that in cases where the delay is being put in place mistakenly, notice is key to enable the individual to act quickly to minimize the financial damage that the delay will cause.

  - There should be mandatory and **<u>immediate</u>** 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.
  - Where the account is a guardianship account, there should be mandatory notice to the court overseeing the guardianship.
  - Where the account is a trust account, there should be mandatory notice to the trustee.
  - Where the account is a business account, there should be 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. Consider a situation where an agent was undergoing a legitimate but possibly unusual transaction for a cognitively impaired individual (such as, withdrawing a large amount of money to create a trust or to purchase exempt assets for a Medicaid "spenddown.") If the qualified individual chose not to notify the agent since the agent was suspected of "abuse" – then **<u>nobody</u>** would know that the qualified individual had taken this action. In the event that the qualified individual is mistaken, the idea that an account could be suspended with no effective notice (if the agent is working on behalf of a principal who is incapacitated) simply flies in the face of responsible financial services.

    Because the nature of the agent's relationship is fiduciary, the presumption should be that the agent is acting consistent with that duty. An agent should be given the opportunity to address a concern. 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.

    Recommendation: To solve this concern, 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.