Wisconsin Bankers ASSOCIATION

To: Members, Senate Committee on Financial Institutions and Revenue

From: Mike Semmann – Executive Vice President/Chief Operating Officer, WBA
John Cronin – Assistant Director – Government Relations, WBA

Re: Elder Financial Exploitation Legislation – Summary, Supporting Information, FAQ

WI Legislation:

Senate Bill 19; relating to: financial exploitation of vulnerable adults.

Senate Bill 20; relating to: financial exploitation of vulnerable adults with securities accounts, violations of the Wisconsin Uniform Securities Law, granting rule-making authority, and providing a penalty.

Summary of Provisions:

- Both bills are very similar – they allow transactions to be refused or paused when financial exploitation of a vulnerable adult is suspected. SB 19 covers financial institutions and SB 20 deals with securities companies,
- SB 19 allows transactions to be held for 5 business days, whereas SB 20 allows holds to last 15 days. WBA supports adoption of Senate Amendment 2 to SB 19, which aligns the allowable hold times and provides more certainty.
- Both bills allow personnel to create a list of people the vulnerable adult designates to be contacted if the financial institution/securities company reasonably suspects the vulnerable adult is being exploited.
- Both bills have reporting requirements, and both provide liability protection for personnel acting in good faith.
- SB 19 allows a financial services provider to refuse to accept power of attorney if they suspect the vulnerable adult may be a victim of financial exploitation. WBA supports Senate Amendment 1 to SB 20, thus aligning provisions in both bills.
- SB 20 adds a penalty enhancer for securities law violations against vulnerable adults.

Wisconsin Bankers ASSOCIATION

Supporting information on why these bills are necessary:

A March 2016 report from the Consumer Financial Protection Bureau (CFPB) report lays out the importance of taking action to address elder financial exploitation.

- Executive summary (verbatim):
  - Elder financial exploitation has been called the crime of the 21st century and deploying effective interventions has never been more important.
  - Older people are attractive targets because they often have assets and regular income.
  - These consumers may be especially vulnerable due to isolation, cognitive decline, physical disability, health problems, or bereavement.
  - Elder financial exploitation robs victims of their resources, dignity and quality of life—and they may never recover from it.
  - Financial institutions play a vital role in preventing and responding to this type of elder abuse. Banks and credit unions are uniquely positioned to detect that an elder account holder has been targeted or victimized, and to take action.
- Demographics information
  - America's population is aging, and 75 million Americans will be age 65+ by 2030.
  - Older consumers are far more likely to use tellers for transactions, so empowering them to act goes a long way.

A February 2019 CFPB report examining Suspicious Activity Reports (SARs) on elder financial exploitation sheds additional light on the pervasiveness and extent of the problem. This is only what is reported.

- Figures:
  - 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.
- Demographics information:
  - A full third of individuals who lost money were over 80 years old.
  - The average monetary loss was highest among the 70-79 age group.
- Older adults know the suspect:
  - Monetary losses are more common, and amounts lost are higher when the older adult knew the suspect
  - Additionally, losses were larger and more common when the suspects were fiduciaries, such as an agent under power of attorney
  - 7% of SARs identify a power of attorney as the perpetrator. Again, this is only what has been reported. Paired with information below on how often the victim knew the perpetrator, this percentage is probably much higher.

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.

Wisconsin Bankers ASSOCIATION

Frequently Asked Questions

Q: Does a hold under these bills freeze an entire account?

A: No, only the specific transaction may be delayed. The account would remain active otherwise.

Q: Do prescriptive hold times disincentivize resolution of these cases? Shouldn't we reduce these allowable hold times?

A: Banks work expeditiously to do their due diligence – they lack incentive to hold transactions and doing so would be bad for business. The language in the bills is designed to accommodate Adult Protective Services (APS) and/or law enforcement. Holds often expire while cases are still open at APS or DA's offices. The more time they have, the more likely investigations and prosecutions can be completed. The hold may also be lifted should other criteria be met first.

Q: By allowing refusal of power of attorney, will SB 19 allow financial services providers to do so for inappropriate reasons?

A: Financial services providers may already refuse to honor power of attorney under certain circumstances. These provisions are designed to help stop financial exploitation before a loss occurs, whereas the authority under current law is generally moot and can only be triggered by events after the fact. SB 19 actually puts narrower guard rails on refusal of POA. Indiscriminately denying POA would also be bad for business.

Q: Who will be making the decisions to pause a transaction?

A: While tellers are on the frontlines and are adept at spotting elder financial abuse, under the normal course of business a transaction pause decision would generally made higher up the chain of command.

Q: Are these bills 'ageist'?

A: Financial institutions work to prevent exploitation and fraud against people of all ages. The definitions in these bills are consistent with the range of language in legislation enacted in other states.

JOHN J. MACCO

STATE REPRESENTATIVE • 88TH ASSEMBLY DISTRICT

DATE: April 12, 2021

TO: Senate Committee on Financial Institutions and Revenue

FROM: Representative John Macco

RE: Testimony on 2021 Senate Bills 19 and 20

Chairman Kooyenga and members of the Senate Committee on Financial Institutions and Revenue:

Thank you for hearing testimony on our 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.

Senate Bill 19 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 to create a list of individuals that a vulnerable adult authorizes to be contacted if financial exploitation is suspected.

Senate Bill 20 allows securities industry professionals to provide to the Department of Financial Institutions and other appropriate entities notice of suspected financial exploitation of vulnerable

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

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.

National Association of Insurance and Financial Advisors – Wisconsin

Support of Senate Bill 20

Protections against Financial Abuse of Elders

Thank you for the opportunity to share NAIFA-Wisconsin's support of Senate Bill 20.

Sen. Pat Testin, Rep. John Macco and others have introduced bipartisan legislation designed to help protect against financial abuse of senior citizens. Similar legislation passed the Assembly last session on a voice vote.

SB 20 would allow financial advisors to temporarily delay a financial transaction if exploitation of a vulnerable adult is reasonably suspected. Appropriate authorities and affected parties must be notified if a transaction is delayed. Civil immunity is provided for delays made in good faith.

Financial elder abuse is on the rise, according to both statistics and the professional experiences of NAIFA members. This important legislation can help protect vulnerable adults from the loss of valuable assets, including life savings.

Please support passage of this important bill in 2021. Thank you.

TO: **Senator Dale Kooyenga, Chair**
Senate Committee on Financial Institutions and Revenue

FROM: **Attorney Carol J. Wessels**

RE: SB 19 and 20

DATE: April 12, 2021

INTRODUCTION

This written testimony is in my capacity as an attorney who has practiced elder law in Wisconsin for 29 years. I will also be providing oral testimony on behalf of the State Bar of Wisconsin.

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 oppose SB 19 and 20 and am asking you to send these bills back to the drawing board. 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. (Although they are not before this committee, I support SB 17 and 18, related to enhanced criminal proceedings and expedited proceedings in elder abuse cases.)

Not only do the bills create financial and legal problems for seniors, as I describe in detail below, but without a clear opportunity for the senior to "opt-out", these proposed bills are a substantial threat to individual liberty. In a year in which individual freedom from government intervention has been a fundamental focus in this state and this country, and restrictions on liberty in the name of the greater good have been scrutinized and challenged at every turn, these bills create severe restraints on one of the things the citizens of this state hold most dear: their money. Yes, this government imposition is in the name of a good thing: reducing financial exploitation, yet the irony is not to be ignored.

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. If 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. In fifteen days, you can miss a mortgage payment, miss an important investment opportunity, incur late fees on a credit card, rack up thousands of dollars in nursing home fees, and lose out on that one-of-a-kind item you wanted to buy on Facebook Marketplace.
- 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 and trust him more than you do a random bank employee that you may have never met. If you become incapacitated, your choice of your son as your agent can be second-guessed by the bank employee 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, 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. 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 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?
- Your constituents will ask, "Well I heard about how the government is allowing banks to hold up 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, we took it away from you 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. After all is said and done, you truly have no way to recover the losses you suffer when the institution acts 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.

THE GOOD PARTS

There is some good in these bills, and as an advocate for victims of abuse I wish to point this out. Both SB 19 and 20 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 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 provide training on properly and respectfully handling the situation during the process of reporting.

SOME SPECIFIC PROVISIONS OF CONCERN

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. Such a severe interference, without a remedy to the individual, demands that the individual have the right to say no. If you hear nothing else that I say today, understand that you need to add an opt-out provision to these bills, or better yet, an opt-in provision to allow individuals to exercise the maximum amount of control over their finances.

If a customer is 60, they are "vulnerable." Both SB 19 and 20 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 based on their age. Ageism is an insidious practice which has harmful effects on older adults. Even if the standard age were 90, it is 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, and on the other hand, with 45-year-olds who clearly cannot handle their finances. 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, such as SB 17, 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. Routinely we are called upon to troubleshoot issues with banks and investment companies, such as an investment company telling a person who had a valid POA that they also needed to be appointed guardian, or a bank telling an individual that they would only honor a POA that was executed within the last 6 months. Most of these frequent mistakes are minor inconveniences that can be handled with some phone calls by an attorney, of course costing the client money. However, freezing a transaction is not minor at all. I can tell you that if the legislature wants to create an endless stream of work for elder law attorneys, these are the two bills that will do it. Unfortunately, the costs will have to be paid by the senior, since the institutions cannot be held liable when they inevitably act in error.

<u>Account transactions can be frozen for long periods of time</u>: 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, which if amended would be fifteen days for both bills, those holds can be extended. 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. Also likely is that there will be an increasing amount of unpaid debt to nursing homes, when a person who is financially eligible for Medicaid is prevented from qualifying because the bank put a hold on his funds or refused his valid POA. Many nursing homes are already in financial trouble, this will place increased stress on them.

A Durable Power of Attorney Can be Disregarded: If the amendment to SB 20 is adopted, then both bills would eliminate well-established consumer protections that were put into Wisconsin's financial power of attorney law in 2009. The bills allow a financial provider to disregard a durable power of attorney (DPOA) if the provider believes the agent is perpetrating financial abuse. The ability of banks and securities institutions 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 a POA document 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 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

[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

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.***

A government attorney who has previously testified regarding these bills responds to this concern by claiming that the language regarding refusal of powers of attorney merely *supplements* § 244.20. He fails to acknowledge the critical difference – this proposal contains immunity to the financial institution, whereas § 244.20 provides an orderly process that allows an individual adversely effected to recover the fees of fixing the problem under §244.20(5)(b).

Reasonable cause is not defined: Both SB 19 and 20 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." Appropriate standards should be included within the statute, to avoid a situation where a bank teller untrained in the law is expected to understand complex legal concepts defining "reasonable." It is entirely inconsistent with reality to believe that the existence of caselaw on the definition will be adequate to help any front-line bank employee or other professional covered under the laws make appropriate decisions on these issues. Instead of hoping that these individuals will make decisions that, in hindsight, will fall within caselaw-defined parameters, why not give them a framework to avoid the wrong decision in the first place? Also, there is no requirement that the basis for the decision be documented in writing and provided to the customer. This will make any evaluation of whether reasonable cause existed extremely difficult.

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. If these programs are already being developed for banks to use, it should not be any additional burden to require them to participate.

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. In Wisconsin, we can do better. Wisconsin has a history of taking the lead to protect the rights of elders, their autonomy, and individual freedom from unnecessary intervention. Consider our guardianship bills, and the original elder abuse law that was enacted in Chapter 46. These both are deliberately structured to protect autonomy, to give people the right to say NO, and to ensure that the people tasked with applying the law are properly trained.

We can do better with this law too. Substantial work needs to be done to revise these bills. At a bare minimum, the clear ability to "opt-out" entirely and have that choice honored by the institutions is critical. The State Bar of Wisconsin has submitted a list of proposed improvements for both 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.

Thank you.

Carol J. Wessels
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

ELDER LAW AND SPECIAL NEEDS SECTION

To: Senate Committee on Financial Institutions and Revenue
Date: April 12, 2021
Subject: Financial exploitation proposals SB 19 and SB 20 –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 SB 19 regarding financial institutions and SB 20 regarding financial advisors. The Elder Law Section is extremely supportive of appropriate measures to address the grave concern of elder abuse. At the same time, the current bills have certain provisions of significant concern to the Bar because of their ability to cause significant and irreparable harm to the people they are intended to help. Our concerns, and proposals for change, are summarized in brief below. We have a more detailed memo available if needed.

Concerns and recommendations on SB 19

- **Age:** Age 60, by itself, is not appropriate in this situation. Most people age 60 are working, in decent health, and do not need potentially damaging "oversight" by the financial institution merely because of their age. Use of this age alone is "ageist." The language "*or an individual who is at least 60 years of age*" should be deleted from the definition of "vulnerable adult." The definition in § 55.01(1e) should be used exclusively.
- **"Opt-In" should be the standard to apply the statute:** There should be an **opt-in provision**, so this entire protective setup is voluntary, or an **opt-out provision**. "Opt-in" language would be added to proposed §224.46(2)(a).
- **"Reasonable cause" needs clear standards:** "Reasonable Cause" is an extremely vague term and difficult for laypeople to understand. Change language to include *specific* standards defining the circumstances that constitute reasonable cause. Also, require that the circumstances be documented in notations in the individual's account record.
- **Notice:** The notice requirement should be stronger to minimize the damage that will be created by inappropriate use of the statute. There should be mandatory and immediate notice to the customer, and to appropriate parties in specific cases like guardianship etc., in writing. The notice should also include the information on how the individual demands a release.
- **Length of HOLD / Transaction Delay:** the "indeterminate: extension has the potential to cause grave and irreparable financial damage to an individual by tying up his or her finances indefinitely. It should not be allowed. Proposed §224.46(2)(f) should be deleted. Also, language should be added requiring a transaction to 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.
- **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. 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. Proposed § 224.46(4) does an end run around the protections of this section and should be deleted.

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

- **Waiver of Liability/ Lack of Training:** 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. The concern is compounded by the fact that the statute waives an institution's liability for errors in executing this statute. 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 only to a provider who had completed training.
- **Additional protections needed:** There is potential for significant financial harm to the client as a result of the imposition of the delay.
  - 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 unavailable for Medicaid as long as the freeze is in place.
  - 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 question of liability should be excluded from any mandatory arbitration provisions that are otherwise part of the financial institution's account agreement.

SB 20 REGARDING FINANCIAL ADVISORS

Concerns and recommendations are:

- The same or similar concerns about age, notice, lack of training and immunity, and reasonable cause (in this bill "reasonably suspects,") apply to this bill. Similar changes to address these concerns are recommended.
- **Release on demand of owner:** Unlike SB 429, there is no provision in this bill for release upon request of the account owner. Add language requiring immediate release upon demand of customer, customer's POA agent, or attorney for customer.
- **Additional protections needed:** There is potential for significant financial harm to the client as a result of the imposition of the delay.
  - Late fees or service charges should be waived.
  - Funds frozen or delayed should be considered unavailable for Medicaid.
  - Liability of the qualified individual 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:** There should be an **opt-in provision**, so this entire protective setup is voluntary, or an **opt-out provision**.

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

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

Wisconsin State Senate
24th Senate District

Serving Wood, Portage, Adams,
Waushara, Monroe, and Jackson

PATRICK TESTIN
STATE SENATOR

DATE: April 12th, 2021

RE: **Testimony on Senate Bills 19 and 20**

TO: The Senate Committee on Financial Institutions and Revenue

FROM: Senator Patrick Testin

I would like to thank Chairman Kooyenga and members of the committee for accepting my testimony on Senate Bills 19 and 20 (SB 19, SB 20).

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.

SB 20 would allow broker-dealers and investment advisers to temporarily delay transactions when financial exploitation is suspected. This legislation requires certain notifications if a transaction is delayed and establishes time limits on a delay.

SB 20 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+).

SB 19 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.

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

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.

Wisconsin Bankers ASSOCIATION

Testimony of the Wisconsin Bankers Association

John Cronin, Assistant Director – Government Relations, WBA

Senate Committee on Financial Institutions and Revenue
Senate Bills 19 and 20

April 12, 2021

Chairman Kooyenga and members of the Senate Committee on Financial Institutions and Revenue,

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 Ken Thompson, President and CEO of Capitol Bank here in Madison. Ken has over 35 years of banking experience and is Chair-elect of WBA's Board of Directors.

WBA is happy to testify in favor of Senate Bills 19 and 20, authored by Sen. Patrick Testin and Rep. John Macco. 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 two new members of the Senate, Sen. Stafsholt and Sen. Agard, who also happen to be members of this committee, for their support of 2019 Assembly Bills 481 and 482 in the lower house last session.

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.

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.

(over)

- 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.
- Theft from elders 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. These efforts span the political spectrum, and have been passed in red and blue states across the country.

Let's add Wisconsin to that growing list of states taking action to protect its older populations from elder financial exploitation. We urge your support of Senate Bills 19 and 20.

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 urging adoption of two amendments – one to each bill.

Senate Amendment 2 to Senate Bill 19

We ask that the committee adopt Senate Amendment 2, which lengthens 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 adult protective services or law enforcement need to complete investigations. 15 days would match with the allowable time in SB 20. SA 2 also addressed what some perceived as banks' ability to pause a transaction indefinitely. We worked with the authors and minority party committee members in the Assembly to develop a more certain timeline, which is reflected in SA 2.

Senate Amendment 1 to Senate Bill 20

We request the committee adopt Senate Amendment 1, allowing qualified individuals, as defined in the bill, to decline to honor power of attorney as bank personnel would be able to under SB 19. 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.

Again, we are grateful to Sen. Testin and Rep. Macco for making a renewed effort with this important legislation this session.

Thank you Chairman Kooyenga and members for taking the time to hear our testimony today. We would be happy to answer any questions you may have.

Chairman, Members of the Committee:

I had the privilege of serving on the Elder Abuse Task Force that developed the bills introduced as 2021 SB 19 and 2021 SB 20. 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 SB 19. 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. SB 19 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 SB 17, 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. SB 19 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. SB 19 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 exploit 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. SB 19 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

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

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

Waukesha County

Office of the District Attorney

April 12, 2021

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

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

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 the victim knows and trusts.

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.

We need Senate Bills 19 & 20 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 prosecution of financial crimes based on the age of a vulnerable adult at age 60 would assist when a victim who is unable or unwilling to be a witness against the defendant because of capacity issues or undue influence.
2. Allowing a financial institution to place a 5 day hold on a specific transaction that needs further investigation to determine if it is related to a scam (i.e. Romance, grandparent, home remodel, etc.) or other suspicious transaction (i.e. power of attorney theft, lack of fiduciary responsibility, etc.).
3. Allowing a securities firm to place a hold up to 15 days on a specific transaction that needs further investigation to determine if it is related to a scam or other suspicious transaction.

Additional resources and example as to why we need Senate Bills 19 & 20 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 it 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.

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